

[22d June, 1841.]

(No. 15.) WILLIAM F. HOME, Esq. of Billie, and DAVID MILNE,
Esq. Judicial Factor on the Estate of Billie, Appel-
lants.

[*Sir F. Pollock — Knight Bruce.*]

JOHN PRINGLE, Trustee of the deceased WILLIAM
PRINGLE, Respondent.

[*Lord Advocate — Pemberton.*]

JOHN HUNTER and Others, Representatives of JAMES
HUNTER deceased, Respondents.

[*Sir W. Follett — W. Buchanan.*]

Trust. — The appointment by trustees of one of their number to be factor to the trust, is not a breach of trust, so as per se to make those appointing liable for the acts of the factor, as if the acts of a co-trustee, for which they would be liable; but will infer against those appointing a liability for the acts, as if those of their agent.

Id. — The mere fact of trustees allowing balances to remain in the hands of their factor at the annual settlement of his accounts, where there must necessarily have been current accounts between the trust and third parties, without any knowledge by the trustees of fraud, in contriving that the balances should be greater than necessary, will not infer against the trustees liability for the balance owing by the factor at the ultimate settlement.

Id. — General dealing between trustees and their factor held not to infer a liability by them for the balance upon the factor's accounts, lost to the trust by the factor's bankruptcy.

Id. — A trustee does not, by accepting the office of cashier

to the trust, incur any liability, in regard to the management of the trust, beyond that to which he was already subject qua trustee.

Id.—Trustees ought not to have any allowance or salary in respect of offices held by them under the trust; but circumstances under which the House of Lords refused to disturb accounts, in which such allowances had been passed.

Costs.—Though affirming judgment, the House of Lords will not meddle with costs below, although the question may have been brought up by cross appeal.

ON 16th July, 1816, George Home executed a deed ^{22d June, 1841.} of settlement, by which he conveyed to David Renton, Statement. William Pringle, and John Renton, and such persons, as might afterwards be appointed by him, the lands of Billie and others, upon trust, to settle the lands by entail upon a series of heirs, (of whom the appellant was the institute,) after payment of debts and legacies, the former of which amounted to nearly L.100,000.

The powers given to the trustees were expressed in the following, among other clauses:—“ With power to
 “ name and remove factors, from time to time, with
 “ such powers, and liable to such diligence as the said
 “ trustee or trustees shall think proper, and to give
 “ such salaries to the factors, and gratifications to any
 “ other persons who shall be employed in relation to the
 “ premises, as the said trustee or trustees shall think
 “ expedient at the time, and to settle accounts annually
 “ with the said factors, and upon payment of what shall
 “ be found due, to exoner and discharge them of their
 “ intromissions and management; and within six months
 “ after each clearance with the factors, the said David
 “ Renton, William Pringle, and John Renton, or other
 “ trustee or trustees for the time, shall make up the

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ accounts of his or their intrusions, during the
 “ period of the factor’s accounts, and get the same
 “ examined and approved of by an accountant of cha-
 “ racter in Edinburgh ; and if the accounts are approved
 “ of by the said accountant, such approbation is hereby
 “ declared to operate as a full exoneration of the said
 “ trustee or trustees, for their whole management during
 “ the currency of said account : Secundo, With power to
 “ the said David Renton, William Pringle, and John
 “ Renton, or other trustee or trustees acting for the
 “ time, either to compromise, transact, or agree, or to
 “ submit and refer, any questions that may arise betwixt
 “ them, and any other person or persons, touching the
 “ execution of the said trust ; which transactions or sub-
 “ missions, with the decret-arbitral to follow thereon,
 “ are hereby declared valid and sufficient, to all intents
 “ and purposes whatsoever : As also, with power to him
 “ and them to sue and insist in all actions that shall
 “ be found necessary for effectually answering the pur-
 “ poses of the said trust : It is hereby provided and
 “ declared, that in case any of the said three trustees
 “ should fail to accept, or that they should all die
 “ before the execution of the said trust-right, the same
 “ shall not thereby become void, but shall subsist,
 “ with the infestments thereon, until all the ends, uses,
 “ and purposes thereof shall be fully completed ; and
 “ it shall be competent and lawful for any of the said
 “ three trustees herein named, acting for the time, when
 “ he shall think it proper, to nominate and appoint,
 “ from time to time, such a succession of other trustees
 “ for executing the said trust as he shall think neces-
 “ sary ; and which trustees, so to be named by the said
 “ acting trustee, shall be as fully invested in the right
 “ of the whole lands, and others hereby conveyed, and

“ in all the powers hereby committed to the trustees
 “ before named, as if they had been expressly named
 “ and appointed trustees by the said deed, or as the said
 “ trustees herein named might and could have done,
 “ had they lived, and continued to execute the trust
 “ hereby committed to them; with power also to the
 “ said acting trustee for the time, to appoint how many
 “ of the trustees, so to be named by him, shall be a
 “ quorum, in case he should think proper to name two
 “ or more persons to act together: As also, it is de-
 “ clared that the said David Renton, William Pringle,
 “ and John Renton, or other trustee or trustees named,
 “ or to be named, as aforesaid, shall noways be obliged
 “ to do diligence, otherwise than as he or they shall
 “ think fit; nor shall he or they be liable for omissions,
 “ but only each of them for himself, and his own actual
 “ and personal intromissions; nor shall they be farther
 “ liable for their factors, than that they shall be habit
 “ and repute responsible at the time of entering upon
 “ their office.”

Such of the purposes of the trust as it is necessary to
 notice, were expressed in these terms:—“ For payment
 “ of all the public burdens affecting the estates hereby
 “ conveyed, and the due and lawful interest of all
 “ bonded debts, or other debts due by the said George
 “ Home, and of all necessary charges and expenses, to
 “ be disbursed by the said trustees, or their factors,
 “ in executing the said trust-right; which charges and
 “ expenses are to be taken on the honest word of the
 “ acting trustee or trustees for the time, and not to be
 “ subject to challenge on any account or pretext what-
 “ ever; and for payment of such salaries and gratifica-
 “ tions as the said trustees shall give to factors, lawyers,
 “ arbiters, or others, who shall be employed with rela-

HOME
 and another
 v.
 PRINGLE
 and others.

22d June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ tion to the management of the present trust, and of
“ the yearly sum of L.100 sterling, as a gratification
“ to the acting trustee or trustees, for their trouble
“ in the management, — it being hereby declared;
“ that in case there shall be at any time more than
“ one acting trustee, the said yearly sum of L.100
“ sterling shall be equally divided among the said
“ acting trustees.”

On the 6th day of August, 1819, George Home executed a supplementary trust-disposition, by which he revoked the nomination of David Renton and John Renton, and conveyed the lands of new to William Molle, William Pringle, and James Hunter, upon the trusts of the original deed : — “ Declaring that a majority of my said trustees, accepting and surviving, shall at all times form a quorum, for executing the purposes of the said trust, ratifying and approving the said nomination; and declaring that the said William Molle, William Pringle, and James Hunter, as trustees foresaid, shall have the same powers, and be subject to the same declarations, conditions, provisions, and reservations, as if named and appointed as such, in gremio, of the foresaid trust-right, to which this supplementary trust-deed is declared to have an express relation, excepting in so far as hereby altered.”

On the same day, 6th August, 1819, George Home, by his last will, reciting the two deeds of 16th July, 1816, and 6th August, 1819, bequeathed his whole moveable estate to Molle, Pringle, and Hunter, as trustees, for payment of certain legacies and annuities.

The maker of these instruments died on 10th February, 1820, and thereupon Molle, Pringle, and Hunter, accepted of the office of trustees, and entered upon the

execution of the trusts. Molle was a proprietor of considerable landed estates in the neighbourhood of the trust lands, and likewise practised in Edinburgh as a Writer to the Signet: Pringle was a Depute-Clerk of Session, and principally resident in Edinburgh: and Hunter was a Writer, practising in the town of Dunse, in the neighbourhood of the trust lands.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

On the 10th of March, 1820, Molle and Pringle wrote from Edinburgh to Hunter, and also to the appellant, intimating that the first meeting of the trustees would be held on the 16th of that month. A meeting was accordingly held on that day, and was attended by Molle, Pringle, and the appellant: Hunter being absent, in consequence of communications from the appellant, inducing him to think that he, the appellant, would not attend, and that he would procure the meeting to be adjourned to a farther day.

At this meeting the appellant proposed himself to be factor for the trustees. Molle and Pringle did not assent to this, but appointed Molle to be factor, with a salary of L.180 a year; and on the 22d March, 1820, they executed a formal deed of factory in his favour. They likewise appointed Pringle to be cashier of the trust, with a salary of L.50 a year; Messrs Molle, Turnbull, and Brown, Writers to the Signet, a firm of which Molle was the chief partner, to be the law agents of the trust in Edinburgh; Hunter to be the agent in the country; and Brown, the nephew of one of the members of the firm of Molle, Turnbull, and Brown, to be the accountant. At the date of these appointments, Molle was possessed of considerable landed property and respectable practice in his profession, and he was otherwise of undoubted credit and respectability.

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

William Foreman Home, as first heir of entail of the trust lands, brought action against John Pringle, the trust-disponee and executor of William Pringle and his legal representatives; John Hunter, and the other representatives of James Hunter; and William Molle, and Alexander Low, trustee on his sequestrated estate, — setting forth the deeds executed by George Home; that Molle had never been required to find caution for his intromissions as factor; that his accounts had not been annually settled, but large balances had been retained by him and applied to his own purposes, with the knowledge of his co-trustees, and more especially of Pringle, as cashier; that notwithstanding of these defalcations, Molle was allowed to retain his office of factor; that with the knowledge and connivance of Pringle and Hunter, the grossest system of malversation and neglect had prevailed in every department of the trust; that Pringle and Hunter, after endeavouring to obtain payment of the balances owing from Molle, at last took alarm on their own account, and on the 29th of October, 1830, recalled the factory in his favour; that on the following day, Molle intimated his bankruptcy, and admitted that the final balance owing from him amounted to L.5729, after taking credit for about L.11,000 paid for salaries and other charges; that these charges were illegal, and, if disallowed, would thus make the balance owing to the estate amount to L.16,729; that in December, 1830, James Hunter threatened proceedings against William Pringle, to make him liable for Molle's defalcations, in respect of his omission as cashier to make him regularly account; that in consequence of these proceedings, Pringle, on 7th January, 1831, denuded of the trust in favour of Hunter, — Molle having previously taken the

same step, — and thereafter Hunter dropped farther proceedings for recovery of the balances owing to the trust estate.

HOME
and another
v.
PRINGLE
and others.

Upon this narrative the summons concluded for payment of the admitted balance of L.5749, and also of L.11,000, as improperly taken credit for; that it should be found that the trustees were not entitled to make any charge for trouble, as cashiers, factors, or agents, and that they had forfeited all claim to the allowance of L.100 per annum, given by the trust-disposition; that the defenders should be ordained to pay L.10,000 for malversations committed by the trustees, and to hold count and reckoning of their intromissions since the commencement of the trust, and to pay whatever balance might appear by the accounting to be owing to the estate.

22d June, 1841.

Statement.

