

[25th February 1839.]



(Appeal from Court of Session, Scotland.)

(No. 2.) JAMES FARQUHAR GORDON and others, the Trustees and Executors of DAVID CLYNE¹, Appellants. — *Tinney—James Russell.*

GEORGE DUNNET, JAMES TRAILL, and DAVID HENDERSON, Respondents. — *Burge—John Stuart.*



Arrestment—Assignment—Right in Security—Proof.—A party held an intimated assignment, as a security for certain specified debts and relief of specific obligations; another party, creditor of the granter of the assignment, used arrestments in the hands of the assignee, and of the debtor in the assigned debt. Held (affirming the judgment of the Court of Session) that the assignee, in accounting with the arrester, was entitled to take credit, in the first place, for the amount of the debts and obligations specified in the assignment, and all expenses relating thereto; secondly, for all sums paid to or for behoof of and for all furnishings made by him to the common debtor prior to the arrestment; and, thirdly, for all sums which, though paid for behoof of the common debtor after the date of the arrestment, were paid in virtue of obligations contracted prior thereto: Held further (affirming as aforesaid) that it was competent for the assignee to prove by the oath of the common debtor that his claims fell under one or other of the above descriptions.

Costs.—Per L. C. Incompetent to appeal for costs, and it is indispensably necessary to maintain the rule, that parties appealing should not be permitted to mix up their appeal with matter of merits in order to cover an appeal for costs.

¹ Reported in 11 S., D., & B., 791.

Practice.—Question, whether when appealing against a judgment of the Court, it is competent to include in the appeal interlocutors of the Lord Ordinary in the cause, not previously made the subject of a reclaiming note.

THE late Mr. David Clyne raised an action against a person named Fraser for payment of money alleged to be due, and on the dependence thereof he used arrestments in the hands of the respondent Dunnet, and of the respondents Traill and Henderson respectively. The respondent Traill was trustee of a Colonel Williamson, from whose estate Fraser was entitled to receive dividends; the respondent Henderson was factor for the trust. Prior to the arrestment Fraser had assigned his claims upon Colonel Williamson's estate to the house of M'Beath and Dunnet, of whom the other respondent was the surviving partner, in security of certain advances and furnishings made to him. The assignation was granted 23d April 1823; a dividend of 10s. in the pound was paid 22d July 1824. Clyne's arrestments were in May 1825, and he obtained decree in his action against Fraser in June thereafter. A further dividend of 5s. in the pound was paid in January 1830. In April 1830 Clyne brought an action of furthcoming against the respondents, in which he claimed the balance due to Fraser by Williamson's trustees, after paying the advances and furnishings specified in the assignation. The respondent Dunnet contended that he was not bound to make forthcoming funds not in his hands at the date of the arrestment; and further, that he was entitled to apply funds received by him under the assignation to advances made on the faith thereof, though these advances were not referred to in the assignation. The other respondents contended,

1st DIVISION.

Lord Ordinary
Fullerton.

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that as Fraser was entirely divested by the assignation the action was improperly directed against them.

On the 1st December 1832 the Lord Ordinary pronounced the following interlocutor:—"Appoints the defender Dunnet to put in a statement of the account between him and Fraser, showing the balance that was due, first, at the period of the first dividend; secondly, at the date of the arrestment; and, thirdly, at the date of the second dividend, &c." That dividend was received at a period subsequent to the arrestment.

A state was accordingly lodged by Dunnet, and after objections and answers with which avizandum was made, the Lord Ordinary pronounced an interlocutor on the 9th March 1833, in the following terms:—"Finds, that in the accounting between George Dunnet as arrestee, and David Clyne, the former is entitled to take credit, in the first place, for the amount of the debts and obligations in security and relief of which the assignation to him by Fraser the common debtor was granted, and all the expenses relating to these debts and obligations; secondly, for all sums paid to or for behoof of, and for all furnishings made, to the common debtor, prior to Mr. Clyne's arrestment in 1825; and, thirdly, for all sums which, though paid for behoof of Fraser the common debtor, after the date of the said arrestment, were paid in virtue of obligations contracted prior to said date; but finds that Mr. Dunnet the arrestee is not entitled to credit for any advances or furnishings made to the common debtor subsequent to the date of the said arrestment, and not falling within the preceding finding: Finds, that Mr. Clyne is, in virtue of his arrestment in the

