

## SCOTLAND.

## APPEAL FROM THE COURT OF SESSION.

MONTGOMERIE (Lord and Lady)—*Appellants*.  
WAUCHOPE—*Respondent*.

A TRUSTEE, tutor, and curator, appointed cashier and agent to the trust by co-trustees, and when called upon to account, produces accounts made up by accountants from his own instructions. Lord Ordinary appoints objections of a general and preliminary nature to be stated to the accounts, reserving the examination of particulars and vouchers till these should be disposed of. Objections given in that the accounts were not annually balanced, that interest was allowed only at  $3\frac{1}{2}$  per cent., whereas interest ought to have been calculated at three per cent *de die in diem* from time of receipt till three months after the annual balance, and then on the balance at five per cent. and the right to demand all the profits stated but not insisted on, that a charge was made for the service of the accountants which ought to be paid by the trustee and agent as it was by his negligence in not keeping the accounts himself that their services became necessary, that his charge for his own trouble in the management was excessive, and that a charge made for making up titles to certain lands by adjudications in implement, without general service and decree of constitution, ought not to be allowed, as the titles were improperly completed and therefore useless. After several proceedings, final interlocutor below approving the accounts *in toto* without any examination of particulars. This last interlocutor *reversed* as inconsistent with the reservation in the Lord Ordinary's interlocutor which was not appealed from, and the cause remitted for review as to the rest, so that the claim for all the profits might be insisted upon if that question was still open.

The Lord Chancellor observing that he could not conceive how it came to be imagined that the accounts ought not to be annually balanced, that it was new in principle to take

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accounts made up under the directions of one alone of the parties as a ground for judicial proceeding, that the appointment of a trustee by co-trustees to be cashier and agent to the trust to be paid as cashier and agent could hardly be supported in England, that a trustee ought to keep his accounts so regularly at least as to enable the Court to judge how far the assistance of professional accountants might be necessary in the particular case, but that a trustee acting *bonâ fide* with a view to the interest of the *cestui que trust* ought not to suffer for mistake unless he very grossly miscarried.

**T**HIS was a question as to the principle and mode of accounting by a tutor, curator, and trustee, who was also agent and cashier for his colleagues in the guardianship and trust, with the pupil and truster.

1796, death of Lord Eglinton, and leaving two daughters, the elder ten years of age.

Appointment of trustees, tutors, and curators, of whom Respondent was one.

Archibald, late Earl of Eglinton, died in 1796, leaving two daughters. Before and at the time of his death he was entitled to and possessed of a very large estate real and personal of his own acquisition, besides two entailed estates, one of which by the destination went to his cousin the succeeding Earl of Eglinton, the other to his elder daughter Lady Mary Montgomery. By a deed of nomination of Feb. 8, 1788, and a disposition and settlement of Jan. 18, 1791, Earl Archibald had appointed Sir James Montgomery the Chief Baron of the Exchequer in Scotland, Sir Archibald Macdonald, then Solicitor General, afterwards Lord Chief Baron of the Exchequer in England, and others, amongst whom was John Wauchope writer to the signet, to be tutors and curators of his daughters, and trustees of his fortune for their benefit.

Wauchope had in the Earl's life time been his

cashier and agent and had made up his accounts, and regularly struck a balance annually. It was thought proper by the other tutors and trustees that Wauchope should continue to take the active management of the property as agent and cashier, and his powers as such were renewed by them with a recommendation to keep his accounts in the same regular manner as in the Earl's life time.

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Respondent  
appointed  
cashier and  
agent by his  
co-trustees,  
&c.

1803. Marri-  
age of elder  
daughter at  
age of sixteen  
years.

1806. The  
elder daughter  
and her hus-  
band proceed  
to close the  
trust.

Action of  
multiple-  
pounding.

Respondent  
produces ac-  
counts made  
up by account-  
ants under his  
own instruc-  
tions.

Lady Mary the elder daughter, who was only ten years of age in 1796 when her father died, was in 1803 at the age of sixteen or seventeen years married to her cousin Lord Montgomerie, son of the present Earl of Eglinton; her father's wishes expressed in his last illness being in that respect complied with. Lady Susan, the other daughter, died in 1805, in minority. In 1806 Lord and Lady Montgomerie determined to settle with the trustees, and for the purposes of that settlement an action of multiple-pounding was in 1807 instituted in the names of the trustees, in which all proper parties were called, that the trustees might account and be judicially exonerated.

Jan. 25, 1811.  
Interlocutor of

Wauchope, by appointment of the Lord Ordinary, then produced an account of his intromissions as cashier and agent, prepared under his own instructions, by Messrs. Keith and Wilson, professional accountants. Wauchope, it appeared, had not made up his accounts annually, and had rendered none to the tutors and trustees till 1806, and in the accounts prepared by Keith and Wilson no annual rests had been made, nor annual balances struck.

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Lord Ordi-  
nary, ordering  
objections to  
the accounts  
to be stated, if  
they should  
appear objec-  
tionable.

Four objec-  
tions stated.

Interlocutor  
of Lord Ordi-  
nary, Nov.  
1812.

Interlocutor  
of Court, July  
2, 1812.

