[26*th April*, 1849.]

Ex Parte MRS. FRANCES C. RENNIE, with consent of R. RENNIE, her husband, as her Curator, and Administrator in law, and him for his interest, *Appellant*.

Curator Bonis—Trustee.—A *curator bonis* is not entitled to make any other profit by his office than the commission usually allowed to him.

ROBERTSON left a will, by which, among other things, he gave the Appellant (his sister) a life interest in the residuary income of his estate, and appointed Barclay trustee.

In 1835, Barclay, assuming to act under a power in the will for the appointment of new trustees, executed an assignation in trust, whereby he made over the whole estate to Ritchie, who had made advances for the estate to the extent of between four and five hundred pounds. The purposes of this deed were, in the first place, to pay off an heritable bond and the interest of the debt owing to Ritchie himself, and then to pay the Appellant such a sum yearly as might be considered to be warranted, not exceeding 60*l.*; Ritchie accepted of this assignation, and entered under it to the possession of the trust estate.

In the year 1837, Ritchie brought an action to have it found that the assignation by Barclay in his favour was a binding deed, and for payment of the sums which were by it ascertained to be due to him in respect of the trust estate. And the Appellant brought a counter action to have it declared that the assignation was null and void. These actions terminated in a judgment of the House of Lords, declaring the assignation to be invalid.—4 *Bell's App. Ca.* 247.

During the course of these proceedings Crawford was appointed *curator bonis* by the Court of Session for the protection

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of the trust estate. Afterwards Crawford's private interest conflicting with his duty as *curator bonis*, he resigned the office, and Morison was appointed in his stead on the 10th of March, 1841, upon an application presented to the Court of Session, in the name of the Appellant and her husband.

In the month of April, 1845, the judgment was made declaring the trust assignation to be invalid, and an interlocutor of the Court of Session applying that judgment was shortly afterwards pronounced, whereby Ritchie was ordered to give up possession of the trust estate to Morison.

In May 1846, Morison presented a petition to the Court of Session for a remit to the Auditor to audit and examine his accounts as *curator bonis*, and for decree for payment of the balance which might be reported to be due to him, and for exoneration of himself and his cautioner. Along with this petition, Morison produced accounts, in which he charged as *curator bonis*, a commission of five per cent. upon the amount of the trust estate which had come to his hand, and a variety of accounts for "factory" and "miscellaneous" business incurred to him in his professional capacity as a law agent, in regard to the trust estate. The Auditor allowed the commission charged by Morison, and likewise his accounts of business. The Appellant objected to the allowance of the business accounts; but the Court (on the 10th July, 1847,) overruled her objections, and, after ascertaining the balance due to Morison upon his curatory accounts, exonerated him and his cautioners of his intromissions, and granted warrant for payment of the balance out of a sum forming part of the trust estate, which had been consigned in bank.

The Appellant complained by her appeal of the interlocutor, of the Court of Session, in so far as it had overruled her objections, and allowed Morison credit in account for his business charges.

Mr. McQueen for the Appellant.—It is not legal for any

party holding a fiduciary office to make profit thereby. That rule has been recognised in the law of Scotland, so early at least as the year 1639, when in the case of Musket *v.* Dog, *Mor.* 9456, the Court declared it illegal for a tutor at law to make profit to himself from the estate of his pupil by selling the office of factor under him. Again in Scot *v.* Strachan, *Mor.* 13433, the Court refused action upon an obligation given by the relations of a minor for payment of 100*l.* to the obligee, in case he would undertake the office of tutor dative of the minor. And in McDonald *v.* Muir, *Mor.* 13437, the Court refused to allow a claim in account made by a tutor against his minor for an allowance in respect of the risk run by him, in making an advantageous purchase of lands, that the minor, on coming of age, would not ratify the purchase. The principle acted upon in all of these cases was that a trustee could not make benefit by his office. That very question was decided in Johnston's Trustees *v.* His Creditors, *Morr.* 13407, and in later times, this House in Home *v.* Pringle, 2 *Rob. App. Ca.* 438, recognised the principle in very strong terms, though the question did not come before it in such a shape as to call for decision.