“ hands of Mr. Dunnet, entitled to any balance which,
 “ on the application of the principles above laid down,
 “ may be found to remain in the hands of the said
 “ arrestee, but only on the condition of relieving
 “ Mr. Dunnet of the bond of caution granted by him
 “ in the loosing of arrestment on the dependence of the
 “ action of William Sutherland against Fraser, the
 “ common debtor, being one of the obligations still
 “ outstanding in relief of which the assignation was
 “ granted: Finds farther, that Mr. Clyne is, on the
 “ performance of the above-mentioned condition to
 “ Mr. Dunnet, entitled, in virtue of his arrestment in
 “ the hands of the other defenders, Colonel William-
 “ son’s trustees, entitled to draw any balance which
 “ may remain due by the said trustees to Fraser the
 “ common debtor, in so far as necessary for payment
 “ of the debt due by the common debtor to the arrester:
 “ Lastly, in respect that Messrs. Clyne and Dunnet
 “ differ in regard to the amount of the advances or
 “ furnishings actually made to or for behoof of the
 “ common debtor, remits the case to Mr. Donald
 “ Lindsay, accountant, to examine the accounts, and
 “ to report upon the balance which may be due by
 “ Mr. Dunnet agreeably to the preceding findings.”

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Two of the parties, viz. the pursuer Mr. Clyne, and
 the respondents, Colonel Williamson’s trustees, presented
 reclaiming notes against this judgment to the First
 Division of the Court; Mr. Clyne praying for certain
 alterations on the judgment, which would increase the
 balance subject to his arrestment, and Colonel William-
 son’s trustees praying to be assoilzied from the action,
 and to be found entitled to expenses.

These reclaiming notes were advised on the 27th of

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Judgment of
Court, 27th June
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June 1833, when the following interlocutor was pronounced:—“ The Lords having advised this cause with
“ the mutual reclaiming notes, and heard counsel,
“ adhere to the interlocutor of the Lord Ordinary
“ reclaimed against, refuse the desire of both the
“ reclaiming notes, and reserve all questions of expenses
“ till the final issue of the cause.”

In November 1833 Mr. Clyne died, and the appellants, as trustees under his settlements, sisted themselves as parties in the action, and got the remit to the accountant renewed, who thereupon made a report, showing a balance due by Mr. Dunnet after applying the dividends received on the principles of the preceding interlocutor. There being a defect of proof of some of the items allowed, Dunnet proposed to refer to the oath of Fraser, which having been allowed by the Lord Ordinary, the appellant reclaimed. The Court, after an amendment of the minute of reference, also sustained the reference.

Judgment of
Court, 29th June
1836.
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On the 31st of January 1837 the Lord Ordinary pronounced the following interlocutor with reference to the question between the appellants and the respondent Dunnet:—“ Finds it proved by the oath
“ of Fraser the common debtor, that the advances
“ of cash and furnishings set forth in the account-
“ ant's report do fall under one or other of the de-
“ scriptions in the interlocutor of the 9th of March
“ 1833, with the exceptions, first, of the sum of
“ 10s., being the additional articles of the account of
“ furnishings ending in 1823; secondly, of the sum of
“ 2l. 7s., consisting of cash advances, said to have been
“ made by Mr. Dunnet to Mr. Fraser; and, thirdly,
“ the sum of 10l. 15s. 3d., being the business account

“ alleged to have been paid in August 1824 by Dunnet
 “ to Robert M'Kay on account of Fraser the common
 “ debtor: Finds, that these three sums are not proved,
 “ by the common debtor's oath, to fall under either of
 “ the descriptions mentioned in the foresaid inter-
 “ locutor, and therefore, to the extent of those three
 “ sums, sustains the objections to the accountant's
 “ report; quoad ultra, approves of the report: Finds,
 “ accordingly, that the balance now in the hands of
 “ the defender Dunnet amounts to the sum of 40*l.* 14*s.*
 “ sterling, with interest from the 1st day of January
 “ 1830, and decerns against the said George Dunnet
 “ the arrestee for the same, superseding extract of the
 “ said decree until the pursuer shall have relieved the
 “ said arrestee, in terms of the interlocutor of the
 “ 9th of March 1833, of the bond of caution granted
 “ by him, in the loosing of arrestment, on the depen-
 “ dence of the action of William Sutherland against
 “ Fraser the common debtor: Finds the defender the
 “ said George Dunnet entitled to his expenses, and
 “ allows an account thereof to be given in, and to be
 “ taxed by the auditor.

