

at a given time, and the creditor gives a longer period for payment, without concurrence of the cautioner, he is liberated from the cautionary obligation—the act of the creditor having in effect altered the contract to which the cautioner's obligation applied. No such case is presented for decision upon the facts established by the evidence in this case. The guarantee is general, to secure payment of goods, to be furnished in a course of dealing, to an extent not exceeding the sum of £50 beyond the sum of £25; and was in its nature continuous, and applicable to whatever transactions the principal parties might enter into, in the way of sale and purchase of goods. It is not alleged, far less established, that this guarantee was given upon any intimation to the cautioner, or with any knowledge on his part that a settlement of accounts should take place at a certain specified time. He might be entitled to rely that no more credit should be given than is usual in such business transactions. And had a period of six, or even of three, months elapsed without the account being paid; and the creditor had then tied up his hands against enforcing payment by taking bills for a longer period of credit,—there might have been room for the plea that time had been given to the debtor. Here the credit given altogether was for a period within two months of the contraction of the debt; and although when the goods were not paid for in cash at the date when the full discount would have been got by the debtor, the creditor consented to take two bills—the one for £45, and the other for £39, 11s. 7d. at one month's date,—this did not innovate upon the contract to which the cautioner was a party when he granted his letter of guarantee. That contract had no specific reference to a payment of the debt at a fixed and certain period. The course of dealing between the principal parties may have been that a settlement of accounts in cash should take place on or about a month after the furnishing of the goods; but this was not necessarily the limit of credit which the purchaser might have had, supposing him to disregard the large discount which would have been secured by cash payment; and accordingly, on one previous occasion, at least, in March 1869, bills had been taken for goods furnished, payable at a short date, still within the period of credit usual in such transactions. On the whole, therefore, I cannot see any sufficient ground for the plea that time was given to the debtor, in the legal sense of that phrase, in respect of which the cautioner's obligation has been discharged. It would in my apprehension be productive of very injurious effects upon mercantile dealings to hold a general continuous guarantee of the nature here in question to be rendered invalid on such grounds as those maintained by the appellant. These views receive ample support from the authorities referred to in the note to the Sheriff's interlocutor, and also from the decision in *Cook v. Moffat*, 7 June 1827, 5 S. 774.

LORDS BENHOLME and NEAVES concurred.
 Agent for Pursuer—Wm. Officer, S.S.C.
 Agent for Defenders—L. M. Macara, W.S.

Wednesday, May 24.

AITKEN v. HUNTER.

Trust—Agency—Trustee acting as Paid Factor.

Held that a trustee who had acted as factor was not entitled to charge for his personal services in connection with the trust-estate prior to 1841, in respect that he was sole trustee, and that, consequently, the authority of *Home v. Pringle* (H. of L., 22d June 1841) did not apply.

