

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 trustor'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

was quite justifiable in view of the conclusions of count and reckoning against himself.

This was an action of reduction, count, reckoning and payment, and removing, at the instance of Alexander Allan, labourer, Tillicoultry, as administrator-in-law to his daughter Charlotte Allan, the only surviving child of him and of the deceased Christian Forrester or Allan, his wife, who was the only surviving child of Charles Forrester, feuar in Coalsnaughton, in the county of Clackmannan (the said Charlotte Allan being the nearest and lawful heir-at-law of the said deceased Charles Forrester her grandfather), against John M'Donald, only surviving and accepting trustee and executor under the trust-disposition and settlement of the said Charles Forrester.

The pursuer concluded for reduction of the said trust-disposition and settlement of the deceased Charles Forrester, with all that had followed thereon; and that the defender should be ordained to count and reckon with the pursuer, as administrator-in-law for his daughter, for the rents and income of the estate belonging to the deceased Charles Forrester intromitted with by him, and that from the 20th February 1855, the date of the death of the said Charles Forrester; and to make payment of the sum of £250 sterling as the balance due upon said accounting; and lastly, that the defender should be ordained to flit and remove from and give up to the pursuer, as administrator foresaid, possession of the heritable subjects and whole other estate of the said deceased Charles Forrester.

From the pursuer's condescence it appeared that Charles Forrester had died in 1855, survived by his wife and an only child, Christian Forrester, who married the pursuer Alexander Allan in the year 1858. The said Christian Forrester or Allan died in 1863, survived by her husband and an only child, Charlotte Allan, born in 1860. By the trust-settlement sought to be reduced the whole estate of the said Charles Forrester was held by his trustee, the defender, for behoof of the pursuer's daughter Charlotte Allan, after payment of two or three very small legacies, and would have been transferred to her upon her attaining majority. The reason of reduction was that the deed was defective *in essentialibus*, wanting in the testing clause the designation of the writer and of one of the witnesses to its execution. It was not disputed that the defender had acted in good faith, in ignorance of the invalidity of the deed, and with his best care and judgment as trustee under the deed sought to be reduced during the whole time from 1855 till the raising of this action, and that during that time no question as to the validity of the deed was raised by any one.

The pursuer pleaded—" (1) The said pretended trust-disposition and settlement called for being deficient in the solemnities required by the law of Scotland to a valid and effectual conveyance, the pursuer, as administrator-in-law for his said daughter, who is the heir-at-law of the granter, is entitled to have the same reduced and set aside in terms of the reductive conclusions of the summons; (2) The said pretended trust-disposition and settlement being reduced and set aside, the defender, the said John M'Donald, is bound to count and reckon with the pursuer for his intromissions with the estate of the said deceased Charles Forrester; and the pursuer is entitled to decree for count, reckoning, and payment, &c. in terms of the conclusions of the summons."

The defender pleaded—" (1) The pursuer, or those

whom the pursuer represents, having homologated the deed called for, or at least having allowed the defender and co-trustees to act on the said deed as a valid deed, and to make advances for the trust on the faith of the same, the present action, as laid, cannot be maintained; (2) Whether the deed be liable to reduction or not, the defender's actings having been merely as trustee, he is not liable excepting for his intromissions; and he is entitled, in any accounting, to credit for all sums disbursed or expenses incurred by him in connection with the trust; (3) There are no grounds stated or existing for decerniture against the defender personally; and, in the circumstances, the defender is entitled to the expenses incurred by him in this action, either against the pursuer, or as expenses connected with the trust."

Upon 19th January 1871 the Lord Ordinary (GIFFORD) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and considered the trust-disposition and settlement libelled—Finds that the same is defective in the solemnities required by law: Therefore reduces, decerns, and declares, conform to the reductive conclusions of the libel, and grants warrant as craved; reserving all questions of accounting between the parties, and reserving also the question of expenses; and with these reservations, appoints the defenders, within ten days, to lodge an account of their intromissions."

Thereafter a minute was put in for the pursuer in the following terms:—"Campbell Smith, for the pursuer, stated that he was willing to hold that the balance due on his intromissions by the defender is £2, 12s. 9d., reserving the question whether Mr M'Watt has any claim against the trust-estate for his account, and any answer that may be made to said claim." Accordingly on 17th March 1871 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the defender's abstract of accounts, No. 22 of process, and the relative minute for the pursuer, No. 218 of process, Finds, in terms thereof, that the balance due to the pursuer on the accounting is £2, 12s. 9d.; and having heard parties' procurators on the question of expenses, Finds the defenders entitled to expenses, and modifies the same to five guineas; Finds that after deducting the one sum from the other there remains a balance due to the defender of £2, 12s. 3d., and decerns."

Against this interlocutor the defender reclaimed.

LEE, for him, contended that he was entitled to his full expenses, unless he had unreasonably litigated, which under the circumstances it could not be maintained he had.

CAMPBELL SMITH, for the respondent, contended that the trustee had caused an unreasonable litigation by taking his first plea of homologation, which he afterwards departed from, and that the Lord Ordinary, having before him the whole facts and circumstances of the case, had rightly given him only modified expenses.

