

[25th July 1839.]

(Appeal from the Court of Session, Scotland.)

DAVID BARRY, surviving Partner of Robertson and Barry, Merchants in Leith, (Pauper,) Appellant. (No. 25.)

[*John Stuart—Jemmett.*]

ARCHIBALD WADDELL, Accountant in Glasgow, Trustee on the sequestrated Estate of John Geddes of the Vereville Glassworks, Respondent.

[*Lord Advocate (Rutherford)—Sydney S. Bell.*]

Account.—Judgment of Court of Session in a circumstantial case of accounting, affirmed.

THE nature of this case, which involved matters of accounting which had been the subject of investigation by an accountant, by order of the Court of Session, is explained in the note of the Lord Ordinary subjoined to his interlocutor of the 10th June 1836, adhered to by the court, and in the judgment by the Lord Chancellor affirming that of the court.

2D DIVISION.

 Lord Ordinary
 Moncreiff.

There were previous interlocutors, of 20th January 1832 and 8th March 1833, pronounced by the Lord Ordinary. Upon hearing parties on their objections to the accountant's report, the following interlocutor was pronounced by Lord Moncreiff:—"10th June 1836. "The Lord Ordinary, having heard parties procurators

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“ on the objections to the accountant’s report, and
 “ having made avizandum, and particularly considered
 “ the said report, with the objections thereto, and the
 “ whole conjoined processes,—Repels all the objections,
 “ and approves of the report: Finds, in the action of
 “ declarator and constitution at the instance of John
 “ Geddes, that there was due to him from the estate of
 “ Barry and Robertson, and the defenders, on 30th June
 “ 1804 a sum of 554*l.* 19*s.* 4*d.*, with legal interest
 “ thereon since that date, subject to an obligation to
 “ account to the creditors of Messrs. Robertson and
 “ Barry, the compositions on whose debts had not been
 “ paid, and others having interest, for his intromis-
 “ sions with the estates of the company, and the partners
 “ thereof, and in particular with the rents and prices of
 “ George Robertson’s dwelling house and warehouse
 “ in Leith, in so far as the same may have been re-
 “ ceived by him posterior to the said date of 30th June
 “ 1804, or may yet remain to be realized by him:
 “ Finds, that it has not been made to appear in this
 “ process that the said balance due to the said John
 “ Geddes, with the interest accruing thereon, has been
 “ liquidated by any such intromissions already had by
 “ the said John Geddes; but in respect of the minute
 “ lodged by him, of date the 22d January 1822, being
 “ No. 30 of process, finds that no personal decree is
 “ asked against the defender David Barry; therefore,
 “ in terms of the said minute, decerns and declares in
 “ terms of the libel, to the extent of the said debt and
 “ interest, cognitionis causa tantum, against the com-
 “ pany of Robertson and Barry, and against the heirs
 “ of George Robertson, as an individual: And in the
 “ action of count and reckoning, at the instance of the

“ said David Barry, sustains the defences, and assoil-
 “ zies the defenders, and decerns; reserving always, as
 “ aforesaid, the right of any creditor of the said com-
 “ pany, the compositions on whose debts may not have
 “ been paid, and others having interest, to call the said
 “ John Geddes to account for his intromissions had or
 “ to be had with the estates of the company, or the
 “ partners, and in particular the heritable property and
 “ rents above referred to, posterior to the said 30th June
 “ 1804 as aforesaid, or in time coming: Finds, that as
 “ no personal decree can be pronounced against the
 “ said David Barry, it appears to the Lord Ordinary
 “ to be unnecessary to give any deliverance on the
 “ expenses of process, the said David Barry having
 “ alone carried on the litigation; but allows the cause
 “ to be enrolled, in order that any motion which may
 “ be necessary for finally extricating it may be made.

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“ (Signed) JAMES W. MONCREIFF.”¹

¹ “ *Note.*—This cause, which began in 1817, and relates to affairs which
 “ were in a great manner closed in 1804, has proceeded under the old
 “ forms of the Court; and when the Lord Ordinary looks at the process
 “ lying before him, he sees a warning example of the evils which have
 “ since called for and obtained a remedy.