1811, ordered Lord and Lady Montgomerie to give into process any objections of a preliminary and general nature which they might have to these accounts, before entering upon an examination of particulars and vouchers. This interlocutor was not objected to nor appealed from, and in compliance with it four preliminary objections were stated—1st, that the accounts were not annually balanced:—2d, that Wauchope had, instead of stocking out the savings, kept immense balances in his hands, for which there was no occasion in the ordinary administration, and allowed only  $3\frac{1}{2}$  per cent. interest on these balances instead of 5 per cent.:—3d, that the charge for trouble and commission was extravagant, and that 420*l.* charged by Keith and Wilson for making up the accounts ought not to be allowed, as it was the neglect of Wauchope to make up his accounts annually that rendered their assistance necessary:—4th, that the charge for making up certain titles ought not to be allowed, as they were improperly completed and therefore useless.

The Lord Ordinary by interlocutor, Nov. 12, 1811, first in part appealed from, found that the accounts ought to be annually balanced; and that interest on the balances ought to be charged at the rate of 4 per cent. and repelled the other objections.

Representations having been given in by both parties against this interlocutor, the Lord Ordinary made avizandum with the cause to the Lords of the first division, and informations having been lodged, the Court, by interlocutor, July 2, 1812, (second in part appealed from), found that the accounts must

be brought to an annual balance; and that, as to the balances, after allowing certain periods for stocking them out, interest should be charged at 5 per cent.; but that no interest should be charged *de die in diem* till the expiration of these periods, and the Court repelled the other objections.

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Both parties reclaimed, and the Court, Nov. 12, 1812, ordered the petition for Lord and Lady Montgomerie to be answered, with the exception of the point of the expense of making up the titles as to which they adhered, and this part of the interlocutor was appealed from.

Interlocutor  
of the Court,  
Nov. 12, 1812.

After answers put in, the Court by interlocutor, Feb. 2, 1813, (fourth appealed from) approved of the whole accounts of Keith and Wilson, as they stood without examination of particulars or vouchers, and Lord and Lady Montgomerie appealed.

Interlocutor  
of the Court,  
Feb. 2, 1813

Appeal.

The point chiefly contended for below on the part of the Appellants, after the matter of annual balance, was that interest should be charged on the sums received at the rate of 3 per cent. *de die in diem*, from the time of receipt until three months after the annual balance should be struck, and from that time at the rate of 5 per cent.—There were some passages in the pleadings below, touching upon the right of the Appellants to an account of all the profits made by the Respondent of the trust money; but this appeared to be stated rather as a right which might be, than as one which actually was, insisted upon.

Argument.

When the cause, however, came to be heard upon appeal, the point chiefly insisted upon for the Appellants was, that the Respondent ought to account

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Forbes v.  
Ross, 2 Bro  
Ch. Ca. 430.

for all the profits he had made of the infant's money. It was a principle of universal law, that a tutor, curator, or trustee, should not make a profit of the infant's or truster's money; and in no country in Europe was it ever heard of before, that when a trustee laid out the money, he should be allowed to retain the profits. The rule was essential in the character of a trustee, and no express institution was necessary. But in the civil law there was a prohibition against taking interest without accounting for it. Cod. lib. 5. tit. 56. . *De usuris pupillaribus*.— Whatever interest the trustee made ought to be paid, and even though it should be proper to keep the money in deposit, if he did in fact make interest of it, he ought to pay it. A trustee cannot bargain, so as to gain an advantage for himself, out of the trust fund; and therefore where executors were directed to lay out the fund at the best interest, and they agreed that one of them should take it at 4 per cent. the executor was charged by the Court with 5 per cent. So here no authority of the co-trustees, if given, could protect Wauchope from accounting for the utmost interest. No principle could be more clear, than that a guardian ought to charge nothing for care and trouble, but only the money out of pocket. The principle of the office was, that it was a moral and honourary, and not a stipendiary office, and so it was clearly considered in Chancery, in this country, and in the civil law. There was a case, where a person, employed by a testator as a collector of rents, being made executor of his will, claimed an allowance for collecting the rents subsequent to the testator's death, on the ground that it



was so meant; but the Master disallowed the claim, as no intention could be implied so far to take away the character of executor; and so here the character of cashier and agent ought not to be allowed to extinguish that of trustee. These are propositions of universal law, and as true at Edinburgh as at London; and if there was any doubt about the matter, it was of vast importance to have the point settled. Trustees might be proceeded against with more or less severity as to the charge of interest in particular cases; but this was the first time it was ever heard of, that a trustee should not be bound to account for the profits actually made by him of the trust fund. But it was a general and paramount principle of the law of Scotland, that a tutor, curator, guardian, or trustee, could make no profit whatever for himself of the trust fund. There was another subordinate principle, by which trustees, &c. were bound to use a certain degree of diligence, and this varied in its effects and consequences according to the change of times and circumstances. But the principle that the office of guardian and trustee was gratuitous, and that a person in that situation ought to derive no profit to himself from the trust fund, was universal and invariable. The authorities on the other side related merely to the different modes of acting on the subordinate principle without affecting the general and universal principle. The mode of dealing with the trust fund, and of accounting, laid down by these old regulations, however proper in other times and under other circumstances, was totally inapplicable to the present period, and present state and circumstances of Scotland. And then

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N. B. In this case a remuneration was not objected to, but only the amount of the charge.