At advising—

LORD DEAS—The trust-deed under reduction came into operation in 1855. The trustee has acted throughout in good faith, and I am not surprised that it was not observed by him that there was a defect in the deed. The trustor's death took place in 1855. At that time his heir-at-law was the wife of the pursuer. She remained for eight years, until her death in 1863, without bring-

ing this reduction. There is very little interest in this child to bring this action now. She is eleven years of age, and had she waited other ten years would have been put in possession of the property under the deed she seeks to reduce. As to the plea of homologation, it might have been a very strong one if insisted in. The trustee, after acting for so many years, could not have abandoned the deed without putting in defences, and I am of opinion that he stated none that he was not bound to state. I think that he was entitled to a judgment of the Court, and that he did nothing which was not necessary in obtaining it. Neither do I find any unnecessary litigation in the question of accounting. In fact I never saw an interlocutor sheet that showed less; and, on the whole, I am of opinion that nothing was done which could have been omitted with safety, and consequently that the Lord Ordinary should have allowed the defender his full expenses.

LORD ARDMILLAN—I am very unwilling to interfere with the Lord Ordinary's discretion in this matter. The trustee was probably entitled to say, I cannot give up the trust extra-judicially; bring an action of reduction and I will make the slightest defence I can. But I do not think that this is exactly the course that he took. He came into Court with a statement in his mouth which he afterwards departed from. He has now taken the proper course; but it is only by departing from his previous one. In the matter of accounting he proceeded quite properly, and therefore I think he was entitled to some expenses, and the Lord Ordinary has found accordingly. I see no reason for disturbing his judgment.

LORD KINLOCH concurred with the majority of the Court.

LORD PRESIDENT—I am disposed to agree with the majority of your Lordships that the Lord Ordinary's finding of expenses was much too severe. I confess I do not at present see any good ground for modifying expenses at all, but think that the trustee was entitled to his full expenses. With regard to the first plea as it now stands—that, namely, of homologation—it is clear that it was one he was entitled to, and I am of opinion that he might have successfully supported it. For observe, the plea is not against the action—not that the action is barred by homologation—but to defend the actings of the trustee, which are substantially called in question. That is a defence he is surely entitled to. There is no defence maintaining the absolute validity of the deed, and there was no discussion on that point. On the other hand, the trustee did not admit the invalidity of the deed, and I am of opinion that he was not entitled to do so, or to denude without an order of the Court. I think he was bound to come into Court as he did and obtain a formal judgment from the Lord Ordinary. That judgment was given, and the parties then went into an accounting, where the defender was found entirely in the right—so much so that the pursuer accepted his statement of accounts without discussion. Under these circumstances I am of opinion with your Lordships that the defender did not cause any unwarrantable litigation or take any steps in this process which he was not entitled, nay, bound, to take, and therefore that he is en-

titled to his expenses in full, and not as modified by the Lord Ordinary.

Agents for Pursuer—J. & A. Peddie, W.S.
Agent for Defender—Alex. Morison, S.S.C.

Friday, May 26.

JAMES LEITCH LANG v. GLASGOW COURT-HOUSE COMMISSIONERS.

Statute—Lands Clauses Consolidation (Scotland) Act—Compulsory Sale—Notice—Special Jury—Waiver. Held (by a majority of the Judges, Lord Deas reserving his opinion), that where the promoters of an undertaking are empowered to take lands by compulsory sale, sec. 40 of the Lands Clauses Consolidation (Scotland) Act 1845 (which requires ten days' notice in writing of the time and place of inquiry to be given by the promoters to the party claiming compensation), is imperative, and not merely directory, and applies to the case where a special jury is summoned as well as to the case of a common jury; but held unanimously that a claimant, who was present and took part in the proceedings before the Sheriff at which the trial was fixed, who examined havers under an interlocutor fixing the time and place of trial, and who successfully resisted a subsequent motion by the promoters to have the trial postponed, had waived his right to notice.

The complainer Mr Lang is lessee of certain premises in Glasgow. On the 28th December 1870 he was served with a notice from the Glasgow Court-House Commissioners, intimating that under a local Act they required to enter upon the said premises, and requesting a statement of his interest and claims. Mr Lang claimed as compensation £1825, with £25 per cent. as additional, as for compulsory sale; and intimated his desire to have the amount determined by a jury. The secretary to the Commissioners on the 5th January 1871, on their behalf, tendered £150 to Mr Lang as compensation; and intimated that in case of his declining to accept of the same the Commissioners would present a petition to the Sheriff to summon a jury to settle the amount. Mr Lang declined the tender, and a petition was accordingly presented on 17th January 1871 by the Commissioners, praying the Sheriff to summon a special jury for the purpose of fixing the compensation. In terms of section 53 of the Lands Clauses Consolidation (Scotland) Act the Sheriff summoned both parties to appear before him on 25th January. On that day, in the presence of both parties, he nominated a special jury, and appointed the 31st January for reducing the number of the jury to twenty. On the 31st January both parties again appeared before him. The proceedings are embodied in the following interlocutor, pronounced by the Sheriff of that date:—

"Glasgow, 31st January 1871.—The Sheriff hath heard parties' procurators, and they having alternately suggested eight names each to be struck off the list of special jurors, so as to reduce the same to twenty—strikes out and reduces accordingly, the names so struck off being as follow—viz. (here follows list): Further appoints Wednesday, the fifteenth day of March next, at ten o'clock forenoon, for proceeding with the trial for ascertaining and