The gross rental of the trust lands during the management of the trustees, varied from L.7234, 11s. 6d., the amount in the year 1820, to L.7900, 12s. 1d., the amount in the year 1829, giving an average of L.7635, 19s. 7d. This revenue was receivable from seventy-nine tenants, and one hundred and eight feuars. The personal funds left by the truster amounted to L.19,520, 9s. 6d.

The debts and legacies left by the truster, for payment of which the trust estate was made applicable, amounted to L.87,987, 11s. 11d.; and in respect of these, annual payments of interest and otherwise had to be made to thirty creditors, twenty-two annuitants, and seventeen legatees.

With regard to the averment in the summons, that Molle's accounts as factor had not been annually settled, and that large balances had been retained by him, the evidence shewed, that the accounts of Molle as factor,

In Molle's accounts, made up to 31st December, 1827, he debited himself with L.1970, 2s., the balance on the previous year's accounts, and with interest at four per cent; and in each subsequent year's account, the balance of the previous year, with interest, was debited to him.

HOMER
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

With regard to the averment in the summons, as to malversation and neglect of the trust, this was limited to a charge of improper abatements of rent having been allowed to tenants, and the facts as to this were, that the trustees had taken the opinion of land valuers as to the rents for which the lands were let, in consequence of claims of abatement having been made by some of the tenants, and, acting upon the opinions of these persons, had given abatements, amounting in the whole, during ten years, from 1819 to 1829, to L.3319, 16s. 1d. giving an annual average of L.331, 19s. 7d.

The position of the trustees individually, in regard to the matters charged against them, was this, —

The meeting of the trustees were, with few exceptions, held at Edinburgh, where Molle and Pringle chiefly resided, and they were seldom attended by Hunter, his co-trustees having refused to put the trust to the expense of his journies to Edinburgh, unless to attend an annual meeting, at the time at which the accountant's reports should be given in. Accordingly, few of the meetings were intimated to Hunter beforehand, unless business of particular importance was intended to be done, but copies of the minutes of the meetings appeared to have been sent to him from time to time. This arrangement was made subject of complaint by Hunter, in a letter addressed to the agents of the trust, on 9th January, 1821, in these terms: — “ I was surprised to find by
“ your letter of the 22d ultimo, that any meeting had

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ taken place under the designation of Mr Home’s
“ trustees, without my receiving the most remote notice
“ of it. This I was certainly entitled to have had noti-
“ fied, though I could not have conveniently been
“ present.”

That letter produced an answer from Molle and Pringle on 15th January, 1821, in these terms:—
“ With regard to your not having had intimation of the
“ last meeting, we considered it unnecessary, because
“ we could not think of bringing you to town at
“ the expense of the trust, and we could not suppose
“ that you would have come at your own expense.
“ The business must evidently be done in Edinburgh,
“ where the majority of the trustees reside; and it is
“ only on very extraordinary occasions, that we can
“ ever think of troubling you to come from Dunse, at
“ the expense of the trust.”

On the 10th of April, 1822, the agent of the trustees, in a letter to Hunter, said:—“ I am desired to say, that
“ if you would inform us previously of your intention
“ of being in town at any time, a meeting of the trustees
“ would be called on such an occasion.” To this Hunter replied on the 12th April, 1822:—“ Yesterday’s
“ post brought me your letter of the 10th, accompanied
“ by copy minutes of Billie trustees. If it could be so
“ arranged as to have two general meetings in the year,
“ I would wish to be present at both of them. It was
“ in the view of Mr Home, that the three trustees
“ named by him should convene at any meeting to be
“ held relative to his affairs; and though I am advised
“ by unexceptionable authority, that meetings held
“ without due notification being given to me, are
“ irregular, I have no wish to have any altercation
“ thereanent. It is, however, fair and reasonable that

“ such notification should be given, that I may know,
 “ otherwise than from copies of minutes, what is going
 “ forth in the trust. I shall, however, attend to what
 “ you have been desired to state, and give intimation
 “ when I am to be in Edinburgh on other occasions, that
 “ subordinate meetings may then be held.”

HOMER
 and another
 v.
 PRINGLE
 and others.
 —
 22d June, 1841.
 —
Statement.

On the 28th May, 1822, Molle and Pringle wrote Hunter in these terms:—“ Dear Sir, Mr Turnbull
 “ communicated to us your letter to him of the 12th
 “ ulto. We shall certainly give you notice of our
 “ meetings, so that you may have it in your power to
 “ attend; but we do not consider ourselves authorized
 “ to charge the trust-funds with your expenses for com-
 “ ing to town more than once a-year, when L.5 may be
 “ allowed. This annual meeting, we conceive, should
 “ take place when the accountant gives in his annual
 “ report, and when the trustees must arrange matters
 “ for the succeeding year.” Here the matter was
 allowed to rest.

The means of knowledge by Molle’s co-trustees, in regard to the balances retained by him, and the conduct pursued by them upon this subject, appeared to be thus:—

1st, In regard to their means of knowledge, the accounts of the different officers of the trust were transmitted to the accountant for audit, and were reported on by him, as shewn in the table which has been already given.

In the notes which were issued by the accountant in April, 1825, upon the accounts ending at 31st December, 1823, there were the following remarks:—

“ There is a balance in the factor’s hands, at 31st
 “ December, 1823, on the rendered account, of

“ L.760 8 0 $\frac{3}{4}$

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

“ And there had previously fallen due, of the rents
“ of crop 1823, the following amounts, part of which, it
“ is presumed, must have been collected before the end
“ of the year, viz. —

“ Payable at Whitsunday, 1823,	L.220	10	0
“ Lammas,	475	0	0
“ Martinmas,	1096	18	7
“ Christmas,	383	7	1

—
“ L.2175 15 8

“ The factor should not retain in his hands more
“ than sufficient to answer the current demands of the
“ estate. Under this necessary deduction, the rents
“ should be paid over to the cashier as actually received,
“ and, of course, no balance should appear in ordinary
“ cases, in the factor’s hands, at the end of the year.”

So in the notes issued in February, 1826, upon the
accounts ending 31st December, 1824, the accountant
observed : — “ The auditor has formerly had occasion to
“ remark to the progressive state of the factor’s pay-
“ ments to the cashier, and to the extent of the balances
“ which appeared in his hands at the end of the yearly
“ accounts. And from the factor’s answers to the
“ auditor’s last notes on the subject, he anticipates that
“ there will be no more occasion for remark in future.
“ There is no improvement in the point alluded to in
“ the accounts for 1824, which, it is presumed, has
“ arisen from the last notes not having been communi-
“ cated in sufficient time to produce their due effect.”
Molle put an answer upon the notes in these words,
— “ To be attended to.”

In the notes issued in January, 1827, upon the
accounts ending 31st December, 1825, there was this
entry : —

“ MOLLE’S ACCOUNTS.

“ Credited payments to the Cashier.			HOME and another
“ 31st December, 1825,	L.260		v. PRINGLE and others.
“ Do.	1000	22d	June, 1841.
	—————		Statement.
	“ L.1260		

“ These payments were not made to the cashier till the
 “ 3d and 5th of January, 1826, and of course they can-
 “ not pass through the report for 1825, without derang-
 “ ing the bank account, and producing confusion.
 “ They will, however, be noticed at the end of the
 “ factor’s account. With reference to former remarks,
 “ it is observed that the factor’s balance has increased a
 “ little this year. The auditor proposes to have a
 “ meeting with the factor on this subject.”

In the notes issued in August, 1830, the accountant observed :—

“ Crops 1826 and 1827.

“ I. — Account for crop 1826.

“ The auditor had formerly occasion, more than
 “ once, to advert to the state of the balances on the
 “ factor’s accounts; and the situation of those on the
 “ accounts ending December, 1827, and December,
 “ 1828, compels him to resume the subject. When
 “ the accounts ending December, 1826, were under
 “ audit, the factor suggested that interest at a fair rate
 “ might be added to the balance against him, and this
 “ will no doubt be so far satisfactory; but the auditor
 “ cannot admit this to be a correct mode of accounting;
 “ — besides, it is evident from inspection of the pay-
 “ ments to the cashier, that very considerable balances
 “ have been retained by the factor throughout the year,
 “ which are lessened by payments made in December,
 “ and to this extent the statement of interest has not, of

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

“ course, due effect. The auditor considers it indispen-
 “ sable that the rents shall be made over to the cashier
 “ as received, so as no balance may lie in the factor’s
 “ hands more than is required for the current expendi-
 “ ture of the estate. And in reference to such an
 “ arrangement, he is of opinion, that a progressive
 “ statement of the receipts and payments ought to be
 “ exhibited with the annual accounts, as long ago
 “ suggested by him. In the meantime, it is proposed
 “ to debit the factor with interest at four per cent on
 “ the balances, from 31st December, 1826.”

2d, The conduct of the trustees, in regard to requir-
 ing payment of the balances owing by Molle from
 time to time, appeared from the following correspon-
 dence:—

On 26th April, 1828, Brown, the accountant, wrote
 Molle on these terms:— “ I beg to mention that I have
 “ now completed my audit of the Billie trust-accounts
 “ for the year 1826, and prepared the usual states;
 “ but, before closing them, it will be necessary that some
 “ arrangement be come to for the settlement of the
 “ balance on your accounts. It occurs to me, that the
 “ best plan is for you now to pay up the balance with
 “ interest, which I can state in a note in my report.
 “ Feeling the responsible and delicate situation in which
 “ I am placed, I could not docket the accounts, as
 “ approving of them, till a settlement takes place.”

On the 13th May, 1828, Pringle wrote Molle:—
 “ I expected that you would have put me in cash for
 “ L.1000 by this time, in addition to the same sum I
 “ formerly received. I called upon you this forenoon,
 “ but unluckily missed you. I therefore hope, and
 “ request that the above sum be paid up into my hands
 “ some time to-morrow, the term-day being the day

“ following, when you know heavy demands will be
 “ made upon me for the interests of the estate.”

On the 11th June, 1828, Brown wrote Pringle in these terms : — “ I beg to mention, that my report on
 “ Billie trust-accounts for the year 1826, is extended,
 “ and ready to be docqueted whenever a settlement of
 “ the factory balance is provided for. In the mean-
 “ time, as my part of the work is done, I hope you will
 “ have no objection to pay the fees, for which the
 “ bearer has a receipt.

“ I think it right to subjoin the copy of a letter
 “ addressed by me to the factor, on the 26th April last,
 “ with reference to his balance.”

On the same day, Pringle again wrote Molle : —
 “ I received a letter from Mr James Brown, the trust-
 “ account’s auditor, a copy of which I subjoin to this.
 “ You see the accounts for the year 1826 are ready to
 “ be docqueted whenever the balance due by you upon
 “ these accounts is settled. This has been once and
 “ again urged upon you, and it is absolutely and indis-
 “ pensably necessary that it be done, and that within a
 “ short time. In the situation in which I stand, I can-
 “ not possibly agree to let the matter lie longer over
 “ unsettled ; it is not consistent with my duty that I
 “ should. Not only must the balance above referred to
 “ be settled and paid up, but I must be furnished with
 “ a note from you of the precise sum in your hands,
 “ in the view that this also may forthwith be made a part
 “ of the tangible trust-funds, to be applied for the pur-
 “ poses of the trust ; and I beg leave to repeat what I
 “ formerly stated, that neither you as factor, nor I as
 “ cashier, ought to retain any of the trust-money in our
 “ hands for any length of time. I must request your
 “ particular attention to what I have stated. I do so

HOME
 and another
 v.
 PRINGLE
 and others.