“ *Note.*—It is with some hesitation that the Lord
 “ Ordinary has ultimately formed the opinion that the
 “ articles contained in the exceptions in the above
 “ interlocutor are not sufficiently proved. Looking at
 “ the whole tenor of the deposition, it appears to him
 “ that the failure of the defender, even in those points,
 “ is mainly imputable to the very natural uncertainty of
 “ the common debtor's recollections as to the precise
 “ dates at which the alleged transactions took place.
 “ Considering, however, that the defender, the arrestee,
 “ has been substantially successful in all the important

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“ points of the case, and that a very great, and, as it
 “ appears to the Lord Ordinary, unnecessary expense
 “ has been created by the very critical mode of
 “ accounting, insisted in with so much pertinacity by
 “ the pursuer, the Lord Ordinary thinks that in
 “ justice to the defender he must be allowed his
 “ expenses.”

On the 1st February 1837 the Lord Ordinary pronounced the following interlocutor with reference to the question between the appellants and the respondents, Colonel Williamson's trustees:—“ Finds the
 “ pursuers entitled, under their arrestments, to any
 “ future dividend that may be declared and become
 “ payable to the common debtor by the said defenders
 “ in their character of trustees, with any interest that
 “ may become due thereupon, and that to the extent
 “ only, and in extinction pro tanto, of the debt
 “ due to the said pursuers; they, always before
 “ extract, relieving the other arrestee of his cautionary obligation, in terms of the separate interlocutor of yesterday's date: Finds no expenses
 “ due to either party, and decerns to the above effect
 “ accordingly.

“ *Note.*—In this case both parties have carried their
 “ pleas too far; the pursuer in maintaining that the
 “ assignation in favour of Dunnet was of no effect
 “ whatever in divesting the defenders, the arrestees;
 “ and the defenders in contending that the assignation,
 “ though confessedly only an assignation in security,
 “ totally and absolutely divested them, without any
 “ regard to the question whether the debt secured
 “ by it had been paid or not, a point which has already
 “ been decided against the arrestees by the interlocutor

“ of 9th March 1833. In these circumstances, the
 “ Lord Ordinary thinks that neither party is entitled
 “ to expenses.”

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The appellants reclaimed against these interlocutors, praying the Court to alter the interlocutor of the 31st of January in the question with Mr. Dunnet, in so far as it found Mr. Dunnet entitled to expenses, and to find him liable in the expenses of process; and also to alter the interlocutor of the 1st of February in the question with Colonel Williamson's trustees, in so far as it found no expenses due to either party, and to find Colonel Williamson's trustees liable in expenses.

Colonel Williamson's trustees also reclaimed against the interlocutor of the 1st of February, praying the Court to alter it, in so far as regarded expenses, and to find that they were entitled to their expenses.

On the 30th June 1837 the Court, on advising these reclaiming notes, pronounced the following interlocutor:—“ Adhere to the interlocutor reclaimed
 “ against, in so far as it finds George Dunnet entitled
 “ to his expenses, and refuse the desire of this re-
 “ claiming note on that point; of new, find ex-
 “ penses due to the said George Dunnet, and remit
 “ the account thereof, when lodged, to the auditor
 “ of Court, to tax and report; adhere also to the
 “ said interlocutor, in so far as regards the question
 “ with Colonel Williamson's trustees, and refuse the
 “ desire of both reclaiming notes on that part of
 “ the cause.”

Judgment of
 Court, 30th June
 1837.

Against this judgment the appellants brought their appeal, and also against all the interlocutors pronounced in the cause, being eleven in number.

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Appellants
Argument.

Appellants.—An arrester is entitled to have the funds arrested made forthcoming to him by the arrestee, unless the arrestee shall establish a lien over them, or produce evidence that they are attached by diligence preferable to the arrester's diligence.