The facts in this case appear sufficiently from the following extract from the interlocutor of the Lord Ordinary (JERVISWOOD):—"Finds as matter of fact—(1) That the truster, Mr James Roughead, died on 15th February 1824, leaving the trust-disposition and settlement which is set forth on the record, and which is dated 17th January 1821; (2) that by the said deed the truster conveyed in trust, to the trustees therein named (with power of assumption of additional trustees, one or more), his whole estate, heritable and moveable, which should belong and be owing to him at the time of his death, and that the deed also contains a nomination of his trustees to be his executors; (3) that by the first purpose of the trust it is provided 'that my said trustees shall, out of the first and readiest of my means and estate, pay all my just and lawful debts, deathbed and funeral charges, and the necessary expenses of executing the present trust;' (4) that by the third purpose of the trust the truster appointed his trustees to pay to his daughter Mrs Elizabeth Roughead, for the maintenance of herself, and also of her children, Elizabeth Tod (the female pursuer of the present action) 'during the period after mentioned, the interest of my means and estate, after deduction of all just and lawful debts, and to pay to each of the said Elizabeth Todd and Janet Todd, my grandchildren, on their respective marriages, or their respectively attaining the age of twenty-five years complete, whichever of these events shall first happen, the sum of £300 sterling; declaring that on payment of that sum her or their claim to be maintained by their mother as aforesaid shall henceforth cease, and the whole interest, minus the sum or sums paid to her or them, shall be payable to their mother during her lifetime;' (5) that by the fourth purpose of the trust it was provided that 'on the decease of my said daughter, Elizabeth Roughead or Tod, I do hereby appoint my said trustees to divide the free residue of my means and estate of every description between the said Elizabeth and Janet Tod, my grandchildren, if they shall have arrived at the age of twenty-five complete;' (6) that the said trust-disposition and settlement also contains a declaration 'that my said trustees shall not be liable for omissions, or for neglect of management, nor *singuli in solidum*, but each for his own actual intromissions;' (7) that the truster was survived by his daughter, the said Mrs Elizabeth Roughead or Tod, and by her daughters, the said Elizabeth and Janet Tod: and that it is stated on record by the pursuer, and not denied, that the said Mrs Elizabeth Roughead or Tod died on 27th September 1863, predeceased by her daughter, the said Janet Tod, who, as it appears, had been married, but who died without issue; (8) that the said Elizabeth Tod, now Mrs Elizabeth Tod or Aitken, one of the pursuers of the present action, attained the age of twenty-five years on or about 28th November 1836, the period named for payment of a

provision of £300 to her as aforesaid; (9) that the now deceased Mr James Hunter, writer in Dunse, was, at the death of the truster, the sole surviving trustee and executor nominated in the said deed of settlement, and as such entered upon the possession and management of the whole means and estate, heritable and moveable, which belonged to the truster at the time of his death, and acted as sole trustee and executor till 12th January 1833, when, by deed of assumption, as referred to on the record, he assumed his brother, the also now deceased William King Hunter, writer in Dunse, the original defender in the present action, to be a trustee and executor under the said trust; (10) that the said James Hunter having shortly thereafter died, the said William King Hunter became the sole surviving trustee and executor, and as such, and as heir and representative of his said brother, was called as the defender in the present action; (11) that the said James Hunter and William King Hunter, besides acting successively as trustees and executors as aforesaid, also acted, for the liferentrix as law-agents in the management of the trust-estate, and in various legal proceedings connected therewith, as referred to in the original record, record made up before the accountant, and in the said report by the accountant, and addition thereto; and besides professional charges made by them as law-agents, they charged, or were allowed upon the audit of their accounts in the course of the said proceedings, commission for general trouble and outlays, and stand credited in their accounts with the trust with loss arising from the carrying on or the farm of Jardinefield, of which the truster was tenant at the time of his death, commission for managing the said farm, and with loss sustained by the trust-estate from the insolvency of a debtor, and with other sums, all as set forth in the said report, and addition thereto; and (12) that the last date on which any such professional charges or allowances of commission are entered to the credit of the said James Hunter or William King Hunter in the said report is 12th May 1840: Further, finds, as matter of law, with reference to the preceding findings—(First), That under a sound construction of the said trust-disposition and settlement, the trust-estate was burdened with the necessary expenses of executing the trust, comprehending all expenses of management, and expenses incurred in legal proceedings, or otherwise, in so far as properly chargeable against the trust-estate; and that the trust-estate was also liable for all losses arising in the course of management thereof, or from the insolvency of debtors, not inferring gross omission or neglect of management on the part of the trustees: (Second), That the truster's daughter, the said Mrs Elizabeth Roughhead or Tod, was, by the said deed of settlement, constituted liferentrix of the free interest or income of the trust-estate, but subject to the maintenance therefrom, to a certain period as aforesaid, of her said two daughters, Elizabeth Tod and Janet Tod; that her said two daughters became each entitled (if sufficient free funds remained in the hands of the trustees), to payment from the trust-estate, on their respective marriages, or their respectively attaining the age of twenty-five years complete, as aforesaid, of the sum of £300; and that on the decease of their said mother, they (or the survivor of them, in the event of the death of the other without issue before the period of division) were, by the said deed of settlement, entitled

