tion, and has invested the chief part of what remained in an unproductive purchase, the value of which is already half eaten up by interest. Now, I must say that the respondent's whole proceedings appear to me to have been a very gross violation of his duty as a parent, and I think that the Court is bound to interfere for the protection of the petitioner's interests. The result which I have come to is that, if your Lordships concur, the Lord Ordinary will find in terms of the prayer of the petition.

LORD DEAS—The first question is simple enough—namely, Whether the application is competent before the Lord Ordinary? Now, unless we shut our eyes to the plain words of the statute altogether, there can be no doubt that, if competent at all, the application is so before the Lord Ordinary. The question, whether the application should be granted or not, is a different one. That the Lord Ordinary was right in allowing a proof, provided it was necessary, is clear. But if enough appears without proof, I am of opinion with your Lordship that it would be a great misfortune for the parties to have to go into a proof under the circumstances. I think that enough has been admitted to warrant us in passing the application without proof. This boy's small fortune came to him through his mother. It is quite clear that the money, if it had been left with the trustee appointed by the person who bequeathed it, would have been safe enough. But the father enters into an unnecessary litigation with this trustee, making claims on his own account as well as his son's, and much of the expense of that litigation is found against him. And when he does get the money, what does he do with it? He applies most of it to the payment of those expenses which he has thus incurred. This will infallibly raise a question between father and son when the son comes of age. Now, it is admitted that he got this boy, at the age of fourteen, to sign a transfer of this bank stock. No reason is given for this step, except that it was to convert it into cash and apply two or three hundred pounds of it to the liquidation of the expenses above mentioned, and which, it may very well be, he is not entitled to take out of the boy's funds at all. And all he says is, that he will account at the proper time. I am humbly of opinion that enough is admitted, and necessarily admitted, in these answers to entitle the Court to interfere. This is not a case of poverty on the part of the parent personally, but one of conflicting claims; and the circumstances render it absolutely necessary that some third party should be appointed to take charge of the boy's interests in the meantime.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for Petitioner—Menzies & Cameron, S.S.C.

Agents for Respondent—Ferguson & Junner, W.S.

Friday, December 22.

MUNRO'S TRUSTEES *v.* MURRAY & FERRIER.

Trustee—Factor—Remuneration—Indefinite Payment—Interest on Business Accounts. Circumstances in which the established rule, that, where the business of a trust is conducted by a firm, of which one of the trustees is a member, the firm is not entitled to professional remuneration, but only to reimbursement of actual outlay, was *held* to apply.

Held that the agents were not entitled to appropriate any part of an indefinite payment to items, subject to the foregoing objection.

Held that, where an ordinary business account is not rendered yearly, the agents are not entitled to accumulate interest with principal at the end of each year, but only to simple interest.

The late Hugh Munro of Barnaline died in March 1844, leaving a trust-disposition and settlement, by which he appointed several trustees, and among them Walter Ferrier, W.S. Subsequently new trustees were assumed, of whom John Wilson Ferrier, W.S., was one. Walter Ferrier and John Wilson Ferrier, by themselves, and the different firms of which they were members, acted as agents of the trust from its coming into operation in 1844 to 1st February 1850. Subsequent to that date the business was conducted by T. G. Murray and T. H. Ferrier, neither of whom was ever a trustee under the settlement of Hugh Munro. In 1851 Messrs Murray and Ferrier raised an action against the then trustees of Hugh Munro, viz., Archibald Macarthur, who was also the principal beneficiary under the trust, Alexander Campbell, and Walter Ferrier, for payment of the business account incurred to them and to preceding firms in right of which they stood. No appearance was made for the defenders. The accounts were taxed in the ordinary way, and the pursuers, in February 1852, obtained decree in absence for £620, 6s. 1d., and also for £19, 16s. 10d. of expenses, and 13s. 10d., being the dues of extract.

The decree was afterwards opened up by a suspension at the instance of Messrs Macarthur & Campbell, Mr Walter Ferrier being now dead.

