

[14th July 1837.]

HUGH ROSE, Esquire, Appellant.—*Sir F. Pollock—
Buchanan.*

Mrs. ISABELLA M'LEAY and others, Trustees and
Executors of Kenneth M'Leay, Esquire, Respon-
dents.—*Attorney General (Campbell)—Sir W. Follett—
—A. M'Neill—M'Pherson.*

Account—Taciturnity—Morâ—Proof.—Circumstances in
which after accounts had been allowed to lie over for
twenty years before bringing an action—Held (affirming
the judgment of the Court of Session), that the accounting
was to be limited to the matters contained in the
accounts; and the onus thrown on the party objecting to
disprove the charges objected to.

2D DIVISION.

Lords Fullerton
and Mackenzie.

THE appellant, in the month of February 1824,
brought an action before the Court of Session against
Kenneth M'Leay, (who died pending the proceedings,
and in whose place the respondents were sisted,) setting
forth, that he had been for some time the agent for the
deputy paymaster for the West India Islands; that
Mr. M'Leay had been the appellant's first clerk in the
said department, and in that capacity intromitted with
large sums of money belonging to the appellant, and for
which the appellant was responsible; that in the course of
the year 1796, the appellant having fallen into bad
health, which rendered it necessary for him to go first
from Martinique to America, and thereafter, in the year

1797, from America to England, and having, on the occasion of his departure, appointed Mr. M'Leay as his attorney, for managing his private affairs, and for winding up and balancing the arrears of accounts for the public service, Mr. M'Leay, under this authority, entered upon the management of the offices committed to him, and intromitted with the funds of the appellant to a very great amount, part of which he remitted to the appellant, or applied for his behoof, but of which intromissions a large balance was still unaccounted for. He therefore concluded that Mr. M'Leay should be ordained to hold just count and reckoning with him, and to pay to him the balance still in his hands; and on his failing to do so, that he should be decerned to make payment to the appellant of the sum of 28,000*l.* sterling, as the balance of his intromissions, after deducting his legal grounds of discharge, and also of the legal interest of the balance from and after the date of citation.

In defence, Mr. M'Leay, stated that he and the appellant were resident in the West Indies for some years during the end of the last century. Mr. Rose having occasion to leave Martinique on a temporary visit to America, from whence he proceeded to Britain, committed a partial management of his affairs to Mr. M'Leay, who had, in this way, certain intromissions with Mr. Rose's funds, principally during the years 1796 and 1797. After these intromissions had terminated, Mr. M'Leay rendered accounts to Mr. Rose in 1801 and 1802. Mr. Rose subsequently stated certain objections to particular items in the accounts, and furnished corrected or amended statès to Mr. M'Leay. This led to some correspondence and interchange of remarks on the accounts.

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Mr. Rose having, in the meantime, returned to the West Indies, where he remained some months, the parties met there, and then examined the accounts together. All this took place during the years 1801–2 and 1803. Mr. Rose was then seemingly satisfied with, or at least acquiesced in, Mr. M'Leay's explanations. Mr. M'Leay returned to Britain about the end of the year 1806. Some correspondence took place between the parties in 1807, in the course of which Mr. Rose indicated an intention of reviving his objections to the accounts, but speedily abandoned his intention. Both parties resided in Scotland from that time downwards, having a great deal of intercourse, communication, and correspondence, and during that time Mr. Rose never stated any objections to the accounts. But the parties having had some disagreement in other matters, and Mr. M'Leay having raised an action against Mr. Rose for payment of the sum of 1,000*l.*, which had in the interim been lent by Mr. M'Leay to Mr. Rose, Mr. Rose instituted this action. Against it, Mr. M'Leay pleaded, that no debt was due,—that if any debt was ever due, it was prescribed, — and, at all events, that there was a presumption of payment by long taciturnity.¹

After a record had been closed, a debate took place, mainly on the effect of the plea of taciturnity, and Lord Fullerton pronounced this interlocutor on the 17th February 1830: — “ Finds that the pursuer and
“ the late Kenneth M'Leay were engaged in various
“ extensive and complicated pecuniary transactions in
“ the West Indies in the year 1796 and the following

¹ Dict. voce Presumption, p. 11,632—11,646; Tait on Evidence, 442, —467; Elchies, voce Presumption No. 1; Shaw's Digest, p. 264.