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Stair. b. 1. t. 6. s. 17, 21.—Ersk. b. 1. t. 7. s. 19.—  
Bankton, b. 1. t. 7. s. 36.—*Scott* (of Rossie) *v.*  
*Strahan* (of Balgenny) *Elchies*.—*Murray v. Mur-*  
*ray*, June, 1710:—and other cases stated in Dict.  
under title, *Pactum illicitum*.—*Lord Macdonald v.*  
*Mackenzie*, 1780, were cited.—By the principles of  
the law of Scotland then, the Respondent was bound  
to account for all the profits he made of the trust  
fund, and in accounting to bring his accounts to an  
annual balance, and pay interest, according to the  
course and practice of the country at the present  
time. Wauchope was liable to the penalties of stat.  
of 1672. cap. 2. for neglect of its regulations; but no  
penalties for the omission were insisted on, but only  
the profits which he actually made, or ought to have  
made. As the charge by the accountants for their  
services was occasioned by Wauchope's own negli-  
gence in not keeping his accounts so as to render  
their assistance unnecessary, he and not the Appel-  
lants ought to pay it.—His charge for his own re-  
muneration was extravagant, (230*l.* per ann.) and  
he was at any rate precluded, by the terms of his  
appointment as cashier and agent, from charging  
more than was allowed him in the late Earl's life-  
time, (100*l.* per ann.)—Then in making up the titles  
to certain lands by adjudications in implement, the  
general charge and decree of constitution were  
omitted, and the titles were unavailable, and  
the Appellants ought not to be charged with the  
expense.

For the Respondent it was argued, that the ac-  
count of all the profits made, had never been asked  
below, and the Appellants had even made a merit

of not insisting upon it; and now they called upon their Lordships to decide a point which they had excluded from the consideration of the Court below. The question was as to the rate of interest to be paid, and the annual balances; and that was to be decided, not by universal and moral law, but by the law of Scotland; and the rules as to balancing the accounts, and stocking out the receipts, and the interest to be paid, were stated in the authorities, *Campbell v. Lord Galloway*, Fac. Col. March, 1802.—Ersk. B. 1. T. 7. S. 25.—*Spalding v. Farquharson*, Fac. Coll. May, 1809. But Wauchope consented to pay interest according to the rate at which a prudent man would have made interest of his own money. Mr. Wauchope, as a medium between the interest allowed by the private and chartered banks, accounted at the rate of  $3\frac{1}{2}$  per cent. *de die in diem*. It was not the duty of Wauchope to lay out the receipts on landed security, at 5 per cent. as then he might not be able to answer the exigencies which might occur. As to annual rests, even the law of England did not allow interest on interest except in special cases. At law it was only allowed where a judgment was had for a sum composed of principal and interest, and then instead of execution an action was brought on the judgment; interest was then given on the whole in the shape of damages. Equity did not go so far, as the decree only directed interest to be computed on the principal, and it was no settled principle that a trustee should account with annual rests. He paid the profits which he made, or interest, but not on annual rests. The case of *Raphael v. Bo-*

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*ehm*, depended on special circumstances. In this respect, generally, the law of Scotland appeared to run on all fours with the law of England, Ersk. B. 3. T. 3. S. 81. In the law of Scotland there were special provisions as to tutors and curators, but no distinction as to annual rests. As to the charge for trouble and commission it was no point in dispute here whether any thing at all ought to be allowed; the only objection was to the amount, and the charge was not unreasonable in its amount. As to the accountants they were properly employed, as they had no Masters in Scotland. Their charge for their services was not unreasonable, and credit was due to their accounts. (*Lord Eldon. (C.)* Were they attended by both parties?) No; but credit was due to their accounts independent of that. As to the charge for making up the titles, the judges below were clear that it ought to be allowed.

In reply it was contended that the Appellants had made an offer to account on a certain principle, which was not accepted, and not having been accepted, it was no waiver of the right to insist on the whole profits made. (*Lord Eldon, (C.)* Then what had the judges to do with it?) Merely to say whether this was not a fair principle. (*Lord Eldon, (C.)* I do not understand this: Wauchope brings in his account; the Lord Ordinary orders you to state any preliminary and general objections you may have to it. You might then say—"We will have nothing to do with this account, and insist on the general principle," and all the profits made." But instead of that, you proceeded to take the opinion

of the Court on these four objections, and that opinion being against you, it is, as you say, to go for nothing at all. Suppose in such a case, in the Court of Chancery here, a person offered you terms, and you refused to say whether you accepted them or not, but proceeded to take the opinion of the Court on them, and that being against you, could you then maintain that you were entitled to the larger account, and that the opinion of the Court was to go for nothing? I think you would not be heard in our Courts. But if it be otherwise in the Court of Session, why comes this appeal here? Your argument is, that we ought to send back the case to the Court to proceed as if these objections had never been put in. But if we send it back to them to take the larger account, they may say that they never refused it.)

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*Mr. Wetherell* and *Mr. A. Murray* for Appellants; *Sir S. Romilly* and *Mr. Leach* for Respondents.

*Lord Eldon.* (C.) This is a singular proceeding, and one which, according to my notions of legal proceedings, I am as little able clearly to comprehend, as any that ever came before me in the course of my judicial experience.

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Judgment.

The case was originally brought into Court by action of multiple-pounding, and your Lordships have heard passages read at the bar from the books, from which it appears that the nature of that action in general proceedings is well understood.

Ersk. Mor.  
Ed. p. 811.  
Lib. 4. T. 3.  
S. 23.