“ The cause does also, in his opinion, present a notable example of the
 “ extent of trouble and vexation which a man may bring on himself and
 “ others, to whom he stood under the greatest obligations, from indulging
 “ a mere humour of dissatisfaction, originating in circumstances in which
 “ he had himself the chief concern, and in regard to which, at any
 “ rate, his opponent was perfectly innocent. Mr. John Geddes and his
 “ brother had the misfortune, from motives of friendship, to interpose
 “ their credit as cautioners for Mr. Barry and Mr. Robertson, in a com-
 “ position-contract with their creditors. At their own desire, these
 “ gentlemen were at first allowed to manage the bankrupt estate; but
 “ they quarrelled with one another, and it was then necessary to put the
 “ management in Mr. Masterton, accountant. Mr. Robertson continued
 “ to give assistance, but Mr. Barry refused to do so. The management
 “ went on, however, and in 1804, Mr. Masterton made up his final states,
 “ against which no specific objections were stated. Mr. Masterton left

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The appellant reclaimed to the court, praying for absolvitor in Geddes's action, and, in the accounting at

“ this country in the same year 1804, and Mr. Robertson died abroad
 “ in 1807. From that time down to 1817, no proceedings took place.
 “ In that year Mr. Geddes, finding himself to be in advance for the
 “ estate, and seeing that some of the compositions were still unpaid,
 “ found it necessary to obtain a decree of constitution against the heirs
 “ of George Robertson, no one representing him, by which he might
 “ obtain a title to the heritable property which had belonged to him,
 “ and the price of which, though it was sold, could not otherwise be
 “ recovered. That summons necessarily called the defender Barry, and
 “ unfortunately concluded for a sum which has been found by the
 “ accountant to be extravagant and untenable. But the pursuer, by the
 “ minute mentioned in the interlocutor, passed from any personal decree
 “ against Barry. The latter, however, had raised his action, concluding
 “ for upwards of 5,000*l.*, on an account framed on the principle of dis-
 “ carding all Mr. Masterton's accounts and states; and after thirteen
 “ years, when Masterton and Robertson were both gone, refusing to
 “ Mr. Geddes credit for any thing, unless all the books, vouchers, &c.
 “ should be of new opened and exhibited. No creditor has made any
 “ claim. These causes have now been nineteen years in court; and
 “ Mr. Geddes, thus struggling with a bankrupt on the poor's roll, has
 “ himself become a bankrupt.

“ The Lord Ordinary having read with care the whole report, and
 “ attended to all the objections to it, is completely satisfied that the
 “ accountant has done full and fair justice. 1st. He thinks that he
 “ judged rightly, seeing that no personal decree was asked by Geddes,
 “ and that he was in a litigation with a party on the poor's roll, in
 “ proceeding, for the reasons explained in pages 10 and 11 of the
 “ report, to endeavour to ascertain whether the documents in process
 “ were sufficient to show that there was a debt of any amount due to
 “ Geddes. 2dly. He thinks that he has done justice in giving the weight
 “ which he has done to the states of Masterton, which were examined
 “ and approved of by so many persons having interest, and fully qualified
 “ to check or appreciate them: 3dly. He is of opinion, that the report
 “ itself contains sufficient answers to all the special objections now
 “ insisted on. It is therefore unnecessary for him to go into particulars.
 “ Many of the objections put before the accountant were palpably untrue
 “ and unfair; some were given effect to, and the rest seem to have been
 “ rightly decided.

“ One objection (the eighth before the accountant, and the tenth now
 “ insisted on) might afford reasonable ground of doubt. Robertson,
 “ Mr. Barry's partner, and one of the bankrupts, gave assistance to
 “ Mr. Masterton in realizing the estate; and he appears to have received
 “ a sum of 335*l.*, which he did not pay over to Masterton. The question
 “ is, Whether, in a question with Barry, Geddes the cautioner must be

his own instance against Geddes, for decerniture with costs, “ or at least to recal the said interlocutor in hoc statu, and remit to the Lord Ordinary to make up a record in terms of the judicature act, and relative act of sederunt.”

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Against that part of the interlocutor, whereby his Lordship “ finds, that as no personal decree can be pronounced against the said David Barry, it appears to the Lord Ordinary to be unnecessary to give any deliverance on the expenses of process, the said David Barry having alone carried on the litigation,” the respondent presented a reclaiming note; and prayed the court to “ find the said David Barry liable in said expenses, at least from 22d January 1822, the date of the minute referred to in the Lord Ordinary’s interlocutor, or to do otherwise in the premises as to your Lordships may seem proper.”

“ liable for what Robertson so received and did not account for? The Lord Ordinary thinks that the accountant is right in his judgment, as explained in the report, p. 67. Robertson was not factor for Geddes. But, at any rate, the point by itself is really of no importance. The sums employed by Robertson, in payment of the third instalment of the composition, and otherwise, must be set against the sum so received, which would reduce it to 143*l.* 9*s.* 1*d.* But as no personal decree is asked, this could evidently make no real difference on the state of the case.

“ Mr. Barry insists much on what is the first objection before the accountant, and the seventh now pleaded. This is 186*l.* paid by Mr. Geddes to take up a bill of a creditor who refused to accede to the composition. The Lord Ordinary can only say, that any thing more unfair or discreditable, to be advanced by Mr. Barry, after so long a period, in the face of his own letter at the time, (29th July 1803,) as quoted by the accountant, p. 61, and of Masterton’s state approved of by Robertson and the creditors, he has seldom seen; and he cannot think that it can be listened to, coming from Mr. Barry in such circumstances.