“ years: Finds, that in March 1801, at which time
 “ these transactions appear to have ceased, Mr. M‘Leay
 “ furnished an account-current to the pursuer, bringing
 “ out a balance due to the former of 333*l.* 10*s.* 7½*d.* :
 “ Finds that, on the 24th day of April 1802, a second
 “ account was sent by Mr. M‘Leay to the pursuer,
 “ commencing with the balance of 333*l.* 10*s.* 7¼*d.*, and
 “ closed by a balance due to the pursuer of 175*l.* 3*s.* 6*d.* :
 “ Finds, that the completeness of these accounts was
 “ not admitted by the pursuer; but that, on the
 “ other hand, the pursuer, in the year 1802, trans-
 “ mitted to the late Mr. M‘Leay an account, com-
 “ mencing with the balance of 333*l.* 10*s.* 7½*d.*, stated
 “ in the account first mentioned, and after inserting
 “ various additional articles of charge, closing with a
 “ balance, as due by Mr. M‘Leay, of 1,25*l.* 12*s.* 5*d.* ;
 “ and lastly, that the pursuer transmitted, on the 20th
 “ January 1803, another account, setting out with the
 “ balance of 1,25*l.* 12*s.* 5*d.*, and closing with a balance
 “ of 1,903*l.* 1*s.* 9*d.* : Finds, that there is no evidence of
 “ these accounts having been finally adjusted: Finds, that
 “ in the end of the year 1806 and beginning of 1807
 “ a short correspondence took place between the par-
 “ ties respecting the pursuer’s claims, in which refer-
 “ ence appears to have been made by the pursuer to
 “ the balance claimed in 1803, while Mr. M‘Leay
 “ appears to have denied his liability for that or for any
 “ balance: Finds, that from that period until the year
 “ 1831 no demand of accounting or of any kind was
 “ advanced by the pursuer against the late Mr. M‘Leay,
 “ and no additional alteration on or rectification of
 “ the foresaid accounts was offered by the pursuer :
 “ Finds, that in the year last mentioned a demand of

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“ a settlement was made by the pursuer; and that in
 “ the year 1824 the pursuer raised the present action
 “ of count and reckoning, concluding for the produc-
 “ tion and examination of the accounts of the whole of
 “ Mr. M'Leay's alleged intromissions from the year
 “ 1796: Finds, that under the circumstances of this
 “ case the claim for a general accounting cannot, after
 “ such a lapse of time, be sustained; and that the long
 “ silence of the pursuer, though not pleadable in abso-
 “ lute bar of the action, ought, when combined with the
 “ circumstances of the accounts-current mutually trans-
 “ mitted in the years 1801, 1802, and 1803, to receive
 “ effect in limiting the accounting to the contents of
 “ those, as embracing the whole transactions which the
 “ parties themselves, having means of information now
 “ unattainable, ultimately considered to be outstanding
 “ and unsettled; and therefore remits the case to
 “ Mr. Donald Lindsay, accountant, with directions to
 “ consider the said accounts balanced as above men-
 “ tioned, and the vouchers and documents to which the
 “ parties respectfully refer in regard to them, and to
 “ report if any and what balance be due to the pur-
 “ suer, agreeably to the principles laid down in the
 “ preceding findings.”

The appellant reclaimed to the Court against this remit; but his reclaiming note was unanimously refused on 9th July 1830, with expenses.¹

The case then went to the accountant, who made a full report, and stated his views upon the question of onus probandi thus: — “ It humbly appears to the ac-
 “ countant, that the amount of the balance to be found

“ due to the pursuer must ultimately, from the want of
 “ positive evidence, depend in a great measure upon
 “ the decision of the question, on which of the parties
 “ the onus probandi ought, in the circumstances of this
 “ case, to be thrown. The sums in dispute are princi-
 “ pally on account of charges which were originally
 “ made by Mr. M'Leay against the pursuer, but were
 “ not admitted by him to be correct. The impression
 “ upon the mind of the accountant, on considering the
 “ circumstances of this case, has been, that the onus
 “ probandi ought here to rest with the pursuer; and
 “ that the charges in question should remain at the
 “ credit of the defender, unless where the pursuer can
 “ instruct, by satisfactory evidence, that such charges
 “ were improperly made by Mr. M'Leay.

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“ The circumstances which have principally weighed
 “ with the accountant in coming to this conclusion
 “ are as follow :—

“ 1. The great length of time which was allowed by
 “ the pursuer to elapse after the accounts were ren-
 “ dered before bringing the present action, and the
 “ long period during which he seems to have been silent
 “ in relation to his claims against Mr. M'Leay.

“ 2. That the whole documents which were at one
 “ time furnished by Mr. M'Leay to the pursuer have
 “ not now been produced by him. The pursuer has
 “ admitted, in his revised condescendence, article 7,
 “ that Mr. M'Leay sent him two boxes of books and
 “ papers, which arrived in England in March 1800 ;
 “ and in his deposition, in answer to the defender's call
 “ for the whole of these books and papers, he depones,
 “ ‘ That he cannot produce the whole books and papers
 “ referred to in No. 65., part of them having been given

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“ into the pay office, the remainder having been taken
 “ back to the West Indies by the deponent in the same
 “ year. Depones, that he cannot say with certainty
 “ whether the whole of the books and papers which he
 “ so took back to the West Indies were afterwards again
 “ brought to this country ; but he now produces, con-
 “ form to inventory, such of them as are in his posses-
 “ sion.’ It is to be observed, that although the accounts
 “ now under remit were rendered at dates subsequent
 “ to the transmission to the pursuer of the two boxes
 “ here referred to, nearly all the transactions with
 “ regard to which the parties now differ had previously
 “ taken place.