The oath of Fraser was inadmissible to prove the items of account not otherwise established. In the first place there was evident collusion between Dunnet and Fraser, and in the second place the account was not liquid before the arrestments were used. In the ordinary case the arrestee, in a process of forthcoming, may refer his defence to the oath of the common debtor; but where there is collusion, or when a debt, of which compensation or retention is pleaded, was not liquid before the arrestment was used, the oath of the common debtor cannot affect the claim of the arrester.

The firm of M'Beath and Dunnet, who were the original assignees of the common debtor Fraser, and Mr. Dunnet as the surviving partner of that company, were not entitled to apply or hold the funds assigned in security for any other purposes than the purposes specified in the assignation; neither can it be contended that the respondent Mr. Dunnet, as an individual, had any right to apply or hold the funds assigned to M'Beath and Dunnet in security, nor any title to a preference over these funds, in competition with Mr. Clyne's arrestment.

As the appellants have succeeded, in a process of forthcoming, in proving the existence of a fund which was denied by the arrestees, they ought to have been found entitled to expenses; and they ought not at any rate to have been found liable in expenses to the respondent Mr. Dunnet, who, as an arrestee, maintained,

contrary to the fact, that he held no funds which he was bound to make forthcoming. The appellants only asked for that which they could not have obtained without a suit; that part of the interlocutor which gave costs cannot be maintained.¹ The recent case of *Smellie v. Miller* before the Appeal Committee is a clear decision in support of this appeal.

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Respondent Dunnet.—As this respondent could not be bound to make forthcoming any funds of the arrestee which have never come into his possession, and for which he never was liable to the common debtor, he is not chargeable in this accounting with any other sums than the two dividends which he, as assignee of the common debtor, received from Colonel Williamson's trustees, and in accounting for the sums actually received by him on account of the common debtor, he is entitled to credit for the debts and obligations in security and relief of which the assignation by the common debtor was expressly granted, and for all expenses incurred by the respondent in reference to these debts and obligations. Besides this, he is further entitled to credit for all advances and furnishings by him to or for behoof of the common debtor prior to Mr. Clyne's arrestment in 1825, and for all sums which, though paid for behoof of Fraser the common debtor after the date of the said arrestment, were paid in virtue of obligations contracted prior to that date. And the respondent was entitled to prove, as he in fact did,

Respondents
Argument.

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¹ Ersk. b. iii. tit. 6. sec. 2. 11. 15.; 2 Bell's Comm. 66; 2 Bell's Comm. 637, 638; Wardrop, Feb. 1744; Dict. 1025; Stair, b. iii. tit. 1. sec. 42., b. iv. tit. 35. sec. 6.; *Creditors of Menie v. Bloomfield*, Dec. 7, 1736, Elch. voce Arrestment.

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such payments and furnishings by the oath of Fraser the common debtor.

The real question in the cause is as to the costs.

The interlocutor of 1837 adopts the report of the Lord Ordinary, and the principles laid down by him; and it is not competent to reverse that part of the interlocutor of 1837 against which no reclaiming note has been presented without infringing the express provisions of the statute 48 Geo. 3. cap. 151. sect. 15.¹

Respondents Traill and Henderson. — As the appellants did not think proper to take the judgment of the Inner House upon the propriety of paying the second dividend from Colonel Williamson's estate to the other respondent Mr. Dunnet, it is not competent to bring that part of the case under appeal. By the 48th Geo. 3. cap. 151. sect. 15., which is an act concerning the administration of justice in Scotland, and concerning appeals to the House of Lords, it is enacted, "that hereafter no appeal to the House
" of Lords shall be allowed from interlocutory judg-
" ments, but such appeals shall be allowed only from
" judgments or decrees on the whole merits of the
" cause, except with the leave of the Division of the
" judges pronouncing such interlocutory judgments,
" or except in cases where there is a difference of
" opinion among the judges of the said Division; nor

¹ Ersk. b. iii. tit. 6. sec. 16.; Forbes, 20 Feb. 1711, Horn, Dict. 12464.; Kames, 62; Nairn, 1725, Dict. 12468; Maitland, Gibson, and others v. Wills, 2 Dec. 1826, 5 S. & D. 74.; Ersk. b. iv. tit. 2. sec. 8.; Blair v. Balfour, 9 July 1745; Dict. 12473; Hogg v. Low, 13th June 1826, 4 S. & D. 702.