22d June, 1841.

Statement.

HOMER
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ on your own account, as well as in reference to my
“ official duty as a trustee.”

On the 15th September following, Pringle acknowledged to Molle the receipt of L.1000, but pressed him for a farther payment before the expiration of the month, and at the same time told him, that at the next meeting of the trustees, he would insist upon immediate payment of all that was owing.

On the 5th February, 1829, Hunter wrote Molle in these terms: — “ I will thank you to favour me with a
“ sight of those reports in the Billie trust which Mr
“ Brown has already completed.” At this time Molle was absent in England, and the request to see the reports went off upon an answer by Molle, that on his return home he meant to have a meeting of the trustees.

A meeting was accordingly held on 4th March, 1829, and was attended by the three trustees; the entry in the minutes of the meeting upon the subject of Molle’s accounts, was, — “ The agents reported that the factor
“ and cashier’s accounts up to 31st December, 1827, had
“ been laid before the accountant. The accounts for
“ 1828 will also be soon made out, and laid before the
“ accountant.”

On the 18th March, 1829, Brown wrote Pringle, —
“ I propose now to docquet the report on the accounts,
“ ending 31st December, 1826. The balance thereon
“ of L.1971 will be introduced into the subsequent year’s
“ account, with interest; and a note will be inserted
“ in the account 1826, stating that the balance was
“ carried forward, and settled with interest in March,
“ 1829, or something to this effect. I presume the
“ fact warrants such a statement.”

About this period private communications took place between the appellant and Hunter, in regard to the

general management of the trust, and, in consequence, Hunter wrote Pringle on the 15th April, 1829, in these terms:—“ I have never yet seen any of the yearly
 “ reports of the accountant, and I certainly feel most
 “ anxious to peruse them, to note the progress of the
 “ trust, which I fear is extremely tardy, if not station-
 “ ary.” This letter was followed by very urgent letters to the same effect, addressed by Hunter, sometimes to Molle, and at other times to Pringle and Brown. At last, on 21st January, 1830, Brown wrote Hunter in these terms:—“ With regard to the Billie trust, I
 “ must own that I am to blame for so long keeping in
 “ my hands the reports on the affairs. I am now using
 “ them, and probably you will allow me to keep them
 “ in preparing a general view of the management, for
 “ the annual meeting of the trustees, to be held next
 “ month, and at that time the whole may be delivered
 “ to you. I hope that this arrangement may suit you,
 “ as it will greatly increase the trouble of preparing the
 “ view alluded to, if I must have recourse to the drafts
 “ instead of the extended reports.” Mr Hunter acceded to the request in this letter.

On the 10th March, 1830, Molle wrote Brown:—
 “ I think that Mr Pringle and I had better make out
 “ our accounts to 31st December, 1829, before you
 “ make your report of the progress of the trust.

“ I know Mr Pringle has paid from L.4000, to
 “ L.5000, of debt during last year, and it is certainly
 “ desirable that your report should be brought down to
 “ as late a period as possible. I have already begun
 “ these accounts.”

On the 10th April, Pringle wrote Brown thus:—
 “ I had prepared my accounts 1829, and yesterday put
 “ them up with the vouchers for the purpose of their

HOME
 and another
 v.
 PRINGLE
 and others.

22d June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.
22d June, 1841.
Statement.

“ being delivered you ; but I happened to see Mr Molle
 “ early in the forenoon, who told me that he was busy
 “ in preparing his factory accounts, also to be laid
 “ before you, and expects to have them ready in a few
 “ days. He therefore requested that I would not lodge
 “ my accounts till his also were completed, so that they
 “ might be all before you at one and the same time.
 “ In the circumstances of the case, I thought there was
 “ no harm in doing so. I should wish, however, that
 “ when his accounts appear, you would drop him a note,
 “ desiring him to hand you a precise state of the
 “ balance in his hands, brought up to the present time,
 “ so as you may have a complete view of matters at
 “ making out your report upon the trust-affairs. I have
 “ made out a note to that effect, regarding my own
 “ transactions, and put it up amongst with the account.”

On the 30th April, 1830, Molle sent Brown his accounts for the year ending 31st December preceding.

On the 1st of June, 1830, Brown wrote Molle :—

“ I have been expecting your answers to my notes on
 “ your factory accounts with Billie trustees, crops 1826
 “ and 1827, the reports on which I cannot close without
 “ them. I will be obliged by your supplying them
 “ without delay, as I am very much pressed, indeed, to
 “ furnish not only those reports, but my report on the
 “ trust-management since its commencement. In trans-
 “ mitting his accounts for last year, Mr Pringle has
 “ accompanied them with a note, shewing the balance
 “ on his intromissions to the day on which the accounts
 “ were rendered, and he suggests that a similar note
 “ should be supplied by you, shewing the present
 “ balance on the factory accounts. Have the goodness
 “ to supply this with the answers.”

On the 4th June, 1830, Molle wrote Brown :—

“ I send you my answers to your notes, with sundry
 “ documents called for.”

HOME
 and another
 v.
 PRINGLE
 and others.

On 18th June, 1830, Brown wrote Hunter: — “ I
 “ have prepared my report on the Billie trust-accounts
 “ for the year ending 31st December last, and will
 “ immediately draw up the general reports, formerly
 “ ordered, on the whole trust-management since its com-
 “ mencement, so as the fullest information may be
 “ before the trustees at their annual meeting, which I
 “ understand it is proposed to hold in about a fortnight.”

22d June, 1841.

Statement.

On the 29th July, 1830, Hunter wrote Molle: —
 “ I am glad to learn there is now to be a meeting in
 “ regard to these affairs, and that it is proposed to be
 “ held in the country. It should not again be so long
 “ postponed, nor does it appear to me that the want of
 “ Mr Brown’s report was a sufficient reason for this.
 “ Be so good as give me a few days’ notice of the period
 “ you and Mr Pringle may fix for the meeting, that I
 “ may be at home; and if, in the interval, you could
 “ furnish me with a note of the different matters likely
 “ to come before us, it would be very satisfactory.”

On the 7th September, 1830, Pringle wrote Hunter:
 — “ I lately received a letter from Mr Brown, along
 “ with which he transmitted me one from you to me, of
 “ date 31st ult. in which you mention that you had
 “ completed your intended report respecting the state
 “ of the Billie trust affairs, and brought them down to
 “ 31st December, 1829. Mr Brown, (to whom you
 “ sent the states,) handed me an excerpt from the
 “ general view of matters which you have exhibited to
 “ the trustees, and which shews the sum of debts, &c. as
 “ at Whitsunday, 1820, soon after the commencement
 “ of the trust, the balance of the debts and claims as at
 “ 31st December, 1829; and after application of certain

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

“ funds belonging to the trustees, shewing the amount
 “ of debt at that period, and that there has been a
 “ decrease of debt in the intervening period betwixt
 “ 1820 and 1829, to the extent of L.8075, odds.
 “ I observe that you estimate the personal funds as
 “ applicable to the debts due, both as at Whitsunday,
 “ 1820, and December, 1829, at so much ; and, in like
 “ manner, you take an annual sinking fund, commenc-
 “ ing at Whitsunday, 1820, at a particular sum, and
 “ the accumulation thereof for nine years at 4 per cent,
 “ compound interest, at a very large sum. This may
 “ be all perfectly proper and right, as, having not yet
 “ seen the states themselves particularizing matters, I
 “ cannot form any thing of a correct judgment. I
 “ would only just beg leave to say, that I could have
 “ wished that the details of the trust, and of what has
 “ actually been done, of the receipts of rents, abatements
 “ made to the tenants, arrears severally due by them,
 “ and precise yearly payments made by the trustees,
 “ whether of interests, annuities, or a variety of other
 “ expenditures, had been simply pointed out ; I mean a
 “ statement of things just as they actually appear, and
 “ what the result upon the whole in the first place ; and
 “ afterwards pointing out any plan that might appear
 “ to be more proper for conducting the affairs of the
 “ trust, than the mode that has hitherto been adopted.
 “ Most likely all this and more may appear to be done
 “ by the view of things now given. Very great pains,
 “ I am sure, must have been taken in framing the
 “ report, owing to its great length.”

On the 21st September, 1830, a meeting of the trustees was held in the house of Hunter, to whom the accountant's reports had been previously sent, but being from home when they were sent, he had not, according

to a letter written by him at the time, had an opportunity of perusing these reports previous to the meeting.

The minutes of the meeting bore, that the factor and cashier's accounts, up to 31st December, 1829, had been audited by the accountant; and that "he had completed his view of the progress of the trust, from its commencement to 31st December last; which the meeting desire the agents to communicate to Mr W. F. Home, the heir of entail, for his information."

On the 27th September, 1830, Pringle wrote Hunter thus:— "Dear Sir, — I yesterday had yours of the 24th. I can assure you, that the circumstance of the balance due by Mr Molle, the factor on the Billie trust-estate, is fully as distressing a circumstance to me, as it can possibly be to you. Neither that balance, nor a former one, I mean as it stood some time ago, and which amounted to about L.2000, I think, escaped my observation, when directed to it. I urged Mr Molle again and again, and pressed it upon him, in the strongest manner, by letter, to have it paid up. Before I say any thing farther, I may lay before you a note of the sums I received from Mr Molle, annis 1828, 1829, and 1830, so far as it is come. This I do from my note-book, which I have with me; and though I cannot positively vouch the accuracy of it, not having my books before me, it would appear to stand thus:—

" Sums received in 1828,	.	.	L.3613	14	0
" Do. Do. 1829,	.	.	6706	2	0
" Do. Do. 1830, as at September,			4339	18	0

" In the payments 1829, L.1500 was paid on 13th March, that year. I had previously stated the necessity of paying up the balance of L.2000, or thereabout, in the factor's hands, and the above payment

HOME
and another
v.
PRINGLE
and others.

