

John Arratt, Esq, - - - Appellant; Case 92.
 John Wilson of Baikie. - - - Respondent.

21 Feb. 1721-2.

Appeal.—In an action of declarator of trust an interlocutor is pronounced, holding a defender as confessed upon an account of charge and discharge, given in by the pursuer, and he is ordered to denude. Afterwards upon the defender's application, the Court allowed him ten days longer to give in his accounts, but before the expiration of these ten days, he brings his appeal against certain interlocutors, and amongst others, against the interlocutors holding him as confessed; all which are specially affirmed by the House of Peers. After the determination of the first appeal, the defender applied to the Court to have liberty to give in his accounts in ten days, as allowed by the interlocutor before the appeal: but it was found that his right was extinguished, and that he must denude in terms of the decree affirmed by the House of Lords.

AFTER the determination of the former appeal, No. 52. of this Collection, the parties returned to the Court of Session, and a new litigation took place between them relative to the judgment of the House of Lords. In detailing this litigation, it is necessary to recapitulate some of the steps taken previous to the former appeal.

The Court, by interlocutor on the 9th of July 1717, “ Found
 “ that the disposition executed by the respondent to the appellant
 “ of the estate of Baikie, was redeemable by payment of the
 “ sums resting due to the appellant after deduction of his intro-
 “ missions, and ordained him to continue in the possession of the
 “ said estate until it were instructed, that he was paid, and remit-
 “ ted to the Lord Ordinary to proceed accordingly.” The Lord
 Ordinary, when the cause was called before him, on the 23d
 of July 1717, “ Ordered the appellant to give in an account of
 “ charge and discharge of his intromissions with the said estate
 “ in terms of the act of sederunt about accounts and reckonings,
 “ and an account of what was truly paid by him, in acquiring
 “ the rights upon the said estate, as also of his necessary charges,
 “ and the vouchers thereof by Tuesday then next.” This term
 was afterwards at different times enlarged; and the respondent
 in the mean time gave in an account of the appellant's intromis-
 sions and disbursements, making the balance due to the respondent
 81*l.* 11*s.* 4*d.* Scots. The appellant having still craved further
 time, the Lord Ordinary on the 13th of November 1717, gave
 him till the Tuesday following, “ with certification that if he
 “ failed, he should be found liable to the penalty in the act of
 “ sederunt.” The cause afterwards coming to a hearing, upon
 the 21st of November 1717 the Lord Ordinary pronounced the
 following interlocutor: “ In regard the appellant has failed to
 “ give in his accounts, and that the respondent has given in an
 “ account of charge and discharge signed by him upon oath in
 “ the terms of the act of sederunt, holds the appellant as con-
 “ fessed upon the said account given in by the respondent, and

“ finds that by the said account the appellant was paid off all his
 “ rights on the said estate; and therefore decerns the appellant
 “ to denude himself thereof in favour of the respondent, and de-
 “ clares in terms of the respondent’s libel, and also decerns the
 “ appellant to pay to the respondent 8*l.* 11*s.* 4*d.* Scots, being
 “ the balance of the said account.”

The appellant having reclaimed, their lordships “ *allowed him*
 “ *ten days longer to give in his accounts.*” Instead of giving in his
 accounts, however, he brought his appeal to the House of Lords,
 against fundry interlocutors, and particularly against the said in-
 terlocutor of the 21st of November 1717, whereby he was held as
 confessed upon the account given in by the respondent. And all
 the interlocutors appealed from (as stated in the former appeal)
 were, on the 23d of March 1718-19, affirmed, with 40*l.* costs to
 the respondent.

The respondent afterwards made application to the Court of
 Session to put the said judgment in force against the appellant, by
 compelling him to denude himself of the said estate in favour of
 the respondent, pursuant to the said interlocutor of the 21st of
 November 1717, and for payment of the 8*l.* 11*s.* 4*d.* Scots, the
 balance of the account whereon he was held confessed; and the
 appellant contending that he was still at liberty to give in an ac-
 count of charge and discharge, the Court on the 9th of July 1719
 “ Found the appellant’s right to be extinguished, and that he must
 “ denude in the terms of the decree affirmed by the House of
 “ Lords, reserving action to the said appellant for any articles
 “ that were not brought into the said account.” And to this in-
 terlocutor the Court adhered on the 11th of July and 16th of
 September following.

The appeal was brought from “ an interlocutor of the Lords of
 “ Session of the 9th of July 1719, and the affirmances thereof the
 “ 11th of the same month and 16th of September following.”

Heads of the Appellant’s Argument.

Though the interlocutor of the 21st of November 1717, came
 in the recital of the proceedings to be mentioned in the said peti-
 tion and appeal, yet the same was not insisted on in the case, nor
 pleaded at the bar; as the appellant well knew that interlocutors
 of that kind, which are pronounced by default, are easily altered
 and relieved against by the Judges themselves. In the present
 case, that interlocutor had been set aside by the Court, and ten
 days longer time allowed to the appellant to give in his vouchers,
 within which ten days the order on the appeal having been served
 upon the respondent, the Court could have no further proceed-
 ings till the appeal were discussed. After that the appellant ex-
 pected that he had the same liberty to apply to the Court, and give
 in his vouchers, as he had at the time when the order was served:
 and he conceived, that it never was the intention of the House of
 Lords to oblige him to re-convey the estate without being paid
 the money he had really laid out, especially since some of the in-
 terlocutors mentioned in the former appeal, and equally affirmed
 with

Entered,
 10 Jan.
 1720-1.