“ shall any appeal to the House of Lords be allowed
 “ from interlocutors or decrees of Lords Ordinary
 “ which have not been reviewed by the judges
 “ sitting in the Division to which such Lords Ordinary
 belong.”

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By their reclaiming note the appellants confined their application to the Court to an alteration on the question of costs, and as this House never entertains an appeal in regard to costs alone, the present appeal must be dismissed as incompetent. The case of [■]Smellie v. Miller never having been actually before this House, cannot be relied upon or used as an authority.¹

LORD CHANCELLOR.—My Lords, there are some points which have been addressed to your Lordships in the course of this discussion which are points of form; and your Lordships have also heard the merits of the case discussed. The first point, namely, of form, is, how far this case falls within the provision which prohibits parties from coming to your Lordships upon interlocutors which have not been the subject of a reclaiming note to either of the Divisions of the Court of Session, namely, appeals from the interlocutor of the Lord Ordinary only.

Ld. Chancellor's
 Speech.
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A case has been referred to as deciding that point, namely, the case of Smellie v. Miller. In the view I take of the present case it will be unnecessary for me to come to any conclusion upon that point; the only

¹ Jeffrey v. Brown, [■]2 Shaw's App. Cases, 356; Tod v. Tod, 26th March 1827, 2 Wilson and Shaw, 549; Hunter v. Duff, 11th August 1832, 1 Wilson and Courtenay, 212; M'Aulay v. Adam and Brown, 17th May 1835, 1 Shaw and Maclean, 665.

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object of my referring to it at all is, that there may be no misconception as to the case that has been referred to. My Lords, the case of Smellie v. Miller was a petition which was disposed of by the Committee of Appeal, not by your Lordships House, and therefore can go no further than the individual opinions of such of your Lordships as happened to be present upon the Committee of Appeal; but what was done upon that petition your Lordships will see in a moment does not proceed upon the ground for which it has been cited at your Lordships bar. There were two interlocutors appealed from. The objection to the appeal as to one was, that it was an interlocutor of the Lord Ordinary; the objection raised to the other was as to matter which had been gone into by a Division of the Court of Session by a reclaiming note. I have no recollection of the case, or of the grounds on which it was disposed of; but it is clear that as there were two points raised, it could not have been decided in favour of the petitioner, and the appeal dismissed, unless the committee had been in favour of the case stated by the petitioner on both points. This question of form will have to be considered if it should ever be brought before your Lordships in a case in which it is necessary to come to a decision upon it. It does not appear to me to be necessary to enter into the discussion of that question now, being very distinctly of opinion that your Lordships will find quite sufficient upon the merits of the case to dispose of the appeal now before you, which merits may be very shortly stated.

A gentleman of the name of Fraser being entitled to receive certain sums of money from the trustees

of Colonel Williamson, and having transactions with the firm of which the respondent Dunnet is now the surviving partner, assigned his interest in those sums of money—his right to receive those sums—to the firm of which Dunnet is now the surviving partner, for the purpose of indemnifying them against certain obligations which they had come under for his, Fraser's, benefit, and which obligations are specified in the deed of assignment. It appears that a dividend of ten shillings in the pound was received by the house of which Dunnet is the surviving partner, and it appears that the house being in possession of this security, and therefore necessarily looking to receive these monies on account of Fraser, made certain advances in money to him, and furnished him with articles which he required, which raised a private debt as between the house and Fraser. After the first dividend of ten shillings in the pound had been paid to Dunnet, there being a further dividend expected to be received from Williamson's estate, the present appellant, that is, the person who is now represented in the present appeal, namely, Mr. Clyne, having also a demand against Fraser, arrests in the hands of Dunnet such monies as he might have belonging to Fraser, that is to say, such money as he otherwise would have to pay to Fraser, subject of course to all such demands as the house now represented by Dunnet would have against Fraser, because it cannot for a moment be contended that the party making the arrestment or arresting the fund could put the arrestee in a worse situation than he would have been in as against the party to whom he was bound to account. Whatever rights Dunnet had against Fraser he necessarily had

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against Clyne, who could only claim from Dunnet that which Dunnet would otherwise be bound to pay to Fraser.