221 June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ was made, I believe, (though not distinctly stated to
 “ be so,) toward reduction of the above-mentioned
 “ balance. I own that I was a good deal pleased that
 “ this was done, from whatever quarter it was procured;
 “ in consequence thereof, there remained some hundred
 “ pounds to be accounted for; and I hoped and
 “ flattered myself, that this sum also would not be long
 “ being made furthcoming, as by far the greatest part
 “ of the debt had been got rid of; and that, after what
 “ I had said upon the subject, and expressed myself in
 “ no ambiguous terms, matters would thereafter go on
 “ in their proper channel. In this, however, I have
 “ been disappointed; and notwithstanding my repeated
 “ remonstrances to have the balance, which I vexatiously
 “ saw again increasing, paid up many months ago, I
 “ found I was quite unable to effect it, notwithstanding
 “ many promises that it should be so. I am most sorry
 “ to state, that the sums constituting the present balance
 “ of L.1634, due by the factor to the trust-estate, have
 “ been most unguardedly applied to purposes altogether
 “ foreign to what they should have been. Upon this
 “ there cannot remain a doubt. At same time, I must
 “ say, that I entertain as little doubt, that when Mr
 “ Molle did so, upon different occasions, he just took
 “ the readiest, whether it belonged to one or another,
 “ or was part of his own funds; and if it was not, he
 “ just satisfied himself, that out of these funds, when
 “ they came round, he would be able to return and
 “ restore what had been most inconsiderately and rashly
 “ misapplied. Unfortunately, however, that day has
 “ not yet arrived. I do not, in the smallest degree,
 “ justify his conduct; on the contrary, it has my most
 “ decided disapprobation; and I told him that nothing
 “ could possibly vindicate or excuse it. Unquestion-

“ ably a factor has no right or title to retain any con-
 “ siderable sum in his hands, no more than to answer
 “ exigencies, say L.150, or L.200 ; he has a paid and
 “ certain stipulated allowance for his factory trouble,
 “ and he has nothing farther to demand. All monies,
 “ therefore, received by him ought to be handed over
 “ to the trustees’ cashier, and by him applied for the
 “ benefit of the trust estate, in the best possible manner.
 “ Having got this length, I find that I must endeavour
 “ to contract what I have farther to say within pretty
 “ narrow bounds. I do not see any necessity in our
 “ transmitting a joint letter to Mr Molle upon the sub-
 “ ject before me ; my idea is, that you may write him
 “ yourself as a trustee, and state to him, that after hear-
 “ ing what was expressed by me at the meeting on
 “ Tuesday last, and after examining the accountant’s
 “ report, and taking into full consideration the large
 “ balance ascertained to be due by him, it appeared to
 “ be indispensably incumbent upon him, in his capacity
 “ of factor, to pay up that balance, with interest, since
 “ December, 1829 ; and in order to make it more easy
 “ and convenient for him, that you had no objection
 “ that he pay it by two instalments, Martinmas and
 “ Candlemas next ; L.600 at the first of these terms,
 “ (as being only six weeks from this time,) and the
 “ remainder at the other term ; and that unless this was
 “ done, and the first instalment made good, satisfactory
 “ security behoved to be required for the sum then
 “ falling due, and for the subsequent instalment, with
 “ interest till payment ; and should this not be obtained,
 “ and as matters could not be allowed to go on longer
 “ in the way that they have been with regard to the
 “ factor’s payments, some other mode must necessarily
 “ be adopted, to render the management more efficient,

HOME
 and another
 v.
 PRINGLE
 and others.
 ———
 22d June, 1841.
 ———
Statement.

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

“ and the rents more regularly and punctually paid by
 “ the factor, upon their coming into his hands. If you
 “ incline to adopt those ideas I have thrown out, let me
 “ know, or say what else may, in your opinion, be
 “ thought proper to be done. I have a great personal
 “ regard for Mr Molle; and it distresses me much to
 “ think that the measures which I have now proposed,
 “ or something similar, may be thought necessary; but,
 “ in the circumstances in which I am placed, I must
 “ put out of the question my own personal feelings and
 “ sentiments of regard, when these interfere with, or
 “ come into competition with, my duties in society. In
 “ addition to what I mentioned, I would also strongly
 “ recommend, (as I stated at the meeting,) that it be
 “ made a point that the factor should, at the end of
 “ every three months, render to the cashier a particular
 “ note of the sums he has received within that period,
 “ also of his disbursements, and forthwith pay over what
 “ balance is in his hands, with the exception of L.150,
 “ or so, to answer contingent demands; and that he
 “ should lodge a note immediately of the precise sums
 “ so received and delivered since December, 1829, when
 “ the balance due by him was struck, and that what
 “ sums may appear to be due in the intervening period
 “ should be added to that balance, and included in the
 “ first instalment to be exacted at Martinmas, or
 “ divided betwixt it and the other; and that the after-
 “ states should commence from the 1st of October, and
 “ go on progressively every three months. The state
 “ of each (year’s) arrears due by each tenant should, as
 “ you observe, be also regularly handed alongst with the
 “ other. I intended to have despatched this on the day
 “ of its date, but I was out of town in course of the
 “ forenoon, and had not time to complete it in

“ course of the evening. I leave this on Thursday, and
 “ go to Knowsouth, the Sheriff’s residence, where I
 “ shall remain till Sunday, when I intend being in Jed-
 “ burgh, and to remain there till the week following, say
 “ 14th proximo, when I mean to make my departure
 “ for Edinburgh. Post town for Knowsouth, ‘Jed-
 “ burgh.’

“ P.S. — I need hardly say, that what I have stated
 “ must be received by you in perfect secrecy, and com-
 “ municated to no individual whatever; of course the
 “ letter not left exposed to inspection, it being a most
 “ vexatious and distressful matter. Of course, you will
 “ be upon your guard not to make it to be understood
 “ by Mr Molle that I have taken any part whatever in
 “ what you may write. I must also beg leave to put
 “ you in mind, that nothing be started in any other
 “ quarter, which shall be construed as interference in
 “ any respect in the management, except in reference to
 “ the sale of lands, (which, I suspect, is one of the ques-
 “ tions at present, as a partial sale would do no good.)
 “ The trustees must stand aloof from this, and be
 “ directed by their own judgment; and I shall ever,
 “ while connected with the trust, protest against any
 “ interference whatever.”

On 1st October, 1830, Hunter wrote Pringle: —
 “ Dear Sir, — I was duly favoured with your most
 “ particular letter of the 27th ultimo. I have since
 “ addressed a letter to Mr Molle, a double of which I
 “ annex. He ought, beyond a doubt, immediately to
 “ pay over the balance of L.1634 against him in
 “ December last. The system has continued too long,
 “ from motives of delicacy and feeling. I hold it to be
 “ a complete breach of faith, and an evident misappli-
 “ cation of the trust-funds, to withhold payment for

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

“ one day ; and there must be considerable funds in his
 “ hands at the present period, independent of this
 “ balance. However strong our regard may be for
 “ Mr Molle, we have a duty to perform here, for the
 “ satisfaction of conscience, and the protection of
 “ character, as well as for those more directly inte-
 “ rested. To propose to him to receive payment by
 “ instalments, would be a virtual declaration of our
 “ impression of inability on his part, which I do not
 “ wish even to insinuate ; and, moreover, a direct
 “ charge of mal-appropriation of the trust-funds, the
 “ bare supposition of which would never warrant us in
 “ continuing him in that office, without security for
 “ intromissions ; as the funds belonging to the trust, in
 “ the hands of any of the trustees, or their agents,
 “ ought never to be diverted to any other purpose, but
 “ should be tangible on demand. I hope he will at
 “ once see the necessity of remitting immediate pay-
 “ ment to you, and of furnishing a correct state of his
 “ receipts and disbursements, to the date of our last
 “ meeting. If, however, I do not hear within ten or
 “ fourteen days from you, that this has been complied
 “ with, some other plan must be adopted ; while I will,
 “ though very reluctantly, conclude that a certain un-
 “ pleasant surmise is not altogether without the shadow
 “ of foundation. This solely for your own eye.

“ P.S. — I really do submit, that in a trust-business
 “ such as this, the factor should be called upon to find
 “ security for his intromissions, &c.”

The letter written by Hunter to Molle, referred to
 in the foregoing letter, was in these terms : — “ Dear
 “ Sir, — It is with some degree of reluctance and pain-
 “ ful feeling that I advert to the subject which last
 “ engaged the attention of the Billie trustees at their

“ recent meeting. But, after giving it every conside-
 “ ration, and examining the reports by the accountant,
 “ I cannot avoid concurring with Mr Pringle in the
 “ impropriety of so large a balance being due by the
 “ factor, and of the necessity of its being immediately
 “ paid over to the cashier. The case of Mr Ainslie, to
 “ which you referred, where wealthy estates are under
 “ his management, is totally different, and the circum-
 “ stance of being charged four per cent interest, I can-
 “ not regard as any sufficient reason for so enormous a
 “ balance being due. I am sure this must be fully
 “ apparent to yourself. With the exception of what I
 “ mentioned to the meeting, of the hint I got on the
 “ subject, the two reports, or views of the accomptant,
 “ contained the first positive intimation I had; and I
 “ would have been pleased, when the matter was talked
 “ of, had you readily given the cashier an order on
 “ your account for the balance against you in Decem-
 “ ber last, being L.1634. I shall be most happy to
 “ learn that you have, ere now, done this. But I have
 “ nevertheless deemed it my duty to apprize you of my
 “ written sentiments, in a matter so essentially impor-
 “ tant to the trust. The other verbal recommendations
 “ of the meeting, as to furnishing Mr Pringle with a
 “ state of the rents realized at that date, and of those
 “ in arrear, and to quarterly render a state of accounts
 “ in future, you will no doubt give attention to, and
 “ pardon my anxiety and candour; for I shall never
 “ hesitate to express my sentiments in the trust, as I
 “ have hitherto done, whoever may be concerned, and
 “ however disagreeable, in some instances, this may be
 “ to me.”

On the 16th October, 1830, Pringle and Hunter
 wrote Molle a joint letter, in these terms:—“ Dear Sir,

HOME
 and another
 v.
 PRINGLE
 and others.

22d June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Statement.

“ —At the general meeting of the trustees on the Billie
 “ estates, held at Dunse a few weeks ago, it was noticed,
 “ amongst other things, that our auditor of accounts
 “ had, in the state of the trust-affairs lately made up
 “ by him, and laid before us, reported that there was
 “ no less a balance than L.1634 due by you, as the
 “ factor to the trust-estate, as on 31st December last,
 “ and which has never yet been paid up. You were
 “ some time ago apprised (and that repeatedly) of the
 “ necessity there was that this sum should be put into
 “ the cashier’s hands for the benefit of the trust ; and it
 “ was hoped that this would have been complied with
 “ before the meeting took place ; but the urgent recom-
 “ mendations which were given were not attended to,
 “ and matters remain at this moment as they did in
 “ December last. Upon the matter being stated at the
 “ meeting, you remarked that it was a pretty general
 “ practice for factors being permitted to retain, from
 “ time to time, considerable sums in their hands ; and
 “ as an instance of this, you mentioned the case of Mr
 “ Ainslie, Lord Douglas’ factor, who you understood
 “ was allowed to do so ; and besides, that four per cent
 “ interest was charged against you by the auditor, so
 “ that, in fact, the trust-estate did not sustain any loss.
 “ But in reference to the first of these, it may be
 “ answered, that Lord Douglas’ factor was in the use
 “ of receiving large sums from his Lordship’s estates,
 “ which perhaps were not needed for immediate use ;
 “ that the constituent was himself the proprietor, and
 “ was entitled to do with his own as he chose ; that he
 “ might grant this indulgence from personal favour to
 “ the factor ; besides, that there were no debts or encum-
 “ brances to provide against. Be this, however, as it
 “ may, the trustees are most decidedly of opinion, that

“ a factor ought not to be permitted to retain sums to
 “ any extent in his hands at any one time, but pay
 “ them over to whoever is authorized, or has right to
 “ receive them from him. Trustees have very serious
 “ and solemn duties to perform, upon their acceptance
 “ of the trust; they themselves are not the proprietors,
 “ but hold the estates intrusted to them for behoof of
 “ numerous and large creditors, (as is the case here,)
 “ and also for behoof of the legitimate proprietor, whose
 “ interest they are bound to attend to, to the best of
 “ their power. With regard to the case of interest,
 “ which was stated as meant to shew that no loss has
 “ accrued to the trustees from withholding the monies,
 “ the trustees possess no funds which can be allowed to
 “ lie at interest, (with the exception of the bank deposits
 “ from time to time;) and instead of any thing like a
 “ loan bearing interest, (which the balance before men-
 “ tioned had the appearance of, while it remains in your
 “ hands,) it is most incumbent on the trustees to apply
 “ whatever funds are tangible, or ought to be so, towards
 “ the extinction of the very heavy debt affecting the
 “ trust-estate.