The summons states:—"Whereas, it is humbly  
meant and shown to us by our lovite, Sir William

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“ Augustus Cunynghame, of Livingstone, Baronet ;  
 “ Sir Archibald Macdonald, Lord Chief Baron of  
 “ his Majesty’s Court of Exchequer, in England ;  
 “ Sir James Montgomery, of Stanhope, Baronet ;  
 “ William Fullarton, of Fullarton, Esquire ; and  
 “ John Wauchope, writer to the signet ;—that  
 “ where the pursuers as trustees under two trust  
 “ dispositions and deeds of settlement, executed by  
 “ the now deceased Archibald, Earl of Eglinton,  
 “ the one dated January 18, 1791, and the other  
 “ dated November 5, 1795 ; and likewise as tutors  
 “ appointed by the said Archibald, Earl of Eglin-  
 “ ton, to his daughter, stand vested in, and are  
 “ possessed of, certain lands and sums of money  
 “ and effects, the extent and amount whereof will  
 “ be specified, and condescended upon, in the  
 “ course of the action to follow hereon ; that the  
 “ pursuers are willing and desirous to account for  
 “ their management, intromissions, and transac-  
 “ tions, as trustees, and tutors, and curators, and  
 “ to pay over and convey to the person or persons  
 “ who may be found to have best right thereto the  
 “ sums of money and lands, &c. ; but they are  
 “ distressed, and threatened to be pursued for the  
 “ same, not only at the instance of the Right Hon.  
 “ Lady Mary Montgomerie, the only surviving  
 “ daughter of the said deceased Archibald, Earl of  
 “ Eglinton, and spouse of the Right Hon. Archi-  
 “ bald, Lord Montgomerie, and the said Archibald,  
 “ Lord Montgomerie, for his interest, who pretend  
 “ to have right to the said lands and other funds in  
 “ virtue of the foresaid trust, dispositions, and set-  
 “ tlements, or otherwise ; and also by Hugh, now  
 “ Earl of Eglinton, Archibald Montgomery, Es-

“ quire, late of Stair, and the pursuers, the saids  
 “ Sir Archibald M'Donald, Sir James Montgo-  
 “ mery, and John Wauchope, who pretend to have  
 “ right to the said trust funds and estate, or part  
 “ thereof, in virtue of the contract of marriage  
 “ entered into between the saids Archibald, Lord  
 “ Montgomerie, and Lady Mary Montgomerie;  
 “ therefore the saids, &c. &c. ought, and should  
 “ be convened before the Lords of our Council and  
 “ Session, and it ought, and should be found, and  
 “ declared by decree, &c. that the pursuers are  
 “ only liable in once and single payment, &c.; *and*  
 “ *that to such of the said defenders or to the pur-*  
 “ *suers, &c. as shall be found to have best right*  
 “ *thereto at discussing their preferences, &c;* and  
 “ the pursuers as trustees, and tutors, and curators,  
 “ appointed by the said Archibald, Earl of Eglin-  
 “ ton, &c., ought to be decerned and ordained to  
 “ make payment, &c. to such of the defenders, or  
 “ others, as shall be so found to have best right  
 “ thereto, and in like manner to denude of and  
 “ convey to, &c. such of the said defenders, or  
 “ others, as may be found to have best right there-  
 “ to, the whole lands, &c. or other funds or effects  
 “ vested in their persons or in their possession, as  
 “ trustees, or tutors, or curators foresaid; and upon  
 “ the pursuers accounting for their said intromis-  
 “ sions, and lodging in process a conveyance in  
 “ favour of the person or persons so preferred, of  
 “ the lands and others foresaid, they ought and  
 “ should by decree foresaid, be exonerated and dis-  
 “ charged of the offices of trustees, and tutors, and  
 “ curators foresaid, and their whole of management  
 “ and intromissions in virtue thereof, &c. &c.”

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Stripping this of the technical form, I take the object and meaning to be, that all who had any claims should be called into Court, that the claims should be there stated, and discussed, and decided upon, and that the trustees should be decreed to pay the trust moneys, and to convey the trust lands according as the rights should be established.

One circumstance is material—that, in the life time of the late Earl of Eglinton, Mr. Wauchope acted as his cashier and agent; and, after the Earl's death, the trustees, who attended their first meeting, November 29, 1796, resolved, “that Mr. Wauchope's powers, as cashier and agent, ought to be renewed, but they delayed giving directions about making out the commissions till their colleagues were advised, and their opinion of the measure known,”—and then they recommended to him, in case his powers should be so renewed, *to continue to keep his accounts in the same, regular manner as before.* All the trustees afterwards agreed that the powers held by Mr. Wauchope from the late Earl should be renewed, and commissions, appointing him cashier and agent, were accordingly made out and executed. Mr. Wauchope himself was one of these trustees, and I am too well aware of the distinction between the law of Scotland and that of England to take upon myself confidently to say that this was an appointment which ought not to have taken place, though I cannot but observe that it is a sort of proceeding at which, in this country, we should look with very great jealousy, when we came to consider that it must be his duty, in his character of trustee, to overlook, check, and control his own management

Respondent appointed cashier and agent by his co-trustees, with directions to keep his accounts as before.

Whether such an appointment would be permitted in England, considering the incompatible nature of the duties.



and accounts, as agent and cashier, and there would certainly be a difficulty in permitting a transaction of that sort to take effect here. Such, however, is the fact in the present case.

In April, 1806, Mr. Wauchope communicated to the then Lord Chief Baron, Macdonald, a state of his intromissions from the time of the late Earl Eglinton's death, to October 1805, and this, according to the paper now before me, appears to have consisted of the following accounts, viz. 1st. Account, charge, and discharge of Mr. Wauchope's intromissions as cashier for the late Earl, from May 21, 1796, to May 21, 1797. 2d. Mr. Wauchope's account as cashier for the trustees, comprising accounts from October 30, 1796, to March 13, 1801, with a continuation from March 13, 1801, to February 16, 1805. 3d. Mr. Wauchope's account as cashier for the tutors and curators of Lady Mary Montgomery, from February 11, 1797, to April 7, 1801, with a continuation from April 7, 1801, to March 31, 1803. 4th. Mr. Wauchope's accounts as cashier for Lord and Lady Montgomerie, from March 31, 1803, to February 16, 1805. These were the accounts delivered on that occasion. When the action came into Court, Mr. Wauchope produced a continuation of his accounts down to February 3, 1807, and the Lord Ordinary ordered the trustees in the mean time to make over to the Appellants securities belonging to the trust estate, to the amount of 20,000*l*.