This case came before the Lord Ordinary in the first instance, and the first interlocutor was pronounced on the 1st of December 1832; and by that interlocutor the Lord Ordinary appoints the defender Dunnet to put in a statement of the account between him and Fraser, showing, first, the balance that was due at the period of the first dividend; secondly, at the date of the arrestment; and, thirdly, at the period of the second dividend, the second dividend having been received at a period subsequent to the arrestment. The interlocutor of the 9th March 1833, which was made the subject of a reclaiming note by Mr. Clyne, was adhered to by the Court of Session; and this forms the foundation of all that followed; it establishes the right as between the parties; and what has afterwards taken place merely are the means by which that right is worked out. That interlocutor finds, first, "that in the accounting
" between George Dunnet as arrestee, and David
" Clyne, the former is entitled to take credit, in the
" first place, for the amount of the debts and obliga-
" tions in security and relief of which the assignation
" to him by Fraser the common debtor was granted,
" and all the expenses relating to these debts and
" obligations;" that was secured and conditioned in the deed by which the debt was assigned to them; the second point is now made a subject of contest, being for all sums paid to or for behoof of and for all furnishings made to the common debtor prior to Mr. Clyne's arrestment in 1825; and, thirdly, for all sums which, though paid for behoof of Fraser the

common debtor after the date of the said arrestment, were paid in virtue of obligations contracted prior to the said date. The interlocutor further finds that Mr. Dunnet the arrestee is not entitled to credit for any advances or furnishings made to the common debtor subsequent to the date of the said arrestment, and not falling within the preceding finding. The result, therefore, is, that the interlocutor of the year 1833 declared that, as between the party arresting, namely, Mr. Clyne, and the arrestee Dunnet, in taking the account for the purpose of ascertaining upon what sum that arrestment ought to operate, Dunnet was entitled to deduct not only the particular sums specified in the assignation under which he claimed, but that he was also entitled to deduct all sums furnished by him,—sums paid, or furnishings, as they are called, to Fraser at the time when the arrestment was made; and that he was also entitled to set off against what might be found in his hands due to Fraser such sums as were paid subsequently, provided they appeared to have been paid by virtue of obligations entered into prior to the time at which the arrestment took place.

The only question, supposing this to be open now for your Lordships consideration — and I am anxious to show the parties that the decision of your Lordships House, if your Lordships agree with me in the opinion which I have formed, does not proceed upon matter of form, but that your Lordships have the facts so far before you, that if there were no objection in point of form, the decision to which your Lordships would come would be precisely the same — the question is, whether Fraser as against Dunnet could either have stopped the

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second dividend in the hands of the trustees of Williamson, or have compelled Dunnet to pay over to him, Fraser, monies which he had actually received, leaving Dunnet to obtain payment as he could of monies paid or furnishings supplied to Fraser anterior to the period of the arrestment, or subsequently, in consequence of obligations entered into before the arrestment. That no such law can exist in Scotland is manifest, not only from some of the authorities which have been referred to, but from the nature of things, because it is not a matter of set off; but here is a fund put into the hands of a certain party, and the person whose funds are so put into his hands induces him to advance monies, which, whether the subject of any special contract or not, are obviously advanced upon the credit which he is furnished with by means of the assignation, which puts into the hands of the party paying, funds belonging to the party to whom the monies are advanced, and which funds are to be accountable for that advancement of money. It might as well be said that a banker to whom monies or securities are given, nothing special being said upon the subject, can have these securities taken out of his hands without paying him the balance found due upon the money transactions between the parties. It does not, however, rest upon that, because Fraser himself is examined, (I shall presently consider how far that examination is correct, looking at the state of the pleadings between the parties,) and Fraser says that it was a matter of arrangement between the parties,—that he drew these sums, and was supplied with the furnishings, in consequence of the credit which he was to receive on account of money coming from those trustees. It is said that that statement of Fraser