“ 3. That the remarks which were transmitted by
 “ Mr. M'Leay to the pursuer in reference to the charges
 “ made in the pursuer's first account have not been
 “ produced. It is admitted that the pursuer received
 “ these remarks ; but in his deposition, in answer to the
 “ defender's call, he depones, that they were not then
 “ in his possession, and that, to the best of his recollec-
 “ tion, he had not seen them for twenty years.

“ 4. That the pursuer and Mr. M'Leay appear to
 “ have been in frequent personal communication, and
 “ that the production of the correspondence between
 “ the parties, subsequent to the transmission of the
 “ pursuer's second account, does not seem to be com-
 “ plete. Much of the correspondence which is pro-
 “ duced, being in reference to transactions which were
 “ familiar to the parties themselves, and alluding to
 “ conversations and to explanations not now extant, is
 “ nearly unintelligible.”

On the case returning to the Lord Ordinary, both parties lodged objections to the accountant's report,

which having come before Lord Mackenzie, he, on the 13th November 1832, partly repelled them, and partly sustained them. Both parties reclaimed to the Inner House, who, on the 7th of March 1833, altered the interlocutor as to one sum which the Lord Ordinary had sustained in favour of the appellant, and adhered quoad ultra.¹ A discussion then arose as to the right of the respondents to credit for a sum of 725*l.*, and the right of the appellant to produce a letter relative to it. The Lord Ordinary and the Court (29th May 1834) refused to admit the claim, or allow production of the letter.² Thereafter the Lord Ordinary decerned against the respondents for 502*l.* 5*s.* 1*d.*, with interest from 1st March 1802; and the Court, on 5th July 1834, refused reclaiming notes by both parties. On a motion for expenses, a further debate took place, which terminated by the Court finding the respondents entitled to modified expenses, which they ascertained by striking off one third of the whole expenses of process.

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Mr. Rose appealed; and the case was fully pleaded at the bar; but as (with the exception of the plea of taciturnity, maintained by the respondents,) it resolved into a minute and complicated question of accounting, it is unnecessary to report it in detail.

LORD BROUGHAM.—I would now call your Lordships attention to the case of *Rose v. M'Leay*. It was a litigation which commenced in February 1824, touching a series of accounts and transactions between the parties,—those accounts and those transactions having

¹ 11 S. D. B., 546.

² 12 S. D. B., 631.

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closed twenty years before this action commenced in February 1824,—leading to the pronouncing of six successive interlocutors in the Court below, the earliest of them, I think, in January 1829, and the last as late as June 1835. My Lords, the parties have been enabled to collect the opinions entertained by some of your Lordships, by the observations which were made, and the explanations which were called for in the course of the argument. Our opinion was thus expressed on the leading features of the case. Where we saw reason to doubt the items,—and there were but a few of them where we saw any reason to doubt,—the explanations we received seemed to us to put an end to all doubt, and to make it imperative upon your Lordships not to allow an alteration of the judgment below, even respecting those on which a doubt might for the moment be entertained, especially considering the great lapse of time unaccounted for; when I say unaccounted for, I do not mean to allege that there was not something like a reason given, but which, in my opinion, did not at all explain the taciturnity, as it is called in the Scotch law, for so many years. It was not at all satisfactorily accounted for on the ground on which, it was put, namely, that the appellant had a great interest in not coming to any thing like a difference, if he could help it, with the other party, for that his own accounts could not pass, and that therefore it was expedient not to quarrel with the other party. That appears to me rather worse than no explanation. It was not a very good argument to be urged; but it was the only one which could be suggested to counteract the operation of that which they could not get rid of, namely, the unaccounted for delay.

But, my Lords, we went into the items minutely, and our opinion was, that if the delay had not taken place, in a very great majority of those items there was sufficient to justify the result of the examination of those accounts in the Court below, as imported into those six interlocutors, the first in January 1829, and the last in June 1835, which related to a sum of somewhat above 900*l.* allowed to the respondent in the Court below for costs. That item bore a very small proportion to the whole of his demand; the amount of those items which he disputed being somewhere about 56,000*l.* The sum awarded for costs was not 1,000*l.*, and a further consideration of this case confirming the view originally taken upon the hearing, and leading us not to differ from the Court below as to the accounts, I am of opinion that they were right also in having allowed the costs by the last interlocutor in June 1835, amounting to 950*l.*; and therefore, upon a view of the whole case, I would humbly advise your Lordships to affirm the interlocutors complained of, and to allow the costs of the appeal.

LORD LYN DHURST.—I concur with my noble and learned friend.

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: And it is further ordered, That the appellant 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.

JOHN MACQUEEN—SPOTTISWOODE and ROBERTSON,
Solicitors.