to the free residue of the trust-estate, under deduction of all debts, losses, expenses of management, and other expenses properly effecting thereto: (Third), As regards the charges made by the said deceased James Hunter and the said deceased William King Hunter respectively for business performed by them as law-agents in the trust, including commission and allowance for outlays charged for by or allowed to them on the audit of their accounts for management of the farm of Jardinefield, and otherwise, finds that the said professional charges, commission, and allowances having been incurred or made prior to 22d June 1841, the date of the judgment of the House of Lords in the case of *Home v. Pringle and Others*, which is referred to in the record made up before the accountant, the rule established by that decision with respect to the non-remuneration of trustees for business performed by them in trusts, ought not, on the principle on which it proceeded, and which had regard to the practice which had previously prevailed, to be applied to the said professional charges, commission, and allowances in the present trust, and that the said deceased James Hunter and William King Hunter were entitled to be credited therewith in accounting for the income and residue of the trust-estate."

The pursuer appealed.

Solicitor-General (CLARK and NEVAY for them. MILLER, Q. C. and ASHER in answer.

At advising, the Court unanimously recalled that part of the Lord Ordinary's interlocutor, by which the trustee was held entitled to charge for his personal services in connection with the offices of the trust-estate.

LORD COWAN—The leading question on which the Court has to pronounce judgment is that involved in the third finding in point of law contained in the interlocutor of the Lord Ordinary.

The general principle—that a person filling an office of trust is not entitled to charge remuneration for personal trouble or services connected with the trust-estate—is not disputed; but, on the special ground stated by his Lordship, is held to be inapplicable in the circumstances of this case. And truly the only matter for consideration is, whether there is room for holding the charges for agency and commission, for which the trustee has taken credit in his trust-accounts, excluded from the operation of a principle so deeply seated in the law of Scotland and of England, and to which effect has been given so frequently in important and well-considered judgments of this Court. I am of opinion that there is no sufficient ground for such exclusion of the principle, and that in this respect the interlocutor under review is erroneous.

The management of the estate under the trust-deed of Mr Roughhead commenced in Feb. 1824; and the charges to which exception is now taken were incurred prior to 1834. It is objected, in the first place, by the respondents that after so long a period of time these charges should not be permitted to be brought under challenge. And this plea, it is urged, ought to receive the more consideration because of the trust-accounts having been before the Court in previous judicial proceedings. The answer to this defence is, that the pursuers of the present action became interested in the fee of the trust-estate only upon the death of the liferentrix in Sept. 1863, and that this action was instituted in Jan. 1864. There had been previous proceedings during the trust management, in the course of which investigation did

take place regarding the trust-estate and its management to the effect of disposing of the questions raised by the parties to those legal proceedings. An action was instituted by the widow of the trustee, claiming her legal rights, which was carried to the House of Lords, and in which, the widow having been successful, the amount to which she was entitled had to be ascertained by the report of an accountant. There were also proceedings with a view to ascertain the interest of the liferentrix in the estate, which caused another remit to an accountant; and in the course of which an award relative to various matters in the accounting was pronounced by the late Mr Greenshields, to which effect was given by the judgment of the Lord Ordinary (MONCRIEFF), dated 20th March 1840. But in all these proceedings, although the trustee was necessarily the party against whom they were directed, or with whom they were discussed, the interest of the fiars was not matter for discussion, and could not be; for their right to the estate under the trust-deed did not emerge till the liferentrix's death in 1863. Only then it was that the trustee became bound to account to the fiars for his management, and to vindicate the legality of the charges taken credit for by him in his accounts. For these reasons, it appears to me that no good defence can be stated on this part of the case simply on the ground either of the length of time that has elapsed since those charges were entered by the trustee to his credit in the trust-accounts, or of the previous judicial proceedings.