ought not to prejudice the question now between the parties, because it is not made a subject of pleading. It did not arise upon the pleadings. The pleadings were these;—to what extent the plaintiff was entitled to receive the balance of the account pending between Fraser and Dunnet; and accordingly it is referred to an accountant for the purpose of looking into the account, and reporting what, at the various periods stated in the first interlocutor, was the state of the account between the parties. In taking that account Dunnet claims certain sums, to which sums he is to establish his title. It may as well be said, that in a proceeding for the purpose of taking the account, every item of account is the subject of a special plea. It arises necessarily in the investigation of the accounts; and in the investigation of the accounts, Dunnet, having claimed a right to retain a certain portion of the monies in his hands for the purpose of paying a certain obligation, proves his right, first by showing that he did advance the money to Fraser; and he establishes his title to it by showing that the money advanced to Fraser was upon the faith and credit of the money, of which he held an assignation. Therefore not only is there no dispute, but there is no contest raised at your Lordship's bar between the account as taken by the accountant and as acted upon; and the last interlocutor appealed from is not the subject of contest as to any item of account which it contained. A very different course of proceeding must have been adopted if it had been the intention of the appellant to appeal against particular items, but it is not attempted on the part of the appellants to bring before your Lordships a question upon the disallowance of any particular

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item; the appeal is for a different purpose, and not for the purpose of trying the question as to disallowing any particular sum. The interlocutor of 1833 laid down the principle upon which this account was to be taken, giving to Mr. Dunnet the benefit of all sums which he could show to have been advanced to Fraser, before the date of the arrestment, or subsequently, in consequence of obligations contracted before that time.

The cause was proceeded in down to the date of the last interlocutor, which was in the month of February 1837, without any appeal being brought before your Lordships, questioning the propriety of the principle established in the decree of 1833. Interlocutors in sufficient abundance appear to have been pronounced, eleven in number, all of which are made in part or in whole the subject of the present appeal; but against the principle established by the decree in March 1833, up to the time when this petition was presented, which I understand was in July 1837, no question was brought before your Lordships as to the propriety of the principle established in that interlocutor of March 1833. The result of all this investigation has been, that at the time of the arrestment there was nothing due to Fraser; I consider it to be established beyond all controversy that there was nothing that the pursuer could claim against Dunnet, because, whether there was a small balance or not in the hands of Dunnet, whether it was 7*l.* or 30*l.* in the hands of Dunnet actually exceeding the amount which at that time he had advanced and paid, he had at that time come under obligations binding himself to make payments at a future day to Fraser, to an amount exceeding that

which he had in his hands, whether it be considered one sum or the other; and it is impossible to say that the present party, who could not stand in a better situation as against Fraser, had any right to come against Dunnet to obtain a sum of money which he had in his hands in that state of circumstances. At the time the arrestment took place there was nothing in his hands. The whole suit proceeds upon the foundation of that arrestment; and the result of that investigation has been that a certain sum amounting to 30*l.* was at that time due from Dunnet, not however payable by him, because there was an obligation existing between himself and Fraser, which entitled him to be secured, and secured upon money in hand against the consequences which might follow upon that obligation.

My Lords, a question might be made, (but it is not necessary to consider that,) whether it was quite right to alter the security which the party had in his hands, and whether it was not giving the pursuer something more than the pursuer ought to have, an indemnity having been given in respect to which there was actual money in hand. The pursuer at least cannot complain of that; he has all that he could reasonably expect, and perhaps it may be thought that he had something more than he was strictly entitled to, but however that may be the money balance is found to be 40*l.*

Now, up to that moment nothing is complained of; no appeal is presented to your Lordships House. The parties from 1833 up to 1837 are proceeding upon the principle which established the right as between themselves, and now the amount of the account taken is not

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in dispute. What is it then that has given rise to this appeal, by which in 1837 the parties complained of an interlocutor of the year 1833 in which they had acquiesced from that time until the time when the appeal was presented? They are ordered to pay the costs. Now, I have a very strong opinion, that if these costs had been otherwise disposed of your Lordships would never have heard of the appeal from the interlocutor in 1833. And concurring entirely with these opinions which have been referred to, in which it has been stated that this House will not entertain an appeal for costs, it is indispensably necessary, in order to maintain that principle, that where parties appealing for costs in substance mix up their appeal with some other matter of merits, in order to cover the appeal for costs, they should not be permitted to escape from that rule by attempting to mix the one subject matter with the other. But, my Lords, I do feel some satisfaction in having heard so much of this case as not to be compelled to advise your Lordships to dispose of it upon that technical ground, because if you look at the liabilities of the parties to costs upon the merits, it seems to me that there is no question upon it, and that the Court below have done, with regard to costs, that which the justice of the case required. Mr. Dunnet has no connexion with the present appellant Mr. Clyne; his transactions were entirely with Fraser. It is for the purpose of a benefit to Clyne that he is permitted to come upon the fund in the hands of another person, and he cannot come upon this fund to the prejudice of that other person; he cannot take money which that other person is entitled to retain, or expose him to a liability for costs to which he would

not have been exposed but for the intervention of a stranger.