It is farther stated in the Appellants' case that the Appellants, by their marriage contract, had become bound to provide a certain sum for the younger children of the marriage, and that the trustees, before

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Accounts  
given in by  
Respondent.

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Final account.

they denuded, thought it their duty to have this provision properly secured. This was accordingly done under the sanction of the Lord Ordinary, who, by an interlocutor of the date June 23, 1807, found that the trustees were bound to account for, and denude of the trust fund, and that, upon their so accounting, the Appellants should be bound to discharge them of all their management and intromissions, whether as trustees or as tutors and curators. The Appellants then represented that nothing now remained to be done in order to bring the whole business to a close, except the settling of Mr. Wauchope's accounts, as cashier; and, in obedience to an appointment of the Lord Ordinary, Mr. Wauchope produced a final account of his intromissions, by which it was admitted that there was a balance of 1,981*l.* and a fraction in favour of the trust estate, subject to a charge as for trouble and commission. Of this balance Mr. Wauchope, pursuant to an *interim* decree or order of the Lord Ordinary, paid 1,000*l.* to account, but objected to the payment of the remainder until the accounts should be finally settled, and the Appellants ready to discharge the trustees, and tutors, and curators of their intromissions and management,—which was sufficiently reasonable.

Proposed reference to arbitration, ineffectual.

Then some proposition was made by the Appellants to have the different objections which they had to state to Mr. Wauchope's accounts determined by arbitration, and they proposed a reference to counsel for that purpose. Mr. Wauchope proposed a reference to accountants; but, there being certain points of law to be settled, and it appearing that accountants would not be the most

proper persons to decide, where it was not very clear what the law was, the appellants thought it right that the matter should be settled by persons more particularly conversant with the law, and the proposition having come to nothing, they proceeded with the process, and on January 25, 1811, the Lord Ordinary pronounced this interlocutor, against which, your Lordships will please to observe, there is no appeal. “The Lord Ordinary having heard parties procurators, appoints Lady Montgomerie and her husband to give into process any objections of a preliminary and general nature, which she may have to state to the accounts produced by the pursuers, and upon which it may be wished to obtain the judgment of the Lord Ordinary before entering on an examination of the particular articles of the said accounts and the vouchers thereof.”

If that had been a proceeding in the Courts of this country, it is difficult to conceive how it could be supported. The mode here would be to call upon all who considered themselves interested to state their claims; and I think it obvious, that we could not call upon them to state their claims, till the Court had before it some such authentic accounts in a judicial form, as might properly be taken as the recorded statement of such accounts. In this case, however, the accounts mentioned in the Lord Ordinary’s interlocutor are accounts drawn up by the accountants Keith and Wilson, for and at the instance of Mr. Wauchope; and the Court, by its final judgment, adopts the whole of these accounts so prepared by Keith and Wilson, although, in drawing up such accounts they acted, not under a

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Interlocutor of  
the Lord Ordinary (not ap-  
pealed from)  
Jan. 25, 1811;  
proceeding on  
the footing of  
the Respond-  
ent’s accounts,  
and appointing  
any prelimi-  
nary and gene-  
ral objections  
to them to be  
stated before  
examining  
particulars.

A Court of  
Justice in  
England  
would hardly  
proceed on the  
footing of an  
account made  
up under the  
controul and  
directions of  
one of the par-  
ties only.

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It is new in principle to take an account made up by one of the parties as of equal effect as a ground of judicial proceeding, with an account made up under a reference from the Court in the presence and under the check of both parties.

But suppose the interlocutor right, it only calls for general and preliminary objections, re-

reference from the Court, but by the directions, and under the instructions of Wauchope alone. I know that matters of account are often referred by the Court of Session to accountants; they having no Masters to perform the necessary duties of that description, and, no doubt, the Court may, after the cause has been heard, refer matters of this kind to accountants, and then the accounts prepared under such a reference become part of the judicial proceedings in the cause. But it is new to me, and I am sure that it is perfectly new in principle, that a Court of Justice should take an account, made up at the instance, and under the instructions, of an agent, one of the parties in the cause, as an account of equal efficacy and equal judicial effect, as if the matter had been referred by the Court itself to an accountant, taking the account as between both parties, in the presence of both parties, and each having the opportunity of checking the other throughout the whole course of that operation.

The words of the interlocutor, your Lordships will observe, are, “appoints Lady Montgomerie and her husband to give into process *any objections of a preliminary and general nature*, which she may have to state to the accounts produced by the pursuers, and upon which it may be wished to obtain the judgment of the Lord Ordinary before entering upon an examination of the particular articles of the said accounts and the vouchers thereof.” Now, suppose this to be in all respects a perfectly regular and proper proceeding, the interlocutor calls for nothing more than *objections of a preliminary and general nature before entering upon an examination of the particulars*

*and vouchers.* Then when these objections of a general and preliminary nature should be given in, and judgment pronounced upon them, it is quite obvious that it would still remain to enter upon an examination of the particular articles of the accounts, and the vouchers thereof. Now the result, as expressed in the last interlocutor of the Court, is,—not that the preliminary and general objections being disposed of, the examination of the particular articles of the accounts and the vouchers thereof ought to be entered upon; but that the whole of the accounts prepared by the accountants Keith and Wilson were throughout right and proper in every particular, without any examination at all! If the commencement startles one a little, the conclusion is, to me at least, absolutely unintelligible.