“ The Lord Ordinary thinks it unnecessary to advert to any of the other objections.

“ J. W. M.”

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On advising both the reclaiming notes the following interlocutor was pronounced: “The Lords, having considered this reclaiming note for poor David Barry, and another note for Archibald Waddell, reclaiming against the same interlocutor as to the expenses of process, adhere to the interlocutor in so far as complained of in this note, and refuse the desire thereof; and on the other note, find David Barry liable in the expenses of process, from the date of the remit to the accountant; allow the account to be given in, and when lodged, remit to the auditor to tax the same, and report, in so far altering the interlocutor of the Lord Ordinary.”

Barry appealed.

Appellant's
Argument.

Appellant.—The course of procedure below had been such as to baffle every attempt by the appellant to get into the real truth and merits of the transaction.

Respondent's
Argument.

Respondents.—The respondent maintained that the proceedings, not having admitted of the application of the modern forms of pleading, presented much to be animadverted on; but that substantial justice had been done, and every facility of investigation afforded by the accountant's report, which had undergone the judicial review of the Lord Ordinary and the Court.

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LORD CHANCELLOR.—The objections to the account are all to be found on the face of the account itself; there is no evidence dehors the account?

Mr. Stuart.—The first objection is printed in the accountant's report at page 25, and afterwards at page 42. My Lords, at page 42 it is perhaps more explicitly

stated, because there the objections are narrowed and more conveniently printed.

LORD CHANCELLOR.—Does that appear on the face of the report?

Mr. Stuart.—Yes, my Lords.

LORD CHANCELLOR.—Your four objections are objections to the course the accountant has taken on the facts as they appear on the face of the report. There is no evidence de hors the report.

My Lords, in this case, which is an appeal against four interlocutors of the Court of Session, the two first objections appear to me to be without any foundation; the two latter depending entirely on an examination of the account, it may be proper to take some time to investigate the account, and the entries on which the objections depend; but the two first are for not having made an order on an application by the appellant, for which I cannot find on the face of the proceedings, or on any thing that is stated at the bar, that there was any foundation. In the course of the contest between these parties it was referred,—the whole matters of account were referred,—to an accountant by an interlocutor of the year 1830, and against that there is no appeal. The interlocutor, therefore, is binding on the party; and the sole question is, whether in carrying that into effect the accountant has or has not done his duty which the court intended he should do,—that is, whether there has been a miscarriage in the mode in which he has performed the duty which the interlocutor imposed on him. The two first interlocutors do not touch that part of the question. They are appealed against as interlocutors of the Court of Session refusing the application requiring certain special directions to be given to the accountant as to the mode

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in which he was to carry out the account, an application inconsistent with the interlocutor of December 1830, which directed him to take the account generally. I do not find any ground laid before the Court of Session to induce that court to depart from the direction of the interlocutor of 1830, therefore there is no ground for the appeal against the order which refused that application.

My Lords, the other two interlocutors, that is to say, the third, which disposed of a complaint against the mode in which the account was taken, and the fourth, which gave effect to the decision of the Lord Ordinary, is a subject involving a question of account, which appears entirely on the face of the account. In a complicated case of account it would not be satisfactory to dispose of a question of that sort without taking an opportunity of accurately examining the account itself; and for that purpose I propose to your Lordships to adjourn the consideration of this case till Monday next, it being then considered that the two first interlocutors are to be affirmed, and the question to remain open on the two last, which raise the question of the account.

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LORD CHANCELLOR.—My Lords, I do not feel it to be necessary to trouble your Lordships at any length in this case, having in fact stated my views at the close of the argument. It appears that the appellant Mr. Barry and his partner Mr. Robertson, who had been merchants in Leith, became insolvent in the year 1801. The partnership property was sequestrated, and a trustee elected, but the bankrupts having offered a composition of seven shillings and sixpence in the pound by three several payments, the offer was accepted on condition of sufficient security being given for the first and

second payments. The Messrs. Geddes accordingly became cautioners for the payment of those instalments, in consideration of which the whole of the sequestered estate and effects was conveyed to them, and the sequestration was recalled. The Messrs. Geddes, residing at Leith, appointed Mr. Masterton their factor, and he made up statements from time to time of the monies he had received and expended on account of the estate. Whatever came in from the original estate beyond that which was necessary to indemnify the trustees in the payment of that 5s. in the pound, on the debts to the firm, would of course immediately go to the insolvents, or those who stood in their place. That trust continued for a great number of years, during which time statements of the acts and transactions were furnished for the inspection of those interested in the cause; they investigated the concerns of the general firm, which are represented to have remained in the hands of Robertson, the late partner; afterwards another person was appointed to get in the property, and ultimately the present appellant, Barry, obtained from the creditors an assignment of all their interest, so that at last he came to represent those interested under the sequestration; and under these circumstances he has called in question accounts of Messrs. Geddes with the creditors of the bankrupt estate. It was contended that he had no interest, because the creditors under the sequestration had no interest except for the purpose of seeing that there was a due appropriation to the payment of those instalments of 2s. 6d. each in the pound, making 5s. in the pound,—it is in the first instance to themselves, and ultimately to the creditors interested under them. There was another suit by Messrs. Geddes, for the purpose of estab-

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lishing the deed, in order to enforce the claim they had against the real property of Barry and Robertson.