Now, I have already said, that at the time of the arrestment he had nothing coming. It turns out that by means of a subsequent dividend, not by means of any thing which he had at that time, but subsequently, he had something which, whether Fraser received or Clyne, his (Dunnet's) demand being satisfied, was a matter of indifference to him. But till that moment, till his demands are satisfied, he is not in a situation to be compelled to part with this money to the one party or the other, for he has still in him a right to look to that money, or any other he may receive to secure him from any liability which he may have come under to Fraser; and it is only on the condition of relieving himself from that liability that he is entitled to retain the sum of 40*l.* Then what has the interlocutor done with regard to costs, so far as these parties are concerned. I am looking to Dunnet only. Why, so far as these parties are concerned, it has said that Dunnet was entitled to retain this money, he being the stakeholder as between Fraser and Clyne, who was claiming as against Fraser, and he, Dunnet, being involved in litigation merely because he had in hand a fund which was, so far as regarded the surplus, payable to Fraser's creditors. The only subject of contest is with respect to this balance, which he is compelled to part with upon the performance of a certain condition. That condition never having been performed, he was never in a situation to part with it; and all that the interlocutor provides is, that he shall not be put to expense and to costs by proceedings not arising out of his own act, but arising out of the act of the pursuer, who is seeking

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a remedy which incidentally involves him, Dunnet, as the stakeholder of the fund in question. My Lords, it appears to be quite a matter of course, and according to the justice of the case, and according to every principle by which courts regulate their proceedings as to costs, that the stakeholder should be indemnified against the expenses which the litigation had occasioned, and with which he had nothing to do beyond securing himself from the liability arising out of obligations totally independent of the party claiming, namely, Mr. Clyne.

Then, My Lords, there are parties before us here, who have much less to do with it than Dunnet, namely, the parties from whom the monies were to proceed, which Dunnet by his assignation was entitled to. These were monies that Fraser in the first instance was entitled to; Fraser's right to receive those monies had by him been assigned to Dunnet. Why are Williamson's trustees to be involved in that question? the party to whom they were bound to pay had by his assignation directed them to pay to another, and to Dunnet they had a right to pay. I do not, therefore, see why it was necessary to keep those parties before the Court; but having been brought to your Lordships bar as respondents, it appears that they have done only that which the person to whom they owed a duty, namely, Fraser, ordered them to do; they have paid to Dunnet that which Dunnet was entitled to receive by virtue of the assignation and obligation which on their part existed at the time when this claim was first made. They have done no more, therefore, than perform the duty which was incumbent upon them; they have paid the party as between themselves that which he was entitled to

receive; then the appellant brings them here without any thing to ask as against them, because he does not ask for the 40*l.* against them, but for the 40*l.* against Dunnet, so far sanctioning the receipt by Dunnet of that which Williamson's trustees have paid. On this ground, therefore, I also think it is quite clear that the Lord Ordinary, though that is not made the subject of any complaint, has done quite right in not making the parties pay the costs. The Lord Ordinary gave neither party their costs; he seems to have found (but it is not necessary to enter into that) there was some reason which should preclude these parties from having those costs. The complaint is, that they ought to have been made to pay costs, and I think that the pursuer has very good reason to be satisfied with that, so far as regards Williamson's trustees.

The other question, as to denying those costs, is not now under your Lordships consideration; it is quite sufficient therefore to say that the interlocutor appears to be quite right, at all events in not ordering costs.

My Lords, this exhausts all the points to which it is necessary now to advert. If your Lordships agree with me in the views that I take, your Lordships will affirm the interlocutor with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is further ordered,

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That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON,
Solicitors.