Then four preliminary objections were stated, and on these preliminary objections the Lord Ordinary and the Court of Session pronounced several interlocutors; one of which is wholly, and some are partly, appealed from. But the result is that the accounts, prepared by the accountants Keith and Wilson, are right upon the whole matter without any examination of particulars.

Thus then we have the judgment of the Court below upon the points of law arising out of these four preliminary objections. But now we are told that all this is to go for nothing; and so told to my no small astonishment; for it is saying neither more nor less than this; “If you, the Judges of the Court of Session, should be for us upon these points, all is well; but if not, then your opinion goes for nothing at all.” This may be consistent with their practice, but it bears no analogy to any

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servicing the consideration of particulars. The conclusion was that the accounts were approved without examination of particulars.

Objections stated to the accounts pursuant to Lord Ordinary's interlocutor.

Argument of the Appellants that the proceedings and judgment of the Court ought to go for nothing, and that as the judgment on the ground which they first took is against, they have a right to commence

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again on a  
new ground.

thing I know. The proposition is, “if your opinion  
“is not in our favour, then your opinion must go  
“for nothing, and we shall be at liberty to open up  
“the whole matter *ab initio*, and you shall hear the  
“cause over again, as if the Lord Ordinary had  
“never called upon us for these objections, and we  
“had never given them in.” But, if that be con-  
sistent with their practice, why comes this appeal  
here? For, if they have a right to say to the Court  
of Session: “Your opinion, being against us, is to  
“go for nothing at all,” why bring the cause before  
us? We cannot act on that principle, and give them  
an opinion which, if against them, is to go for  
nothing. And I do not know very well how to  
deal with the cause in that view of it, unless we  
were to dismiss the proceedings altogether, and  
allow them to begin again. But lest we should risk  
too much in doing that, I shall state these objec-  
tions.

Objections.

*First* then, they say that it was the duty of the  
Respondent, as cashier and manager for the trust-  
tees, and tutors, and curators, to have rendered his  
account annually, in order that the large balances in  
his hands might have been ascertained: and that  
the interest against him might have been annually  
calculated; and then they state that his account, as  
cashier for the trustees, is balanced only twice in  
nine years, and his account as cashier for the tutors  
and curators only thrice in the same period.—2d.  
they say that the cashier, instead of stocking out  
the savings of the estate (by stocking out they mean  
putting out at interest) had kept in his hands  
immense balances, for which there was no occasion  
in the ordinary administration of the estate, and of

the actual employment of which he refused to give any account ; and then they state that upon these balances, which were very great, he had allowed the appellants interest only at the rate of  $3\frac{1}{2}$  per cent. while, as they contended, he was bound to account to them either for the profits actually made of their money (there they speak of the profits actually made) ; or at least for the legal rate of interest.—3d, The Appellants objected to the amount of the charges made by the Respondent, for his trouble in managing these affairs, and they stated that they were willing to allow a fair, and even a liberal gratification for his trouble ; but they thought the Respondent asked a great deal too much (not objecting therefore to pay him something for his trouble, and not bringing into dispute how a demand for any allowance at all for trouble could be supported by a trustee converting himself into an agent for managing the trust property, and requiring to be paid as an agent for his trouble) but objecting only to the amount of the demand, and insisting that it ought to be less than it was. Before the cause can be finally decided that will be a question to be considered ; and, if the matter be open to him on the *quantum meruit*, then it will be for him to prove that he deserved more than they are willing to allow ; and if the question depends upon the contract, it will be to be considered what is the meaning of his being continued in the situation of cashier and agent to act in that situation, as he did in the late Earl's life time. And, without presuming at present to say what, according to the Scotch law, ought to be the construction of such a contract, I may say that the Courts here would consider the

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A. 26, Infor-  
mation for  
Appellants.

Whether a trustee, appointed by his co-trustees agent and manager of the trust fund, can support a claim to an allowance for his services as agent.

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meaning to be that he should act for the same reward, as in the late Earl's life time. But I do not presume to say what the Scotch law may be on this head, as I see doctrines laid down not at all reconcilable with the law, which I am in the habit of administering. The Appellants also objected to a charge of 420*l.*, stated to have been paid to Messrs. Keith and Wilson, for making up the first set of accounts, because had the Respondent kept the accounts of this estate separately from his other concerns, and rendered and balanced them annually, as it was his duty to have done, and which had been his practice, while acting under the late Lord Eglington, the assistance of professional accountants would have been unnecessary; and then they objected, 4thly, to payment of Mr. Wauchope's account of the expense of making up titles to certain parcels of land, on the ground that these titles were improperly completed. As to this last point, I do say that there would be no doubt here that, if a trustee proceeds *bonâ fide*, unless there be *crassa ignorantia*—unless he has grossly miscarried, he is not to suffer, by having the expense thrown upon himself, for whatever error he may fall into, acting under advice, or from the general notions of law prevalent at the time. But it is difficult to decide this question at present.

A trustee acting *bonâ fide* in the trust is not to suffer for mistake, unless there has been very gross ignorance and miscarriage.

Question as to the trustees accounting for all the profits made by him of the trust fund.