The principal objection taken by the suspenders to the account was that, for the period between March 1844 and February 1850, the accounts had been incurred to a series of firms, of which one or more of the trustees were members, and therefore nothing but actual outlays could be charged. The respondents admitted the rule, which had been established by decisions subsequent to the rendering of their account, but founded on certain special circumstances, viz., that Mr Archibald Macarthur, one of the trustees, and also the principal beneficiary, had approved of the accounts, and had made an indefinite payment of £500 to account, which they maintained they were entitled to appropriate to the items worst secured, or at least to those first in date.

Certain other objections were taken to the account, which sufficiently appear from Lord Kinloch's opinion.

After much delay, a remit was made by the Lord Ordinary (JERVISWOODE) to Mr Edmund Baxter, W.S., *qua* Auditor of the Court, and *qua* Accountant, who gave effect to the defenders' objections, and reported that the sum of £620, 6s. 1d. ought to be reduced to £492, 1s., as at 31st July 1851.

The Lord Ordinary approved of the Auditor's report.

The respondents reclaimed.

HORNE and CAMPBELL SMITH for them.

WATSON and HUTCHISON for the judicial factor upon the estate of Hugh Munro, who was now sisted as a party to the process, in room of the suspenders.

At advising—

LORD KINLOCH—The substantial question raised by this action is, What is the amount of the professional account due to the respondents Murray & Ferrier, in their own right, and in that of certain preceding firms, by the trust-estate of the deceased Hugh Munro of Barnaline? A decree in absence was obtained by Messrs Murray & Ferrier, in February 1852, against Messrs Archibald Macarthur, Alexander Campbell, and Walter Ferrier, the then trustees of Mr Munro, for the sum of £620, 6s. 1d., as the amount due on this account. This decree was opened up by a suspension, at the instance of Messrs Macarthur & Campbell, Mr Walter Ferrier being by this time dead. In this process the Lord Ordinary, having received a report from Mr Edmund Baxter, as auditor and accountant, has reduced the sum due on the account to £492. 1s., for which sum he has decerned against Mr Frederick Hayne Carter, accountant, the judicial factor on Mr Munro's trust-estate, appointed in consequence of Mr Macarthur having also died, and Mr Campbell having left the country.

I am of opinion that the Lord Ordinary has arrived at a right result in this case, although, in point of form, his interlocutor may require a slight alteration.

The decision of the case turns on the effect to be given to three general objections stated against the accounts, the whole of which the Lord Ordinary has sustained, in conformity with Mr Baxter's report.

1. The first of these objections is that the accounts sued for were incurred to a succession of firms, of which Mr Walter Ferrier, one of the trustees, was a partner, and that, according to a well established rule, all the charges contained in these accounts must be disallowed, except in so far as they were actual outlays. In other words, no part of the professional profits of Mr Walter Ferrier, or his firms, can be charged against the trust-estate.

The general rule is not disputed, nor its application to the case, except for the circumstance relied on, as excluding its operation. That circumstance is, that Mr Archibald Macarthur, one of the trustees, and also a beneficiary under the trust, approved, as is alleged, of the accounts, and made a partial payment to account of them to the extent of £500.

In so far as any actings by Mr Macarthur, as trustee, are concerned (or the actings of any other of the trustees), it is plain they cannot be effectual to obviate the objection. One trustee cannot effectually authorise another to make charges against the estate which the law does not sanction. There is nothing to prevent one trustee employing another as law-agent. But this must always be with the understood legal disability. The employment cannot legally be granted on any other terms.

On the other hand, there is no doubt that the beneficiaries under the trust may dispense with the objection, and allow the charges. This is only another form of their doing what they please with their own. But I do not perceive sufficient grounds on which this can be held to have been done in the present case. Mr Archibald Macarthur, whose actings are alone relied on, did not represent the beneficiaries, that is, did not represent the whole beneficiaries under the trust. He was only institute in the entail, which the truster directed to be executed. He could not, by any act of his, compromise the rights of the substitutes. In other words, Macarthur did not represent the beneficiary interest under this trust. But the question at present in issue is not with Macarthur individually. It is with the trust-estate; in other words, with the whole beneficiary interest in the estate. This consideration seems by itself sufficient to dispose of the case on this point.

