Saturday, March 6.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

TURNER AND ANOTHER *v.* ROBERTSON AND OTHERS.

(*Ante*, p. 236, December 12, 1896).

Accounting — Taxation — Account of Glasgow Agent—Selection of Auditor—Agent of Trust—Fee for Attendance at Trust Meeting.

In an action of accounting raised by beneficiaries against testamentary trustees, the law-agent of the trust, who was one of the trustees, insisted that he was entitled to stand upon an *ex parte* audit of his account made by the auditor of the Faculty of Procurators in Glasgow. The Lord Ordinary found that the pursuers were entitled to have the accounts taxed of new, and remitted the account to the Auditor of the Court of Session. The agent moved for a remit to the Glasgow auditor; and further objected to the Auditor's report on the ground that he had not been allowed his full fee for the attendance at the trust meetings as agent.

The Court *refused* to interfere with the Lord Ordinary's exercise of discretion in appointing an auditor; and *repelled* the objections to the report.

Process — Expenses — Failure to Move for Expenses of Reclaiming-Note.

A reclaiming-note against an interlocutor of the Lord Ordinary having been dismissed as incompetent on the ground that the whole cause had not been decided, the respondent *per incuriam* omitted to move for Inner House expenses. The case was again reclaimed on the final judgment of the Lord Ordinary.

Held that it was too late for the respondent to move for the expenses of the discussion on the first reclaiming-note.

Mrs Christina Turner and another raised an action of accounting against James Robertson and others, the testamentary trustees of the late Mrs Fraser of Glasgow. The defenders produced an account which they averred had been examined and taxed by Mr Hannay, the auditor appointed by the Faculty of Procurators in Glasgow, and said that it was an implied condition of Mr Robertson's employment that his accounts should be taxed by that gentleman.

The pursuers pleaded that Mr Hannay's taxation was not binding on them, as they had not agreed to refer the accounts to him.

The Lord Ordinary (KYLLACHY) found that the pursuers were entitled to have the business accounts taxed of new, and remitted them to the Auditor of the Court of Session.

The defender reclaimed against this interlocutor without obtaining the leave of the Lord Ordinary, and on 12th December 1896 the First Division refused the reclaiming-note as incompetent.

Objections were lodged by the defenders to the report of the Auditor in so far as *inter alia*—"*First.* The reporter has disallowed charges in the said accounts for attending meetings of trustees to the extent of £5, 15s., having allowed only a charge of 10s. for attending each meeting, in respect that the defender James Robertson is a trustee under Mrs Fraser's settlement, as well as law-agent in the trust. The reporter stated at the taxation of the accounts that it was his practice to limit the charge for each meeting to 10s. in such circumstances, but no such practice is known in Glasgow."

The Lord Ordinary on 28th January 1897 pronounced the following interlocutor:—"Finds it is admitted, as the result of the audit, that the sum due to the pursuer is £168, 15s. 4d.: Therefore decerns against the defenders for payment of the said sum, together with the interest accrued on the sum consigned in bank on 8th February 1895."

Opinion.—"In this case I am of opinion that the pursuers' claim for interest must be confined to the interest earned by the consigned fund. I am not prepared to say that the trustees were justified in consigning the whole of the pursuers' share in respect of the comparatively small question which she had raised—the question, viz., as to the business account of one of the trustees who is law-agent in the trust. But, on the other hand, I cannot overlook that the pursuer obtained an interim payment, covering very nearly her whole share, so soon as her action was brought and served. I must, I think, hold that she is herself responsible for not bringing her action, if she was to bring it, at an earlier date.

"As to expenses, it is, I think, very unfortunate that an action in the Court of Session should have been required to settle a question of pecuniarily so small amount. But it seems to me that the defender Mr Robertson is responsible for that result. He took up a position which I have found to be untenable, and I do not see how I can be asked to affirm that the pursuer (the beneficiary), having to bring an action, was bound to have brought it in the Sheriff Court. If the defender considered that a Sheriff Court action would be less expensive, he might, if he pleased, have raised an action for his account, and might, if he pleased, have brought that action in the Sheriff Court. But not having done so, I do not see how he can complain of the pursuer having exercised her right in raising her action here.