“ One of us (Mr Hunter) lately transmitted a letter
 “ to the other, mentioning, that at the end of last
 “ month, he had wrote you upon the subject of the
 “ balance in your hands, as appearing from the report,
 “ and of the necessity there was of this being paid up;
 “ that it was also most necessary to render to the cashier
 “ a state of the rents received by you since rendering
 “ your last accounts, and not yet accounted for; and
 “ likewise, that you should quarterly put the cashier in
 “ possession of a state of your accounts at the time.
 “ To the contents of this letter, he complained that he
 “ had received no answer whatever; and, therefore, he

HOME
 and another
 v.
 PRINGLE
 and others.

22d June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ urged the indispensable necessity there was of our
 “ meeting, in order to consider as to what it would be
 “ right and expedient to do in regard to this very vexa-
 “ tious affair. We accordingly did agree to meet this
 “ day for the above purpose ; and after having delibe-
 “ rately considered the state of matters, and viewed
 “ them in all their bearings, we have come to the fol-
 “ lowing conclusions :— 1st, That you should forthwith
 “ pay up the balance of L.1634 ascertained to be in
 “ your hands, with interest at four per cent from
 “ December last. 2d, That you hand over to the
 “ cashier an exact account of your receipts and expen-
 “ diture in relation to the trust affairs and management
 “ since December to this date, and settle what balance
 “ may appear to be due thereupon. 3d, That you also,
 “ in future, render to the cashier, at the end of every
 “ three months, a statement of accounts, shewing the
 “ sums then in your hands, and pay over the same, with
 “ the exception of what may be considered absolutely
 “ necessary to be retained for periodical and occasional
 “ advances ; that statement to be accompanied also with
 “ a correct note of what arrears may be due by the
 “ tenants on the estates, or any of them. And lastly,
 “ That you should find proper security for all your
 “ intromissions during the subsistence of your factory.
 “ The rendering a state of your accounts quarterly,
 “ also the propriety of granting security as above, have
 “ been before now signified by Mr Brown, the auditor,
 “ as a proper thing which any factor should be obliged
 “ to do.
 “ If there is any other satisfactory mode which you
 “ can propose for extricating matters, and putting them
 “ henceforth upon a more desirable footing, and which
 “ we can consistently approve of, we will certainly pay

“ that attention to it which it may deserve ; but it must
 “ be such as will be efficient, and will, with certainty,
 “ accomplish the purpose, which, in the character of
 “ trustees, and acting, as we are bound to do, for the
 “ benefit and advantage of the trust-estate committed
 “ to our charge and management, we have in view to
 “ promote to the best of our power.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ We request your answer to this in the course of a
 “ few days, and you will be so good as transmit a dupli-
 “ cate of it to each of us.”

On the 23d October, 1830, Pringle and Hunter complained to Molle of not having received any answer to their letter of the 16th. And on the 29th of October, Pringle wrote Hunter : — “ Dear Sir, — Before I
 “ despatched on Saturday last our joint letter to Mr
 “ Molle, I received one from him, of date the 20th,
 “ saying that he had received ours of the 16th, (from
 “ Kelso ;) that he proposed being in Edinburgh in a
 “ fortnight, when he would advise with his friends on
 “ the subject, and write me. Of this letter, he men-
 “ tions having sent a duplicate to you. Before sealing
 “ our letter, I addressed a postscript to him, that this
 “ was treating the trustees in a very extraordinary
 “ manner ; that I held his letter as a mere nothing ;
 “ and that it only confirmed me more and more in
 “ what we must now absolutely do. The eight days
 “ which we gave for the performance of what we re-
 “ quired of him, will expire to-morrow. I am quite
 “ satisfied that things are now come to that point when
 “ decisive steps must positively be taken. It has
 “ occurred to me that one necessary mode to be
 “ adopted is forthwith to raise an action of count and
 “ reckoning against him, in one respect, for the pur-
 “ pose of immediately obtaining letters of inhibition

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ upon the dependence, so as to strike against future
 “ contractions; and concluding against him, 1st, For
 “ the ascertained balance of L.1634; and, 2d, For
 “ count and reckoning on account of his whole intro-
 “ missions, and libelling for payment of a random sum
 “ on that account, in the meantime; but more must be
 “ done. The factory must most undoubtedly imme-
 “ diately be recalled. There is a little difficulty in
 “ accomplishing it, so as that it may be done as quietly
 “ as possible, as we have so many tenants to do with.
 “ In the view of the summons and consequent inhibi-
 “ tion, I mentioned it to Mr George Turnbull, W.S.
 “ who has been all along acquainted with the business,
 “ and I find he has no objection to undertake raising
 “ the action. It has also occurred, that if we can get
 “ Mr Molle to resign at once, without absolutely certi-
 “ fying him that we have absolutely recalled his powers
 “ of factory, it would be the best and most agreeable
 “ mode of accomplishing our object; and in that case,
 “ he himself might notify to the tenants, or such as it
 “ may be necessary to do so to, at the time of his having
 “ determined to sign a resignation of his factory, and of
 “ his having actually done so; and in that view, and in
 “ order to expedite matters, I think it advisable that
 “ Mr Turnbull, who has been long in habits of intimacy
 “ with him, and formerly connected with him in busi-
 “ ness, should go out in the Union Coach to-morrow,
 “ call upon Mr Molle at Netherbyres, explain to
 “ him the reason of his coming out, and endeavour to
 “ prevail with him forthwith to subscribe a letter of
 “ resignation, which may save a good deal of trouble.
 “ As to the notifications which may be necessary to be
 “ given to the several tenants, Mr Turnbull, returning
 “ by Dunse, will inform you of the result of his applica-

“ tion. Should it so happen, however, (though I hardly
 “ think it will,) that Mr Molle refuse to comply with
 “ what is required of him, then we must address another
 “ joint letter to him, explicitly recalling his powers
 “ under the factory, and declaring it at an end. And
 “ upon the supposition that this may be necessary, I
 “ beg leave to enclose you a letter signed by me, and
 “ to be also signed by you, and addressed to Mr Molle,
 “ to the above effect; and upon this, intimation must
 “ be made to the tenants as quietly and delicately as
 “ possible, so as to be an interdict in the meantime
 “ against their making any payments. I have, in like
 “ manner, enclosed an authority, under both your and
 “ my hands, for adopting the mode which may seem
 “ most proper and suitable for the purpose.

“ I am most dreadfully teased with this business,
 “ what with thinking, writing, and copying, there is no
 “ rest. Since writing the above, I have received another
 “ letter from Mr Molle, of yesterday's date, as follows :
 “ — ‘ The letter by you and Mr Hunter, dated 23d
 “ ‘ inst. has distressed me much, and I would have
 “ ‘ come to town immediately on receipt of it, but I had
 “ ‘ made some previous engagements on business, which
 “ ‘ has prevented me. I shall, however, be in town on
 “ ‘ Wednesday or Thursday next, when I shall make
 “ ‘ a payment, and enter on the consideration of future
 “ ‘ arrangements.’

“ This is perplexing in the extreme. What payment,
 “ or to what extent he means to make the same, I know
 “ not. Still I think it right that Mr Turnbull go out,
 “ so as that matters may not be slackened, and he may
 “ produce some decided favourable effect upon him ;
 “ and in place of enclosing the letter before mentioned
 “ by us for Mr Molle, and the other, respecting the

HOME
 and another
 v.
 PRINGLE
 and others.

22d June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ intimation to the tenants, I will deliver them to him
 “ to be put into your hands, and after seeing Mr Turn-
 “ bull, and hearing what may have passed betwixt him
 “ and Mr Molle, you will be enabled to judge whether
 “ the steps alluded to should be forthwith taken, or not;
 “ or whether you may delay them till your coming here
 “ and meeting with him; or whether, if Mr T. may
 “ inform you that he is disinclined at present to resign,
 “ you may consider it proper to despatch to him our
 “ joint letter of revocation of the factory. It would, no
 “ doubt, be extremely distressing to break him down,
 “ if the interest of our trust did not positively demand
 “ without delay, the adopting of the most compulsory
 “ measures.

“ As you are to be in town against Tuesday, I wish
 “ you would take breakfast with me on the morning of
 “ that day, at half-past nine or ten.

“ P.S.—Upon second thoughts, I think it as well to
 “ enclose you the letter and intimation, which you will
 “ keep till you see Mr Turnbull, and have some con-
 “ versation with him.”

Turnbull accordingly went to Molle's house, as sug-
 gested in Pringle's letter; and on the 30th of October,
 he procured, and sent to Hunter, Molle's resignation of
 the factory in his favour.

From this time Molle ceased to have any intromission
 with the trust-estate, and on the 30th of November,
 1830, he resigned the office of trustee. Molle's accounts
 were then put into the hands of Brown the accountant
 to be audited, and according to his report, the balance
 owing from Molle to the trust-estate, at the date of his
 renouncing the factory, on 30th October, 1830, was
 L.3775, 1s. 11d.

From the correspondence admitted as evidence, it

appeared, that Hunter had throughout objected to any reduction of the rents payable from the tenants, and that in regard to this matter, if there were blame any where, none was imputable to him.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

It farther appeared, in regard to the trust generally, that so early as the year 1821, and throughout the period of the correspondence which has been given, the conduct of Molle and Pringle in the management of the trust was from time to time the subject of communication between the appellant, W. F. Home, and Hunter, the latter using his character of trustee to obtain information from his co-trustees, that he might communicate it to the appellant.

On Molle's resignation of the trust, Hunter and the appellant, W. F. Home, contrived together how Pringle might be induced to take the same course. In consequence, Hunter wrote Pringle some angry letters, imputing the loss sustained through Molle to his (Pringle's) account, and threatening legal proceedings against him. The result was, that Pringle resigned the trust on the 7th January, 1831. Hunter then became sole trustee, and continued such until his death in January, 1833.

It was in these circumstances that the appellant brought his action; and in the course of it, the appellant, Mylne, was appointed judicial factor on the trust lands, and was allowed by the Court to sist himself as a pursuer of the action. Upon advising the record, the Lord Ordinary, on 17th March, 1836, pronounced the following interlocutor :¹ — “ Finds, That by the settle-

¹ “ *Note.* — There are various conclusions in this summons which present no difficulty, and which, indeed, were hardly touched on in the argument before the Lord Ordinary.