If Macarthur or his representatives were individually parties to the process, the question might be raised, Whether the objection was not to be held obviated, so far as regarded Macarthur's individual interest, supposing such interest capable of accurate appreciation? But no such question is, or can be raised. The only question is with the trust-estate; and as to such estate Macarthur's individual acts are of no relevancy.

I would desire to add that, so far as I am concerned, I perceive nothing done by Macarthur to compromise, with any certainty, even himself individually. The mere knowledge in a general way that the Messrs Ferrier were agents for the trust would not by itself involve an obligation to sanction illegal charges. As to his payment of £500, it is clear that it was an indefinite payment to account, made before the accounts were rendered to Macarthur, and which therefore can import neither knowledge nor approbation of specific charges. It was said that the payment was made subsequently to the date of the decree in absence, and that Macarthur, as defender in the process, must be presumed to have known all the details of the account libelled. I am not prepared to hold this to be a necessary sequence to a decree in absence. Proceedings in absence imply ignorance rather than knowledge. But the question, in reality, is not one of legal presumption. It is one of actual intentional approbation, and nothing short. None such, as I think, can be held to have taken place.

It was maintained in argument before us that the payment of £500, considered as an indefinite payment, not being specifically appropriated by the debtor, could be appropriated by the creditor to the items worst secured, or at all events to those first in date. But I think it a sufficient answer to this plea that a creditor cannot appropriate any payment to items not legally chargeable, at whatever point of the account they occur. Until these receive legal existence by force of approbation, they are, properly speaking, not in the account at all, and so can have no appropriation made for their extinction. This result is sanctioned by the authorities, and approves itself to sound principle.

2. The next objection sustained was to the mode of stating interest on the account, the account being balanced yearly, and the interest accumulated with the principal at the end of each year. The objection was, that this was incompetent where the account was not rendered with such accumulation distinctly set forth on its face. I agree with the accountant and the Lord Ordinary in thinking that this mode of charging interest is inadmissible, and that all that can be charged is simple interest, stated on the account on both sides of it, as one account all downward. There are special and exceptional cases in which yearly accumulation will be allowed, even where accounts are not rendered. The case of bankers is generally held one of these; and the principle of the allowance is, that the practice of bankers to balance their books and to accumulate interest at the end of the year is so universal and so well known that every one transacting with them will be presumed to do so on that footing. But, except in such

cases, the mere accumulation of interest in the books of the creditor will not affect the debtor; and will only do so where an account rendered and acquiesced in will raise a case of implied contract. The present is the ordinary case of a law agent's unrendered account, to which no exceptional privilege belongs.

3. The last point involved was that of commission on cash advances, which fell peculiarly within the province of the Auditor to check and determine. He has dealt with this part of the case, with special reference to the exclusion of a trustee from professional profits, and has limited the charge to "costs out of pocket." I see no ground whatever on which to interfere with his report.

In arithmetical result, therefore, I think the Lord Ordinary right. But he has gone wrong, in point of form, in decerning against Mr Carter for the reduced sum of £492, 1s. as in an ordinary action. The question was tried in a suspension of a threatened charge; and the proper form of interlocutor is to find the letters and charge orderly proceeded to the extent of the reduced sum of £492, 1s., with interest from 31st July 1851, and the sum of expenses in the decree, and *quoad ultra* to suspend the same. The decree will then remain in full effect for the limited sum against Mr Hugh Munro's trustees, and as such, Mr Carter, the judicial factor, will be bound to satisfy it.

The other Judges concurred generally.

The Court adhered, in substance, to the interlocutor of the Lord Ordinary, finding the charge orderly proceeded as regards the sum of £492, 1s., and the sums of £19, 6s. 10d. and 13s. 10d., and *quoad ultra* suspending the same.

Agents for the Suspenders—Macnaughton & Finlay, S.S.C.

Agent for the Respondents—Thomas H. Ferrier, W.S.

Friday, December 22.