When this suit had made some progress the whole of the accounts were referred to an accountant; the accountant investigated them very thoroughly, as appears upon the face of these accounts, and transactions between the parties; and in the report to the year 1804 it appeared that there was a sum of 554*l.* due to Messrs. Geddes, being the excess of what they had paid beyond what they had received; and he found that, although there had been some interest for items arising from part of the property not realized, the interest on the other side of the account exceeded the amount of that on the items, which could have been received by Messrs. Geddes. Taking up the account as it had been stated, it appeared on the investigation that Messrs. Geddes were largely in advance when Barry interfered, having acquired an interest by the assignation of the creditors, and interested of course in the ultimate proceeds of the estate in case there had been a surplus. On the making up the account to that time, no creditor complaining, the accountant found that under any view of taking the account, giving credit for all that might possibly come in, there was a debt of upwards of 600*l.*,—a very considerable sum,—due to Messrs. Geddes for money paid by them beyond that they had received; and Barry, standing in the situation of creditor under the sequestration, having produced nothing to break in upon that, under those circumstances the court properly, in my opinion, decreed against him, his only object being to establish a surplus beyond what was necessary to be applied by Messrs. Geddes's in indemnifying themselves against that which they had undertaken to pay; and on the cross suit they

found no personal demand against Barry, the whole object of that suit being to establish a claim against Robertson, who had been permitted to assist the factor in getting in the property.

Your Lordships have before you not Robertson, who has since died,—you have not before you any creditor of Barry, who, if any thing wrong had taken place under those circumstances, would have been aggrieved by that which had been done, and would have had a right to complain,—your Lordships have nobody before you but Barry, the original debtor, who could have no possible interest in the proceeds of the estate, unless he could shew that there was a surplus beyond that which was necessary to pay Messrs. Geddes. The accountant has investigated these accounts, and he reports them to be perfectly correct, and that it is impossible there can be a surplus coming to Barry. Under these circumstances it is clear that there is no ground for this proceeding on behalf of Barry, who is suing in formâ pauperis, and never can possibly have any thing coming from this source. The interlocutor appealed from disposes of his claim, finding that he has not made out his claim; and as to the other suit, finding that the pursuer has made out a title to that which he asks. The interlocutor brought before your Lordships is only appealed from as far as it affects Barry; consequently any other question as to the property, though perhaps unnecessarily reserved, is entirely between the creditors and Messrs. Geddes. It is quite open to them to investigate the accounts of Messrs. Geddes,—nothing precludes them from that; the whole object of the interlocutor being to shut out Barry from any right to investigate the account, in which, from the statement

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of accounts, it appears he cannot possibly have any interest.

My Lords, it is unnecessary to go into details of these items, but there is one which has been very much observed on, and to which, therefore, I will just call your Lordships attention, inasmuch as it shews the ground taken by these parties. It appears that the creditors in a bill of 186*l.* refused to come into the arrangement, and Messrs. Geddes, as the friends of the bankrupts, ultimately produced the money to satisfy the creditors, by paying off that debt in full. That gave rise to an objection, on the ground of an alleged improper payment out of the bankrupts estate; but the 186*l.* was not paid in fact out of the bankrupts estate; it no longer constituted a debt upon the bankrupts estate, as it was actually paid by Geddes himself. The question as to that bill is not between the creditors and those who claim under it; Geddes can claim repayment of that bill of 186*l.* only as between himself and Barry and Robertson, for whom it was paid. It was attempted, however, to confound that with payments made on account of the estate with the money of the creditors, for which there is no ground; it is clearly not liable to any objection, Barry cannot dispute the right of Messrs. Geddes, as between him and them, to be repaid that sum of 186*l.*

My Lords, there are some other objections, which are equally void of foundation. I had not any doubt, from the argument, that the conclusion arrived at below was perfectly satisfactory, yet as it involved matter of account, I thought it safer to investigate the whole circumstances accurately before I should state to your Lordships the opinion to which I have come. It only remains

that I should move your Lordships to affirm the interlocutors complained of; there can be no costs, as the party sues in formâ pauperis.

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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.

A. DOBIE—ARCHIBALD GRAHAME, Solicitors.