“ 1st, Considering the large discretionary powers conferred by the trust-deed on the trustees, in regard to the expenses of management, the Lord

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ ments of the late George Home of Wedderburn and
 “ Paxton, William Molle, writer to the signet, the late
 “ William Pringle, and the late James Hunter, were
 “ appointed trustees for carrying those settlements into

“ Ordinary sees no ground for questioning the amount of the salaries allowed
 “ to the cashier, factors, or agents ; upon which it may also be remarked, that
 “ comparing the present system of management followed by the pursuers
 “ themselves with that under the trust, the former is considerably the more
 “ expensive of the two.

“ As to the appointment to those offices of persons holding the situation of
 “ trustees, the Lord Ordinary has to observe, that the impropriety, inexperience,
 “ diency, and hazard of such a course, is well exemplified in the present case.
 “ Considering the evident consequences of such nominations, by which the
 “ interest of the same individual, as an officer under the trust, may, and in
 “ many cases must, be placed in opposition to his duty as trustee, much might
 “ be said against their legality. But, taking into view the notoriety of the
 “ practice, and the extent to which it has been carried in this country, without
 “ any attempt at challenge, the Lord Ordinary does not consider himself
 “ warranted in sustaining this circumstance as a substantive objection to the
 “ trust-management.

“ 2dly, In regard to the conclusion for ‘ malversations ’ committed by the
 “ trustees, it must be at once dismissed, as the record contains no specific
 “ statements of any malversations requiring farther inquiry.

“ 3dly, The same remark applies to the general conclusion for accounting.
 “ The whole accounts, audited by an accountant of character, are now, and
 “ have been from the beginning, in process, and in so far as the Lord
 “ Ordinary is aware, there is no objection to any of the articles of them,
 “ except those connected with the balance due by the factor, Mr Molle.

“ Indeed, from what took place at the debate, that appears to the Lord
 “ Ordinary to form substantially the only ground of dispute between the
 “ parties ; and in regard to it, he has found it necessary to make a material
 “ distinction between the case of the late Mr Hunter and that of Mr Pringle.
 “ Against the former and his representatives, the claim seems to be ground-
 “ less. Mr Hunter, though a trustee, took, or rather was allowed, little or
 “ no share of the management. He was resident in Berwickshire, and acted
 “ as the country agent of the trust. Mr Pringle and Mr Molle, the other
 “ two trustees, resided in Edinburgh ; being a quorum, they had the means
 “ of carrying on the management, without requiring the presence of Mr
 “ Hunter at their meetings ; and the inference fairly to be drawn from the
 “ correspondence is, that they were not disposed to admit him into the
 “ management, farther than was absolutely necessary. Accordingly, the
 “ Lord Ordinary is satisfied, on a perusal of the documents, that the late Mr
 “ Hunter was, from the year 1822, entirely in the dark as to the true state
 “ of the factor’s accounts, and the continued balances allowed to remain in
 “ his hands. It also appears, that from the 5th of February, 1829, he made
 “ constant attempts, though unsuccessfully, to get access to those accounts,
 “ and it was not until the end of September, 1830 that they were put into

“ effect : Finds, that on the 17th of March, 1820, being
 “ the first meeting of the said trustees after the truster’s
 “ death, William Molle was appointed factor, and the
 “ said William Pringle cashier, each with a salary, in 22d June, 1841.

HOME
 and another
 v.
 PRINGLE
 and others.

Statement.

“ his hands. From that time he did every thing in his power to obtain pay-
 “ ment from Mr Molle ; and, indeed, it is to his exertions that the ultimate
 “ recall of the factory may be ascribed.

“ In these circumstances, considering the exuberant confidence reposed in
 “ the trustees by the trust-deed, the reliance Mr Hunter was fairly entitled
 “ to place in the acting quorum of the trustees, Mr Pringle and Mr Molle,
 “ two professional persons of the first respectability, the backwardness of those
 “ gentlemen to communicate with Mr Hunter, his ignorance of the factor’s
 “ balances, and his anxiety and activity from the moment his suspicions were
 “ roused, and his attention called to the matter, the Lord Ordinary must
 “ hold, that Mr Hunter and his representatives are fully entitled to the
 “ benefit of the protecting clauses of the trust-deed ; and he may farther
 “ observe, that the charge made in this clamorous summons against the late
 “ Mr Hunter, of entering into a corrupt compact with the late Mr Pringle,
 “ by which he, Hunter, abandoned the action he had raised against Mr
 “ Pringle, in consideration of Pringle resigning the trust in his favour, seems
 “ most absurd and unwarrantable, now that it is established by the docu-
 “ ments in process, that Mr Hunter truly acted in those matters as the
 “ instrument of the pursuer, the heir of entail, and an instrument which,
 “ considering the somewhat extraordinary and unscrupulous proposals made
 “ to him in the course of those proceedings, the pursuer evidently viewed as
 “ completely under his power. Upon all these grounds, the Lord Ordinary
 “ has thought himself bound to award expenses to the representatives of Mr
 “ Hunter.

“ The case of Mr Pringle is very different, though, in one particular, viz.
 “ the fairness and good faith of his actings, his character stands perfectly
 “ unimpeached. The whole charges made against him in the summons, of
 “ wilful violation of his duty, and corrupt connivance at the dilapidation of
 “ the trust-funds, appear to be utterly without foundation, and might have
 “ been spared. At the same time, the Lord Ordinary is compelled to hold,
 “ that there was such a constructive violation or neglect of his duty, as to
 “ render him liable for the consequences. It is true, that by the trust-deed,
 “ the trustees are protected from any farther liability for their factor, than
 “ that he shall ‘ be habit and repute responsible at the time of entering upon
 “ office ;’ and it also appears, that Mr Molle was habit and repute responsible,
 “ not only at the time of entering upon his office, but until a very short time
 “ indeed, before the public declaration of his bankruptcy. But the present
 “ case, like every other of the kind, must depend upon its special circum-
 “ stances. Now here, Mr Pringle was not merely a trustee receiving the
 “ allowance granted by the truster, he was the cashier, appointed by himself
 “ and his co-trustees, with an additional salary. It was his duty, and he had
 “ the power, to ascertain the state of the factor’s accounts, and to restrict his
 “ balances within a reasonable amount, whatever delay might occur in the

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ addition to the sum allowed to them by the trust-
“ deed for ‘ their trouble in the management:’ Finds,
“ that in virtue of this appointment, Mr Molle had
“ large intromissions with the rents of the trust-estate :
“ Finds, that from December, 1822, large annual
“ balances were due by the factor on his intromis-
“ sions, and were never fully paid up : Finds, that the
“ management, in terms of the above mentioned ap-
“ pointments, continued until the 29th of October,

“ formal auditing of those accounts by the accountant, — a delay which, in
“ this case, occasionally extended to years after the accounts were given in, —
“ the cashier, whose province it was to collect and apply the trust-funds to
“ the proper purposes of the trust, was bound to inquire, and to know how
“ the factor’s account stood. It is proved by the documents in process, that
“ he did know, and that the irregularity of the large balances retained by the
“ factor was repeatedly noticed by the accountant. Mr Pringle’s case, then,
“ is not merely that of a trustee, relying on the circumstance of a factor being
“ habit and repute responsible ; for Mr Pringle, as trustee and cashier, had
“ the means of knowing, and knew that whatever might be Mr Molle’s
“ general character for solvency, he was in the habitual violation of his duty
“ as factor, and was either unable or unwilling to account properly for the
“ trust-funds. Having this information, Mr Pringle neither required cau-
“ tion, nor communicated the matter specially to his co-trustee, Mr Hunter,
“ for the purpose of recalling the factory ; but knowing, as he did, at the end
“ of the year 1829, the large balance in the account of that year due by the
“ factor, he allowed him to go on collecting the rents for the year 1830, thus
“ increasing the balance to a great amount, if not to the sum actually con-
“ cluded for. It is quite possible, and indeed there is no reason to doubt,
“ that this conduct on the part of Mr Pringle proceeded from an ill founded
“ reliance on Mr Molle’s solvency, and from a reluctance to take strong
“ measures against a person with whom he was on a footing of intimacy and
“ confidence. But it appears to the Lord Ordinary, that the consequences of
“ this mistaken confidence must be borne by him, and not by the trust-estate,
“ of which he was the guardian.

“ Before concluding, the Lord Ordinary feels himself called upon to notice
“ the enormous accumulation of documentary evidence with which this process
“ has been encumbered. That of the pursuer extends to 300 pages of print,
“ while on the part of the defenders there are about 200 more. It is true,
“ that this case, turning much upon written evidence, required the printing of
“ documents to a certain extent. But he must say, that this mass of pre-
“ tended evidence, whether the indiscriminate admission, or confused
“ arrangement of its contents be considered, has had the effect of obscuring,
“ rather than of elucidating, the points in dispute, and may form a fit subject
“ of consideration in discussing the point of expenses.”

“ 1830, when the said factory was recalled by the co-
 “ trustees, the late William Pringle and the late James
 “ Hunter : Finds, that on the following day, the bank-
 “ ruptcy of the said William Molle was declared, and
 “ that a large balance was then due by the said William
 “ Molle, as factor to the trust-estate, amounting, accor-
 “ ding to the pursuer’s statement, to the sum of L.5729
 “ sterling : Finds, that the object of the first conclusion
 “ of the present summons is to fix upon the defenders,
 “ the representatives of the said William Pringle and
 “ of the said James Hunter, a liability for the said
 “ balance : Finds, that the said late William Pringle
 “ being not only a trustee, but having been appointed
 “ cashier, with an additional salary, undertook in that
 “ double character the special duty, and had the special
 “ means of superintending and controlling the actings
 “ and the accounts of the factor and co-trustee, Mr
 “ Molle : Finds it established by the documents in pro-
 “ cess, that the late William Pringle was apprised of
 “ the factor’s irregularity in failing to pay up and
 “ account for the annual balances of his intromissions :
 “ Finds, that the said William Pringle, though thus
 “ aware of the factor, Mr Molle’s, violation of his duty,
 “ took no steps, either by requiring caution, or insisting
 “ for payment, or recalling the factory, for securing the
 “ trust-estate against the consequences of the irregulari-
 “ ties of the factor, of which he was so cognizant : Finds,
 “ that in these circumstances, the late William Pringle
 “ did incur a liability for the loss ultimately occasioned
 “ to the trust-estate by the failure of the said factor,
 “ William Molle : Therefore, finds the defenders, the
 “ representatives of the said William Pringle, liable for
 “ the balance due by the said William Molle as factor,
 “ and appoints the case to be called, that this balance

HOME
 and another
 v.
 PRINGLE
 and others.

22d June, 1841.

Statement.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Statement.

“ may be precisely ascertained, but assoilzies the said
“ representatives from the other conclusions of the libel,
“ and decerns; and in regard to the defenders, the
“ representatives of the late James Hunter, assoilzies
“ them from the whole conclusions of the libel, and
“ decerns: Finds them entitled to their expenses, and
“ allows an account thereof to be given in; and to be
“ taxed by the auditor.

“ JOHN FULLERTON.”

Judgment of
Court.