Such being the law of Scotland, as certainly as it is familiarly the law of England, the only question can be in regard to the nature of the office of *curator bonis*, whether it is one of trust or not. Of that there can be no doubt, for his duty is simply to get in and protect the estate under his charge, and if that duty be attended with the sacrifice of more labour and time than he can devote, he is authorised to employ a factor under him. No doubt it has been the practice in Scotland to allow a curator a commission on the amount of the estate under his curatory. In this respect the practice has introduced an anomaly which the Appellant has no desire to disturb,—but the decree in the present case has not only sanctioned that allowance, but has also given payment of professional charges in respect of the same expenditure of time and trouble for which the commission can alone be considered payable. If these charges

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are allowed, there is no duty performed in respect of which the commission could be payable, and on this ground alone even if the party were not a trustee, the decree cannot stand.

LORD CHANCELLOR.—My Lords, in the absence of the Respondent, who has not thought proper to come here to defend the order he has got in the Court below; and, in the absence of any authority amongst those which have been referred to, shewing a different rule, it seems to me that that which the justice of all these cases requires, ought to be acted upon, namely, that a party in a fiduciary character should not be allowed to charge anything in the way of profit. Such a party cannot make his office one of profit beyond the profit which is incident to that office. Here is an office under which a party has charged five per cent. for the trouble belonging to the office of *curator bonorum*. He has, besides that, brought in a bill, in which he seems to charge for every thing he has done, in addition to the five per cent. referable to his office. But if he is paid for every act he does, what is the five per cent. for?

In looking to the items, it seems that some portion of the charges, at least, is for money actually expended. Though he was entitled to his five per cent. profit, he ought not to be put to the expense of providing documents, or be called upon to make other expenditure, which the estate does not afford to him, in the discharge of his office. It seems to me, therefore, that the course will be to declare that he is entitled to the repayment of any money which he is out of pocket, but that he is not entitled to any profit arising from his employment, which constitutes the matter of this bill. Under these circumstances, therefore, the course will be, to refer the report back to the Auditor, and to call upon him to review the report he has made.

LORD CAMPBELL.—My Lords, I entirely concur with the noble and learned Lord on the woolsack that this case must be remitted, and the Auditor be called upon to review his report.

I have no doubt that according to the rule prevailing here, a

trustee cannot make a profit of his office. He is entitled to be repaid all disbursements, but he cannot make a profit of his trusteeship. I assume that to be the law of Scotland unless the contrary be proved. But I am satisfied according to the decisions and practice in Scotland, that the same rule prevails there as in this part of the United Kingdom. I do not understand that the Judges intimate that they can for any particular case lay down a different rule from that which is the established one. It is not a matter of practice, it is an universal principle, and must be acted upon. They cannot pass an act of sederunt, whereby they shall alter a rule from a particular day, and say, hereafter a trustee shall not be allowed to make a profit of his office, or shall be allowed to make a profit of his office. The rule is one which they are bound to declare, they cannot make it. And that rule is the same in Scotland as in England, that a trustee cannot make a profit as a trustee. Therefore, these exceptions, some of them, ought to have been allowed. We find a general rule, and the account must be settled upon the general principle.

It is declared, that the Respondent is not to charge against the estate of the late Lieutenant Robertson, in the said cause mentioned, any professional charges, or charges for loss of time, or other profit or emoluments, save and except his commission as *curator bonis*, already allowed to him by the said interlocutor; but that he is entitled to all such charges and expenses actually paid by him out of pocket, as shall appear to have been properly incurred and paid by him, and not covered by his said commission as *curator bonis*. It is therefore ordered, that the cause be remitted back to the Court of Session in Scotland, with instructions to order that the report of the auditor be referred back to him, and that he do review the same, having regard to the above declaration; and it is further ordered, that the Court of Session, upon such report having been so reviewed and lodged, do proceed further in the said cause, and do make such alteration in the said interlocutor as shall be just and consistent with this declaration and judgment.

SPOTTISWOODE and ROBERTSON, Agents.