Then, as to the 2d objection—I do not mean to say, but that some words may be found *sparsim* in these formal papers, which may open the question whether a trustee is bound to account for all the profits which he has actually made of the trust fund, if pushed to the full extent which the terms would bear. But, although the argument chiefly



insisted upon at the bar here for the Appellants was that the trustee was bound to account for all the profits, which he actually made of the trust money, the argument below turned upon the rate of interest with which he ought to be charged. In looking at the doctrines stated in the books, I find very great difficulty in collecting what the Scotch law is upon this point, and I think we should be running a great deal too fast to venture to decide the question in this state of the proceedings. In England there would be no difficulty. Here a trustee can make no profits for himself of the trust money—and, if he offered to pay a certain rate of interest, the *cestuique trust* might say; “No. You must account to me for all the profits you have made of my money, and I have a right to know from you what profits you have actually made of it, and, if you have made 10 per cent., I am entitled to it. If the use you made of it was to make any particular rate of interest, then you must pay me that interest. If you have mixed my money with your own, so that you cannot distinguish what is yours, and what is mine, and cannot tell what profit you have made of my money, less than the legal interest, you shall pay me interest at 5 per cent.” But, when we come to these doctrines about stocking out, and when it ought to be done, and when interest ought to commence, according to the law of Scotland, I feel a difficulty. And yet it may be well worth while to consider whether, when a trustee has made use of the trust money for his own benefit, these doctrines apply to the question as to profits actually made, and whether on that point the

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COUNT.

By the law of England, a trustee can make no profits for himself of the trust.

Whether the rule of law as to profits actually made by a trustee, out of the trust fund, is not the same in

April 8, 1816. rule of law is not the same as that of the law of England.

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TUTORS,  
CURATORS—  
HOW TO AC-  
COUNT.

Scotland, as in  
England.

Interlocutor  
of the Lord  
Ordinary, of  
12th Novem-  
ber, 1811, in  
part appealed  
from.

Then the Lord Ordinary pronounced this inter-  
locutor : “ Having considered the accounts given in  
“ by Mr. Wauchope, with the objections thereto for  
“ Lord and Lady Montgomerie, answers, replies,  
“ and duplies, and writings produced, and whole  
“ process, *finds* that, though from various circum-  
“ stances stated in the answers, it may have been  
“ difficult for Mr. Wauchope to make up a complete  
“ balance at the end of every year; yet the actual  
“ balance at the end of every year may still be  
“ ascertained, and that each balance, when ascer-  
“ tained; will be the sum on which the interest  
“ ought to be charged.—2d, Considering the rules  
“ laid down in law for the employment of the  
“ money of minors, by their tutors and curators, on  
“ the one hand, and the eventual demands for sums  
“ of money which might be made, though not to  
“ the extent of the balances now in question, on  
“ the other, *finds* that interest ought to be charged  
“ at the rate of 4 per cent., instead of 3½ per cent.  
“ as stated in the accounts; *finds* nothing so ex-  
“ plicitly stated on the part of the objectors, as  
“ should induce the Lord Ordinary to reduce the  
“ allowances for trouble below the rate which was  
“ fixed by Messrs. Keith and Wilson; *finds* that in  
“ accounts of such magnitude, it was proper and  
“ necessary to take the assistance of professional  
“ accountants—repels the third objection accord-  
“ ingly. On the *fourth* objection, *finds* it at least  
“ doubtful, whether a general charge and decree  
“ of constitution were necessary in deducing ad-

“judication in implement; repels this objection, April 8, 1816.  
“&c.”

As it is my intention to propose that this cause should be remitted for review, I shall say nothing as to the necessity of having recourse to the assistance of professional accountants in the present case, and as to certain propositions, as if trustees were at liberty to act so as never to keep regular accounts themselves—except this, that I think, that to be a matter well worth re-consideration; as I apprehend that a trustee, and especially if he be also an agent, ought to keep his accounts at least so regularly, as to enable the Court, upon inspection of these accounts, to judge whether in that case it is necessary to employ professional accountants.

Both parties were out of humour with this interlocutor, and represented against it; but the Lord Ordinary saw no ground to alter it in any respect. He, however, makes avizandum with the cause to the Lords of the first division, and on July 2, 1812, the Court pronounced the following interlocutor, which is partly appealed from:—“Upon report of Lord Hermand, and having advised informations for the parties, the Lords *find* that Mr. Wauchope’s accounts must still be brought to an annual balance.”—I would just say; that I cannot conceive how it ever entered into any person’s head that they ought not.—“And that, in striking such balance, the allowances to Mr. Wauchope for commission, trouble, and correspondence, as cashier and agent, under the trust and for the tutors and curators; and, for Lord and Lady Montgomerie, are to be placed to his credit.”—So that it states, not merely that an allowance for commission, trou-

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TUTORS,  
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HOW TO AC-  
CUNT.

Whether a trustee is not bound to keep accounts of the trust fund, at least so regularly, as to enable the

Court to judge whether it is necessary in the particular case to have recourse to professional accountants.

Interlocutor of Court, 2d July, 1812, partly appealed from.

The accounts ought to be annually balanced.

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HOW TO AC-  
COUNT.

ble, &c. is to be made to Mr. Wauchope, but that this particular allowance is to be made to him,—which deserves reconsideration ;—“ find that upon the said “ annual balance Mr. Wauchope is chargeable with “ interest, at the rate of 5 per cent. after allowance “ of a year for stocking out the same, so far as con- “ sisting of rents payable in victual ; and of six “ months, so far as consisting of rents payable in “ money ; and of the like period of six months, so “ far as consisting of other payments of money.”—

On looking at the doctrines in the books, your Lordships will there find an explanation of that part of the interlocutor ;—“ and *find* that Mr. Wauchope is “ not chargeable with interest on his receipts *de die “ in diem*, or until the expiration of the said periods.”