The ground on which the finding of the Lord Ordinary proceeds requires more consideration, inasmuch as it is based upon the view taken by his Lordship of the judgment of the House of Lords in the case of *Home v. Pringle*, in June 1841. In that case business charges and commission charged by and paid to a co-trustee, were allowed to stand in the trust accounts, because of the practice which was stated to have existed in Scotland of allowing such charges—a practice, however, which was condemned, and which can no longer be pleaded in vindication of such charges taken credit for after the date of that judgment. It has to be observed, however, that the observations of the Lord Chancellor had reference to the accounts of a trustee and cashier appointed to act by his co-trustees, and to their liability to make good those charges to the trust-estate. Even in that case the rule in England is stated to be clear, that the office of trustee and of factor or cashier or agent were inconsistent; and his Lordship said that he should be sorry to give any sanction to a contrary practice in Scotland, there being no reason for any difference in the rule upon this subject in the two countries. Hence it was only as against the trustees who had named a co-trustee to the office that the rule was not held in that case to involve them in liability. A different question no doubt arose as to one of their number (Pringle) who had been credited with £50 a-year of salary, and that charge was not disturbed; but the reason of this is explained in the opinion of the Lord Chancellor, and excludes the speciality from being of weight in this discussion.

Had the circumstances attending this trust management been similar to those in *Home v. Pringle*, I would have concurred in holding that, as the charges in question were all incurred of a date prior to the judgment of the House of Lords, the same indulgent consideration should have

been extended to co-trustees. On that footing the Court acted in the case of *Miller's Trs.* 23 Feb. 1848, where the attempt was to subject the sole surviving co-trustee to repeat charges made by two of the body of trustees originally named, on whom the management had been specially delegated at the commencement of the trust. But no such case here exists. The estate was throughout under the management of a single trustee, *first* of James Hunter, the sole survivor and acceptor of the trustees named in the deed of settlement from the truster's death in 1824 till January 1833; and, *second*, of William King Hunter, assumed by James of that date, and who died shortly thereafter. The case, therefore, is one in which a sole trustee having the management takes upon himself to act as agent or factor in the trust management. Where there are co-trustees, and one of their number is appointed to act in the management, his actings are subject to the control and supervision of the others; and to that case alone can the decision in *Home v. Pringle* be viewed as applicable. And the practice to which the Lord Chancellor refers had regard exclusively to such a state of circumstances. The Judges of this Court in the case of *Wauchope*, (1822) in stating their opinion on this matter, merely said "that it is consistent with the law and practice of Scotland for tutors-curators and trustees to nominate one of their number to act as *their* agent and cashier," and that in accounting with them it was not incumbent on such person to account on different principles than he would had he been a stranger agent or cashier. There is no instance on record of any sanction being given by the Courts in Scotland to a trustee in the sole management of a trust-estate making charges for agency connected with the trust matters, or of commission for discharging the duties of an office to which he had appointed himself. On the contrary, the principles recognised and adopted in the law and practice of Scotland are wholly adverse to the recognition of a person filling an office of trust, and having right to make charges for personal trouble in the trust affairs.

On all the other points of the case I concur substantially in the views which your Lordship has expressed.

Agents for Pursuer—Scott, Moncrieff & Dalgety, W.S.

Agents for Defender—Morton, Whitehead, and Greig, W.S.

Saturday, May 26.

FIRST DIVISION.

ALLAN v. M'DONALD.

Process—Reduction—Expenses—Trust. Circumstances in which it was held (*diss.* Lord Ardmillan) that a trustee had created no unnecessary or unwarrantable litigation, so as to deprive him of his right to full expenses, by stating a plea of homologation which he did not afterwards insist in, in an action of reduction of the trust-deed under which he had *in bona fide* acted for fifteen years, and of count reckoning and payment against himself—the Court being of opinion that he was not entitled to denude extrajudicially, but was bound to state defences and to take the judgment of the Court, and that his plea of homologation