The appellant and Pringle’s representatives reclaimed to the Inner House. The Court ordered cases for the parties, and on advising these, pronounced the following interlocutor: — “ Recall that part of the interlocutor
“ complained of, which finds the representatives of the
“ late James Hunter entitled to expenses, and finds no
“ expenses due to either party; quoad ultra, adhere to
“ the interlocutor, and refuse the desire of this note.”

And upon the reclaiming note for Pringle’s representatives, their Lordships pronounced the following interlocutor: — “ Recall the interlocutor reclaimed against,
“ assoilzie the complainers from the conclusions of the
“ libel, and decern; but find no expenses due to either
“ party.”

Against this interlocutor the appeal was taken, and at the same time Hunter’s representatives took a cross appeal against that part of it which found them not entitled to expenses.

Appellant’s
Argument.

The Appellant. — 1. As to the balance on Molle’s accounts. The general rules of law preclude trustees from appointing one of their number to be factor under them. The trust-estate is entitled to the supervision of

the whole body; but if one be made factor, separate interests arise, and as to him, this supervision is lost. A sole trustee could not appoint himself factor, and a body of trustees cannot throw out one of their number from the trust by thus neutralizing him.

If the general principles be as stated, it is only the special terms of the deed under which the trustees act which can warrant a deviation from the rule. Here the terms of the deed preclude the notion of any intention by the truster to authorize the appointment of one of the trustees to be factor, and lead to the opposite conclusion.

With regard to any practice that may have prevailed in Scotland, or have been sanctioned by the Courts there, the law is not conclusively settled until it has the authority of this House, *Montgomerie v. Wauchope*, 4 Dow. 109; and if the practice be against principles, upon which all laws are founded, this House will not hesitate to correct it; *Stewart v. Fullerton*, 4 W. and S. 196.

Here the trustees appointed one of their own number to be factor, and with a salary; and were thus guilty, not of a moral, but of a legal fraud upon the trust, as it is viewed by Courts of Equity. Though Hunter was not present at the appointment, yet he concurred in it so far, that he never took any measures to disturb it, which he was bound to have done. Molle, therefore, was the agent of his co-trustees, and they are bound by his acts; and in this view they are liable to make good the deficiencies upon Molle's accounts; *Moffat v. Robertson*, 12 S. D. and B. 369; *Blair v. Paterson*, 14 D. B. and M. 361. It is no answer to this, that the duty of settling the accounts was devolved upon an accountant. It was never intended that the accountant was to

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Appellant's
Argument.

HOME
and another
v.
PRINGLE.
and others
—
22d June, 1841.
—
Appellant's
Argument.
—

supersede the trustees, — his duty was to adjust and settle the accounts of the trustees as a body; but their duty remained, to keep their factor close in his accounts and balances. The attention of the co-trustees was called by the accountant to the state of the balances so early as in his notes upon the accounts ending at 31st December, 1823; and though it may be that Hunter was kept ignorant, comparatively, of what was going on under the trust, and of the state of the balances, it was his duty to have made himself, and he must be taken to have been, acquainted with this, more especially as he signed the minutes of the annual meetings; *Charitable Incorporation v. Sutton*, 2 Atk. 406. Neither is it any answer, that both Pringle and Hunter acted in good faith. There cannot be any inquiry as to this, — the broad rule is strict observance of their duty, and their conduct, not their motives, can alone be looked at.

2. The giving of salaries to trustees in the character of officers of the trust, is contrary both to law and principle; *Brocksopp v. Barnes*, 5 Madd. 90; *Sheriff v. Axe*, 4 Russ. 33; *Ayliff v. Murray*, 2 Atk. 58; *Robinson v. Pett*, 3 P. Wms. 249. The respondents, therefore, are liable to make good to the trust the allowances to Molle as factor, and Pringle as cashier, from the commencement of the trust.

3. There ought to be a general accounting and inquiry into the whole management of the trust. This the appellant was entitled to, without the necessity of stating any objection to the accounts rendered. The delegation to the accountant by the trust-deed cannot deprive the party beneficially entitled of an inquiry, unless the deed so declares, which it does not; besides, though the accounts of the individual trustees may have been examined by the accountant, it does not appear

that the general accounts of the trust have been adjusted ; and it cannot but strike the House, as extraordinary, that a trust-estate, having a revenue of between L.7000 and L.8000 a-year, should, in ten years, have discharged only about L.9000 of debt, out nearly of L.70,000.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Appellant's
Argument.

[Four counsel appearing at the bar for the respondents, the Lord Chancellor intimated, that the rule of the House was to hear one counsel for each party ; but if the cases of the two parties differed, the House would hear counsel on the points of difference, otherwise the rule must be observed.]

Sir W. Follett.—We will confine ourselves to the points which distinguish Hunter's case from that of Pringle.

The Respondent Pringle.—The question here is one purely of Scotch law, upon which English authorities cannot have any bearing. Whatever may be the rule in England, there is nothing in the law of Scotland to prevent trustees appointing one of their members to be their factor. In *Wauchope v. Montgomerie's Trustees*, 4 Dow. 130, Lord Eldon recognized the difference in the law of the two countries, as he did also in *Stair's Trustees*, 2 Wil. and Sh. 622. The appointment of one of their own number to be factor, does not alter the self-liability of the other trustees. The case, therefore, must be judged on the same principles as if a third party had been appointed.

Respondent's
Argument.

Trustees are not liable for mere negligence, but for negligence amounting to *culpa lata*. This non-liability arises from the gratuitous nature of the office, and was introduced by the act 1696 in regard to curators for minors ; Ersk. I. 7. 27 ; the same principle applies to

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Respondent's
Argument.

trustees. But more especially must their liability be thus limited, where, as in this case, they act under a clause of immunity; *Ainslie v. Cheape*, 13 S. and D. 417; *Cowan v. Crawford*, 13 F. C. 628.

At the time at which Molle was appointed factor, both his character and his credit were above suspicion. To require security from him appeared, therefore, to be superfluous, and the trust-deed did not prescribe that security should be taken from the factor. Can the omission to require this security be called *crassa negligentia*?

[*Lord Chancellor.* — The question is, whether the act of appointing one of their own number is not an act of intromission by the trustees, by placing in the hands of the factor, one of their own number, funds, which, otherwise, would not have been in the hands of the trustees.]

There is not any authority for saying that the mere signing of the factory would make such an act of intromission as must subject the trustees signing. In all the cases, the appointment was made without authority by the trust-deed, under which the parties were acting. The factor, therefore, was the mere agent of the trustees, for whose acts they were liable. But here there was a power given to appoint, and the party appointed is thus the factor of the trust. But can the appellant, Home, be allowed to challenge the appointment. He was himself present at the meeting at which it was made, and though he did not concur in the appointment at the time, because he wished the office for himself, yet he did not object to it then, nor afterwards, during the ten years which Molle held it.

If the appointment were not in itself invalid, so as to make the trustees liable for the consequences, there was

not any thing in their management of the trust otherwise that could subject them in liability. The accounts shewed, that although there were balances in each year against the factor, yet they were paid off in the course of the subsequent year. If the factor had been a third party, and solvent, like Molle, could it have been alleged against the trustees as *crassa negligentia*, that they had not required security for payment of these balances? The case is just one of those intended to be provided for by the clause of immunity. The cases of *Syme v. Charles*, and *Blane v. Pattison*, were both instances of gross negligence, and in the first, the appointment of factor was without any power to warrant it.

With regard to a general account, it was no part of the case in the Court below that this had not been gone into, — the only ground there taken was liability for Molle's balance.

The cross appeal, though on the subject of costs, is competent, inasmuch as the rest of the case was brought up by the original appellant. This was decided in *Tod v. Tod*.

Hunter's Representatives. — Hunter did not hold any office under the trust; and even as such, there were few of the meetings at which he was present, — his co-trustees had refused to allow the expense of his coming to Edinburgh, where their meetings were held, and in effect excluded him from any interference, — he was forced, therefore, to rely on the others; and if he had gone into Court to complain, he would have been remediless, as the others were a quorum, and, as such, had the full powers. In this way Hunter knew nothing of the balances until 1829, and immediately he became active and urgent in insisting upon payment.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Respondent's
Argument.

22d June, 1841.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Ld. Chancellor's
Speech.

LORD CHANCELLOR. — My Lords, it appears in this case, that by the first deed of the 16th of July, 1816, George Home disposed and made over his estates to, and in favour of, three trustees, David Renton, William Pringle, the respondent, and John Renton, who were to execute and manage the trust in succession, without the interference of the others; and it was provided, amongst other things, that they should have power to name and remove factors from time to time, with such powers, and liable to such diligence, as the trustee or trustees should think fit; and to pay such factors such salaries as they should see fit; and to settle accounts annually with such factors, and upon payment of what should be found due, to exonerate the factor; and within six months after each clearance with the said factors, to make up their own accounts, and to get the same approved by an accountant of character in Edinburgh; and if such accounts should be approved by the said accountant, such approbation was to operate as a full exoneration of the trustee or trustees during the currency of such account; and it was provided, that such trustees should nowise be obliged to do diligence, otherwise than as they should think fit; nor should be liable for any omissions, but only each of them for himself, and his own actual and personal intrusions; nor should they be farther liable for their factors, than that they should be “habit and repute responsible at the time of entering upon their office.”

Amongst other trusts for the application of the income, was the payment of the yearly sum of L.100, as a gratification to the acting trustee or trustees for their trouble in the management. The trusts, it appears, only affected the rents; these were to be applied in payment of the

debts and legacies of the truster, and the interest of charges, and public burdens, and repairs, and the residue in payment of all remaining debts of the truster; and upon fulfilment of all the purposes of the trust, the trustees were to convey to the party entitled under another deed, by virtue of which the pursuer is entitled to the estate, as first heir of entail, to whom the trustees are to account for their intromissions and management.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Ld. Chancellor's
Speech.

By another deed, dated the 6th of August, 1819, George Home appointed William Molle, the respondent, William Pringle, and James Hunter, trustees, in the place of those named in the former deed, but with a declaration that the majority should be a quorum for executing the trusts, and not in other respects altering the provisions of the former deed.

Soon after the truster's death, in 1820, the three trustees met, and, Mr Home, the pursuer, being present, appointed William Molle to be factor, with a salary of L.180 per annum; and William Pringle cashier, with a salary of L.50 per annum; and on the 22d of March, 1820, a regular deed of factory was granted to Molle accordingly.

The real question in the cause, is the liability of Pringle and Hunter for the sum due from Molle as trustee, or factor, at the time of his insolvency in October, 1830; and the grounds upon which the charge is sought to be maintained, are principally, — 1st, That the appointment of one of the trustees to be factor, was of itself a breach of trust, and subjected the parties to it to all the consequences resulting from it; and 2d, That there was such gross negligence in Pringle and Hunter, in permitting Molle to keep balances in hand, as to subject them to liability for the balance due from him.

Such, at least, are the points into which the claims of

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Ld. Chancellor's
Speech.

the pursuers are to be resolved, and which it is important to keep separate, in order to come to a right understanding of the principles of law applicable to this case, which has not, I think, been sufficiently done in some of the proceedings.