SPECIAL CASE—HENRY M'CALL & OTHERS

Succession—Conditio si sine liberis decesserit. A testator directed his trustees, after the death of his widow, to whom he bequeathed a liferent of his whole estate, *inter alia*, to pay to each of the children of his late sister H. W. who should be alive at the death of his widow the sum of £1000. One of the daughters of H. W. survived the testator, but predeceased the widow, leaving a son. The sum of £1000, which would have been payable to her had she been alive at the death of the widow, was claimed by her son, and also by the residuary legatees of the testator. *Held*, on a consideration of the trust-deed, that the *conditio si sine liberis decesserit* did not apply, and that the residuary legatees were entitled to the sum.

The late John M'Call, merchant in Glasgow, died on the 18th October 1833, leaving a trust-disposition and settlement, dated 27th October 1823, with codicils thereto, dated respectively 29th January 1829, 1st December 1830, and 24th October 1831.

The trust-deed provides a liferent of Mr M'Call's whole estate to his widow. It then proceeds—"In the *fourth* place, after the decease of the said Isabella Smith, or upon my own decease in case of my surviving her, my said trustees shall dispose of and divide my estate and effects as follows:—They shall pay to each of the children of my late brother Samuel M'Call who shall be alive at the period of my said wife's decease, or of my decease in case of my surviving her, the sum of £1000 sterling, which sums (and also the sums provided to the children of my sisters Helen Wallis and Mary M'Kerrell), in the case of such of them as shall be minors or unmarried at the above period, shall be paid on their respectively attaining majority, or (if daughters) on majority or marriage, which ever shall first happen; to each of the children of my late sister Helen Wallis, by Henry Wallis, Esquire, of Maryborough Lodge, in the county of Cork, who shall be alive at the respective periods foresaid, the sum of £1000 sterling, to be paid as above mentioned; to each of the children of my sister Mary M'Kerrell, by Fulton M'Kerrell, Esquire, of Paisley, who shall be alive at the respective periods above mentioned, the sum of £1000 sterling, to be paid as aforesaid; to my sister, Sarah M'Call the sum of £1000 sterling, and to my sister Margaret M'Call the sum of £1000 sterling, which sums shall be paid to my said sisters at the first term of Whitsunday or Martinmas occurring after the decease of the said Isabella Smith, or my decease if I shall survive her, or as soon thereafter as conveniently may be, with the legal interest thereof from said terms of payment, and the sums payable as aforesaid to the children of my deceased brother and sisters shall also bear interest from the death of my said wife, or my death, as aforesaid; and further, my said trustees shall pay the sum of £500 sterling to Sarah Crawford, wife of James Crawford, lately of Port-Glasgow, with interest as aforesaid: And *lastly*, my said trustees shall account for and pay the residue and remainder of my said estate, after making good the provisions herein contained, to the said Thomas M'Call and James M'Call, my brothers, equally between them, and to the heirs of the body of them, or of either of them, in place of the deceaser or deceasers, *per stirpes*, and in case of the decease of either of them without heirs of his body, or failing such heirs, then to the survivor of them and the heirs of the survivor."

The codicils were as follows:—

"*Ibroxhill, 29th January* 1829.—I hereby bind and oblige my trustees and executors under this settlement, after the decease of my wife Isabella Smith, or upon my own decease in case of my surviving her, to pay to my niece Eliza M'Call, wife of Archibald Smith, £1000; to my niece Sarah M'Call, daughter of my brother Thomas, £1000; and to my nephews James and John Wallis, £3000 each, in addition to what I have already left them.

JOHN M'CALL."

"*Ibroxhill, 1st December* 1830.—In consequence of the death of my brother Thomas M'Call, I hereby require my trustees and executors under this settlement, after paying the several bequests already stated, or which may still be added, to pay over the whole residue and remainder of my estate to my brother James M'Call, and to the heirs of his body; and to withdraw my late brother Thomas and his heirs from any share of the residue of my estate; and in place thereof, I hereby direct my trustees, after the decease of my wife Isabella Smith, or upon my own decease in case of my surviving her, to pay to each of the children of my late brother Thomas who shall be then alive the sum of £1000, with the exception of Sarah and Eliza, who are mentioned in the codicil above;