"Judging by results, it cannot be said that the pursuer has been otherwise than successful in establishing her contention, viz., that the business account for which the defenders—and particularly the defender Robertson—had taken credit in the trust accounts was to a substantial extent overcharged. The amount of the account was £155. It has been cut down to £134, and in particular it has been found that

the law-agent, being himself a trustee, was not entitled to charge for his attendance at the meetings of the trustees on the same scale as if he had as trustee no duty of attendance, and was to be held as attending simply as law-agent of the trust.

"Then, as to the reasonableness of the parties respectively in the communications which preceded the actions, the pursuer, it appears, offered to refer the accounts to the Auditor of the Court of Session. Now, I can hardly say that that was an unreasonable proposal. The defender, on the other hand, insisted, in the first place, that he was entitled to stand on the audit (made at his own instance, and not under any reference or agreement) by a gentleman in Glasgow who holds an appointment as auditor from the Glasgow Faculty of Procurators. And, though ultimately he offered a re-taxation, he did so on the condition that the account should be referred for re-taxation by the same gentleman who had taxed it before. That appeared and still appears to me to have been an untenable position, and I think also it was a position which was specially unfortunate in view of the circumstances that he was himself a trustee, conjoined as such with the pursuer and her sister, and therefore, I think, bound to have been specially careful to exclude even the suggestion that his accounts were overcharged.

"I think, therefore, the defender—the law-agent, who is separately called, and has lodged a separate defence—must be found liable in the pursuers' expenses, and in the circumstances I am not able to see any ground for modification."

The defenders reclaimed, and argued—(1) The Lord Ordinary was wrong in remitting the accounts of a Glasgow solicitor to the Auditor of the Court of Session. An offer had been made by the defenders before the action to have the accounts re-taxed in Glasgow. The Court had recognised this as reasonable with reference to extrajudicial expenses—*Galloway* v. *Ranken*, June 11, 1864, 2 Macph. 1199. Accordingly the accounts should be taxed according to the standard which would be adopted by a Glasgow auditor. The Lord Ordinary's interlocutors of December 12, 1896, and 28th January 1897, should be recalled, and the accounts remitted to the Glasgow auditor. (2) The Auditor had been wrong in not allowing the defender his full expenses for attendance at the trust meetings. The fact that he was a trustee did not affect the scale of his charges.

Counsel for the respondent was not called upon.

At advising—

LORD PRESIDENT—Of the two special points last discussed the second seems to be purely consequential on the determination of the question of so-called principle. The other point rests on the distinction drawn by the auditor between the attendance at a meeting of trustees of a law-agent who is a trustee and of a law-agent who is not. That must to a certain extent depend on the circumstances of each case, and in particular on the subject-matter of the business before the meeting. But the recognition of such a distinction seems to me a very sound view.

I do not wish to give any encouragement to the raising by reclaiming-notes of questions of this kind, and I am certainly not going to be drawn into a discussion on the relative merits of Edinburgh and Glasgow auditors. These accounts have been remitted by the Lord Ordinary in his discretion to a competent auditor, and it would be preposterous if we were to recal the two interlocutors in question.

LORD M'LAREN—I am of the same opinion, and I may say that, in my view, if the Lord Ordinary had remitted the accounts to any other skilled person, probably we would not have interfered with his discretion. But the natural and usual procedure when accounts come to this Court for revision is to remit, as the Lord Ordinary has done, to the Auditor of the Court of Session.

LORD KINNEAR—I agree, and I have nothing to add except that the reasons given by the Lord Ordinary for his judgment appear to me to be perfectly satisfactory. He says that the defender in the first instance maintained that he was entitled to stand on an audit made *ex parte* at his own instance by a gentleman in Glasgow, and that, when that was not accepted, he insisted that any new audit should be made by the same gentleman. The Lord Ordinary did not consider that a reasonable proposition, and accordingly the action being in this Court he thought it right to refer the account to another auditor, and selected the Auditor of the Court of Session.

I agree that the *ex parte* audit could not be treated as final, and that with reference to the person by whom the new audit is to be conducted, it is out of the question for us to interfere with the discretion of the Lord Ordinary.

LORD ADAM concurred.

The Court adhered.

The pursuer moved for the expenses of the discussion in the first reclaiming-note, having *per incuriam* omitted to do so when it was refused.

LORD PRESIDENT — The question of expenses not having been moved at the time, we will not now go back upon it.

The Court refused the motion.

Counsel for Pursuers — H. Johnston — Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for Defenders—Ure—M'Lennan. Agents—Cumming & Duff, S.S.C.