As to the first, it is said that there is a difference between the law of England and of Scotland. In England, the appointment by trustees of one of their body, to act exclusively in any part of the trust, under the authority of all, would, as to the others, have the effect of making the trustees appointing responsible for the act of the one appointed; that is, they could not treat acts done, or sums received by such appointee, in the character so conferred upon him, as the acts or receipts of a co-trustee, for which they, as co-trustees, would not be liable, but as acts and receipts of their agent, for which they would, or would not, be liable, as there might be proof of culpable neglect in their dealings with such agent. The allowance of a salary to such appointee would clearly be a breach of trust, and would therefore be disallowed.

But it is said, that the practice, if not the law of Scotland, sanctions such appointment, and the case of *Montgomerie v. Wauchope*, Faculty Collection, June 4, 1822, is referred to in proof of that proposition. Nothing was decided in that case upon that point, but the Judges stated, that such appointments were not inconsistent with the law of Scotland, and that a trustee, appointed by his co-trustees, was entitled to the usual remuneration of an agent or cashier. This is the real question, because it is not necessary to hold that the appointment is illegal, in order to maintain the principle, that the party who, having accepted the office of trustee, which; unless otherwise provided for by the trust, must

be performed gratuitously, accepts another office inconsistent with that of trustee, shall not be permitted to derive any emolument out of the trust-property, in respect of such employment. That the office of trustee, and of factor or cashier to the property, are inconsistent, cannot be disputed. If the execution of the trust require such appointments, it becomes the duty of the trustee to exercise his discretion and judgment in the selection of the officers, and his vigilant superintendence of their proceedings when appointed, all which is lost to the trust when a trustee is appointed to the execution of those duties. Therefore the Courts of Equity in England, in such cases, refuse to the trustee any remuneration, which would come to others from the appointment, which produces the salutary effect of deterring trustees from making such appointment when not actually required; and when such necessity exists, preserves to the trust the superintendence and control of the trustees over the officer they may appoint. I should be sorry to give any sanction to a contrary practice in Scotland. There can be no reason for any difference in the rule upon this subject in the two countries. The benefit of the rule, as acted upon in England, is not disputed, and as there is no decision to the contrary, there cannot be any reason for sanctioning a contrary rule in Scotland.

In the view I take of the present case, there will not be any necessity for expressing any farther opinion upon that point. In England, the appointment of one of the trustees to act as receiver, and manage the property, and collect the rents, would not, per se, make the other trustees responsible for his acts; but it would make the trustee so appointed, the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Ld. Chancellor's
Speech.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Ld. Chancellor's
Speech.

and receipts of a stranger appointed to such office, but not otherwise; and in Scotland, where such appointments are treated with more indulgence, the consequences cannot be more stringent. It appears, indeed, from the cases of *Sym v. Charles*, 8 Shaw and Dunlop, 741; *Moffat v. Robertson*, 12 Shaw and Dunlop, 369; *Ainslie v. Cheape*, 13 Shaw and Dunlop, 417; and *Deane v. Paterson*, 14 Shaw and Dunlop, 361; that the Court of Session have acted upon this principle.

The first ground, therefore, upon which the appellant seeks to fix Pringle and Hunter with the balance due from Molle, I think, wholly fails. But, secondly, considering Molle as the agent and receiver of the other trustees, have they, in their transactions with him, been guilty of such negligence as to make them responsible for the acts of their agent? For I have not been able to follow the reasoning by which it seems to have been supposed, that Mr Pringle, by accepting the office of cashier, incurred any additional responsibility as to the acts or receipts of Mr Molle. That office may indeed have afforded him opportunities of knowing the state of Mr Molle's accounts, and have given him earlier notice of his malversations; and such knowledge and notice may be important in considering his liability, but such liability must attach to his office of trustee, and not of cashier.

The question, then, is, What is the case established against Mr Pringle and Mr Hunter, of culpable negligence in dealing with their factor, Mr Molle. The trust deed directs, that the trustees should settle accounts annually with their factors, and upon payment of what should be found due, exonerate and discharge them from their intrusions and management, and within six months of each clearance with the factor, make up their

own accounts, and get them approved by an accountant. This seems to assume, that the amount so to be settled with the factor was to include the whole of his receipts and payments up to the time of the settlement; but that is not possible. It is the usual course, that such accounts should be made up to a certain time, and there must necessarily be a running account not included in any such statement. No doubt, this affords the means to a factor of keeping a balance in hand, which does not appear upon the face of his accounts. He may delay receiving a sum of money until after the time to which the account is made up, in order to keep down the apparent balance. But however dishonest such contrivances may be in the factor, they cannot impose any responsibility upon the trustees by whom he is employed, unless they are parties to, or cognizant of, them, and it is obvious, that in the management of a considerable property, it is indispensably necessary, to leave a certain balance in the hands of the manager, to meet the current expenses.

It appears, accordingly, that in Mr Molle's accounts for 1822, considerable balances were in his hands on the 31st of December of each year; but that in each of those years such balances were more than paid by the month of March or April in the following year, excepting the year 1827, in which the preceding balance was not exceeded by subsequent payments till the month of September. It is true, that in the interval he had received sums equal to, or exceeding, his subsequent payments, so that his actual balance, was not reduced; but of that the trustees had not necessarily the means of information. The balance to the 31st of December, 1829, was L.1634, which was more than covered by subsequent payments by the 7th of April, 1830.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

L.d. Chancellor's
Speech.

HOME
and another
v.
PRINGLE
and others.
—
22d June, 1841.
—
Ld. Chancellor's
Speech.

It appears, however, that the trustees, and particularly Mr Pringle, were aware that Molle retained balances in his hands beyond what they thought necessary or proper, and that his so doing was the subject of remonstrance in 1828, which led to the reduction of what was then due, and in 1830, the correspondence proves that Mr Pringle insisted upon the payment of the balance then in hand, which not being done, led to the recall of the factory granted to Mr Molle, which was followed by an intimation of his bankruptcy on the following day, up to which time it does not appear that there was any ground for suspecting his solvency; and it is proved, that at the time of his appointment he was in high credit. The profit which arises from the use of a balance is sufficient to account for the attempt to detain it without attributing it to inability to pay.

A passage in Mr Pringle's letter of 22d of September, 1830, has been much relied upon as shewing that he had been aware of Mr Molle's bad circumstances in 1828. He says, speaking of a payment of L.1500, received in 1828, "I own I am a good deal pleased that this was done, from whatever quarter it was procured." The meaning of this is very doubtful; it may mean that he doubted Mr Molle's having means of his own to pay that L.1500, or it may mean that it might have been paid out of subsequent receipts, so as not in fact to reduce the amount of balance due on the preceding December. It is much too slight a piece of evidence to support the case of Mr Pringle's having at that time been so cognizant of Mr Molle's difficulties, as to have made it his duty to interpose, for the purpose of preventing his receiving any farther part of the property; and to institute legal proceedings for the purpose of compelling payment of the existing balance, the credit and

supposed responsibility of Mr Molle having been unsuspected until very shortly before his bankruptcy. I cannot, therefore, find, in the evidence given, any such proof of culpable negligence in the mode of dealing with the factor, as would, according to the decisions in Scotland, render a trustee liable for the losses sustained by his ultimate insolvency. The cases of *Ainslie v. Cheape*, 13 Shaw, 417; and *Cowan v. Crawford*, in 13 Faculty Collection, 628, are strong authorities upon this point.

In 1828, the trustees, finding their factor retaining balances in hand beyond what they thought proper, press him by every means short of legal proceedings to keep down such balances, which course continues till December, 1830, when, finding their efforts ineffectual, they recall his appointment, which produces his bankruptcy, without any previous proof of his being insolvent.

The result is, that in my opinion the judgment below was correct in holding, that Mr Pringle's estate is not liable for the loss sustained by the insolvency of Mr Molle; and if he did not make himself liable for such loss, it is clear that Mr Hunter did not, for every circumstance from which the responsibility of Mr Pringle could arise, exists in a less degree in the case of Mr Hunter.

If the case fails so far, there is, I think, no ground for the general account, for if Messrs Pringle and Hunter are not chargeable with Mr Molle's balance, their own accounts have been regularly examined and settled according to the provisions of the trust-deed, and no case is made for opening them.

It is indeed said, that Mr Pringle has in those accounts been allowed a salary of L.50 per annum, to which, as trustee, he was not entitled; and if that question had

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Ld. Chancellor's
Speech.

HOME
and another
v.
PRINGLE
and others.

22d June, 1841.

Ld. Chancellor's
Speech.

arisen for decision in a proper form, and under circumstances calling for a judgment upon the point, whether a trustee could create an office for himself out of his trust, so as to derive profits from his trust, I should have had great difficulty in assenting to what appears to have been assumed, rather than decided, in Scotland. In such a case, there cannot be any good reason for any difference in the rules adopted in the two countries, and there cannot be any doubt as to the inconvenience and danger of such a practice; but in this case, if the L.50 per annum were to be disallowed, and struck out of Mr Pringle's accounts, he would be entitled to charge for all actual expenses incurred by the duty he performed as cashier. So that there is no probability that the estate would profit by opening the accounts in this respect. And when it is considered that this allowance arose from an appointment made in the presence of the pursuer, and was to be paid out of rents, the surplus of which was his, and that it has been sanctioned by the accountant, who had authority from the trustees to settle the trustees' accounts, I cannot think that it would be advisable for such a purpose to interfere with the judgment below, particularly when it appears that such allowances have been usual in Scotland, and that there is something like judicial authority for them, as in *Montgomerie v. Wauchope*, Faculty Collection, 4th June, 1822.

I think also, that the House would be very reluctant, when the principal object of the suit fails, to give any relief upon so small a part of the case, particularly where the record is loaded with charges and accusations of personal fraud and wilful dereliction of duty, against Mr Pringle and Mr Hunter, of which there is not only no proof, but for which there does not appear at any time

to have been any reasonable ground for suspicion, and for introducing which into the pleadings I have not seen or heard any justification.

HOME
and another
v.
PRINGLE
and others.

This leads to the only remaining question, that of costs, the only one upon which I entertained any doubt; and if I had been sitting in the Court below, considering the failure of the case made against the trustees, and the unjustifiable charges brought against them, I should perhaps have thought it just that they should be indemnified in costs, by directing the pursuers to pay them. But in this house the case is different. A court of appeal does not interfere in the question of costs without reluctance in any case, and generally will not entertain an appeal for costs alone, and the question of costs can only arise upon the cross-appeal. I am therefore of opinion, that both appeals should be dismissed with costs.

22d June, 1841.
I.d. Chancellor's
Speech.

Ordered and Adjudged, That the original appeal be dismissed this House, and that the interlocutor of the Lord Ordinary, of the 17th of March, 1836, in so far as not recalled by the two interlocutors of the Lords of Session of the First Division, of the 30th of November, (signed 1st of December,) 1837, or either of them, be affirmed; and that the two interlocutors of the 30th of November, 1837, be also affirmed, with costs: And it is farther ordered and adjudged, That the said two cross appeals be dismissed this House, and that the two interlocutors of the 30th of November, 1837, so far as therein respectively complained, be affirmed with costs.

Judgment.

SPOTTISWOODE and ROBERTSON — GEORGE WEBSTER
— RICHARDSON and CONNELL, Agents.