—This goes by the question as to all the profits, which was not the great point argued below, though it was the point chiefly insisted upon here.—“ Repels “ the objections to the allowances proposed by “ Messrs. Keith and Wilson for Mr. Wauchope as “ agent and cashier aforesaid,—as also repels the ob- “ jection to the proposed allowance to Messrs. Keith “ and Wilson for auditing the accounts ;—and fur- “ ther repel the objection to the charge for the ex- “ pense of the adjudications in implement, relative “ to the lands of Bogside, Dreghorn, Duggan, and “ others.—And *remit* to Mr. Claud Russel, ac- “ countant, to prepare a report of the state of ac- “ counts between the parties, and remit to the Lord “ Ordinary to receive such report when prepared, “ and to do further thereon as he shall see just.”

This, therefore, contains the opinion of the Court on those four preliminary objections, which the Appellants gave in under the appointment of the Lord

Ordinary, who had called upon them to state any objections of a preliminary and general nature which they might have to state to Mr. Wauchope's accounts, and upon which they might wish for the Lord Ordinary's opinion, before entering upon an examination of the particulars.—And the Court then remits to an accountant to prepare a report of the state of accounts between the parties; thereby making the accountant an officer of its own.

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COUNT.

Both parties petitioned against this interlocutor;—Mr. Wauchope, though he would have been contented with it, if the other party had been contented, petitioning *pro forma*, so as to have the whole matter open, and their way of shutting up the business is this:—“ They refuse the prayer of the petition for Lord and Lady Montgomerie, and on the petition of Mr. Wauchope they alter their former interlocutor, and repel the whole objections to the report of Messrs. Keith and Wilson, and approve of the said report in the whole heads and articles of the same, &c.”—Thereby putting an entire extinguisher on the Lord Ordinary's reservation as to the examination of the particular articles of the accounts and the vouchers thereof; so that the result is, that there shall be no examination at all of the particular articles and vouchers; a result, which appears no less singular to an English lawyer than the principle contended for in behalf of the Appellants. They (the Appellants) acceded to the proposition of the Lord Ordinary to give in preliminary objections to Mr. Wauchope's accounts, upon which they might wish to have the Lord Ordinary's opinion. They accordingly gave in preliminary objections, and on these they have the Lord Ordinary's opinion. They

Interlocutor  
2d Feb. 1813  
(appealed  
from), approv-  
ing Wau-  
chope's ac-  
counts, and  
putting an ex-  
tinguisher on  
the Lord Or-  
dinary's reser-  
vation as to  
the examina-  
tion of parti-  
culars.

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then go to the Court, and take the opinion of the Court of Session on their objections, and the principle now contended for at the bar here is this, that, if they are not satisfied with the opinion of the Court, they are entitled to turn round, and say, very civilly and respectfully, “If these are your  
“opinions, we don’t like them, and have a right to  
“begin again, as if we had never acceded to the  
“Lord Ordinary’s proposition to give in these ob-  
“jections.” It is not less singular, however, that this should be considered as a proper mode of settling accounts:—Wauchope, one of the parties, bringing his accounts into Court, prepared by accountants, as intelligent, if you please, as any that ever existed in that profession, but not acting under a reference from the Court, prepared in an *ex parte* way, not checked by any principles of law laid down by the Court, and not checked by all those who had an interest in the subject; and the Court approving of these accounts, so prepared, and brought in, in the whole heads and articles thereof, without any further examination! But it ends where it begins, —“Here are Mr. Wauchope’s accounts, we are sa-  
“tisfied, without any examination of particulars,  
“that they are all right, and you, the other parties,  
“shall know no more about the matter.” How to support that interlocutor I cannot tell.

With respect to the other interlocutors, the Lord Ordinary’s interlocutor appointing the Appellants to give in objections is not appealed from, and some are partly appealed from, and some not at all. But seeing what is so strenuously asserted in regard to the principles of the law of Scotland as applying to questions of this description, I should be sorry

to deal more strongly with these interlocutors than to submit them to the Court below for review. If it be open to the Appellants to insist upon knowing what profits Mr. Wauchope actually made of their money, and upon payment to them of all these profits; and if that be the law of Scotland as contradistinguished from the question of interest, they will have an opportunity of submitting that claim to the Court. And I think it of great importance to minors, tutors, curators, and trustees, not merely with reference to the interest of the parties, but also on account of the difficulties connected with the subject, that the whole matter should be thoroughly investigated, and the law distinctly and finally settled.

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COUNT.

Important to  
have the law  
on the subject  
distinctly and  
finally settled.

.As to the case of *Raphael v. Boehm*, it does not apply. In that case the executors as trustees were bound by the very words of the trust reposed in them, by the very words of the instrument which created the trust, to accumulate the trust fund, by laying out the interest of it from time to time to form capital.

11 Ves. 92.

I propose to your Lordships to reverse the last interlocutor, and to send back the rest for review, so far as they are complained of. And in a case of so much importance, I think we ought to avail ourselves of the clause in the act of parliament, inserted with that view by which we are authorized to require that the division, to which the cause is remitted, shall take the opinion of the other division, that we may know what the accumulated wisdom of the Court of Session will produce on this important subject.

Last interlocutor *reversed*, and the others remitted for review, so far as complained of.