

original instrument, you may do that which he intended — let these estates go with the others.

My Lords, I have a strong impression upon this case. I regret to be compelled to differ from my noble and learned friends. The decision is given in a way in which, in my opinion, it ought not to be. I suppose they have come to a right conclusion; but after all the attention I have given to the case, I have arrived at a different conclusion, and I am not able to agree with them.

Interlocutors affirmed.

Dundas and Wilson, C.S., *Appellant's Agents*.—T. G. Murray, W.S. *Respondents' Agent*.

JUNE 19, 1855.

DAVID MANSON, *Appellant*, v. SIR WILLIAM BAILLIE and his *Curator Bonis*, and Others, *Respondents*.

Trust—Liability of Co-Trustees—Factor—Law Agent—Agent and Principal—*A law agent, who was a trustee and beneficiary under a trust settlement, was appointed "commissioner, factor, cashier, and attorney," in the affairs of the trust, by his co-trustees, one of whom, who was also a beneficiary, was his client, while the others were gratuitous trustees. The whole trust funds having been thereafter exhausted in litigation, a large balance due on the accounts of that trustee, as factor and law agent to the trust, was claimed by him from his co-trustees.*

Held (affirming judgment), *That his co-trustees had not incurred any personal responsibility to him, and were not liable in payment of the balance of his accounts, for it must be presumed that he was acting throughout for his own interest and at his own risk.*¹

The late David Clyne, S.S.C., died on 1st November 1833, leaving a trust disposition and settlement, executed by him on that day, whereby he conveyed his whole means and estate, heritable and moveable, to the defenders, "Sir William Baillie, James Farquhar Gordon, W.S., John Meiklejohn, W.S., John Logan, W.S., Robert Lockhart, S.S.C., and to David Manson, writer, Edinburgh, and to the survivors or survivor of them," the majority being a quorum. The purposes of the trust were declared to be—*1st*, That "out of my said means and effects my said trustees shall pay the expenses of conducting the present trust." *2nd*, To purchase and present a gold watch of the value of 50 guineas to Mr. George Millar, in London. *3rd*, To make payment out of the first and readiest of the subjects to Sir William Baillie of £3000 sterling; to Miss Isabella Baillie, his sister, £1000; and to Mr. David Manson, £3000. *4th*, To pay a sum of £20 sterling annually to the trustees of the congregational chapel, Thurso, and to divide the sum of £270 among five charitable bodies, in the proportions specified by him. *5th*, To pay certain legacies and annuities to about 35 different individuals of the name of Clyne or Manson, 10 of whom were to receive annuities of the amount of £10 each, and the other 25 were left legacies, amounting in whole to about £420. *6th*, "To each of my said trustees and executors I leave the sum of £10 sterling each, for the trouble they will have in superintending the affairs of the said trust."—(These legacies of £10 were never claimed by, or tendered to, the trustees.) *Lastly*, Mr. Clyne directed the residue of his means and estate to be divided equally among Sir William Baillie, Miss Baillie, and Mr. Manson.

No power was given to the trustees, by this deed, to assume new trustees, or appoint a factor, or to submit or compound doubtful questions connected with the trust; and the truster gave no power to any of the trustees named to resign, renounce, or denude, or to receive any resignations or renunciations, after acceptance of the trust.

Mr. Clyne's funeral took place on 8th November 1833; and a meeting was held the same day—which was attended by all the trustees except Mr. Meiklejohn—for the purpose of opening the repositories of the deceased. The trust disposition and settlement having been read over, the trustees who were present intimated their acceptance; and, on the 13th of the same month, Mr. Meiklejohn also accepted the trust, and signed the minutes of the meeting above mentioned, which had previously been subscribed by the other trustees.

The truster had been a party in about 30 pending litigations, and the trustees according to the truster's directions prosecuted these suits. The trustees being however unable to attend personally to the details, appointed Mr. Manson "their commissioner, factor, cashier, and attorney" to execute the trust, and he carried on the litigations without consulting them.

¹ See previous reports 12 D. 775; 18 Sc. Jur. 231; 22 Sc. Jur. 331. S. C. 2 Macq. Ap. 80: 27 Sc. Jur. 526.

Manson ultimately executed an assignation of his whole claims against the other trustees of Mr. Clyne, in favour of Mr. Cullen, W.S., which bore to be granted for onerous considerations. In 1841 the present action was raised by Mr. Cullen against all the trustees, founding on the trust deed, the factory, and the conduct and actings of Manson under it, and concluding for payment of the sum of £2405 9s. 6d. as the balance of the professional accounts due to Manson as law agent, besides interest, and the sum of £400, or such other sum as should be found to be the amount of his fee, as stipulated by the factory. The pursuer at the same time offered to consent to a deduction of these charges equivalent to Manson's proportion of liability, as one of the trustees, for deficiency of the trust funds.

The Court, on 12 Feb. 1856, assoilzied the defenders. Manson then presented an appeal to the House of Lords.

In his case he argued that the interlocutor of 12th February 1846 ought to be reversed—1. Because the respondents, as trustees and executors of the late Mr. Clyne, having accepted and acted under his trust deed, and having, for their own personal convenience, appointed the appellant to act as factor and law agent, and having been kept duly apprised by him of the various law suits in which they and the trust were engaged, were bound to pay his accounts, under deduction of the share effeiring to him as a co-trustee. 2. Because, in the relative action of multiplepounding and exoneration, the trustees (respondents) claimed, and actually took credit for the appellant's accounts in order to obtain their exoneration, as against the legatees under Mr. Clyne's will. 3. Because there are no such *special* circumstances in the present case (as assumed by the Court below) as entitle the respondents to be relieved from their *legal* obligation and liability to pay the accounts incurred by the appellant, on their employment, and by their authority and instructions. 4. Because, in the whole circumstances of the case, the judgment appealed from was erroneous and unjust, and ought to be reversed.

The *respondents* argued that the judgment ought to be affirmed, because—1. A trustee is not entitled to insist for payment of any professional charges or emoluments on account of his management of, or actings in relation to, the affairs of the trust committed to his charge. *Ex p. Rennie*, 6 Bell's Ap. 422; *Bon Accord Marine Insurance Co.*, 12 D. 1010. 2. There are no grounds for holding that the respondents came under any personal liability for the appellant's professional charges.

Pattison and Hodgson, for appellant.—There being no denial that the work was done, the presumption is, that the appellant was employed on the usual terms of reward, unless there is a stipulation to the contrary. There was no stipulation to the contrary. Besides, the deed of factory expressly says, he is to be paid a gratification for trouble. It is quite legal and proper for a body of trustees to employ one of their number to do law business for them at the usual charges.—*Montgomery v. Wauchope*, 4th June 1822, F. C. That case was not at all shaken by *Home v. Pringle*, 2 Rob. Ap. 384. The trustees were personally liable, not merely to the extent of the trust funds.—*Macalister v. Alexander*, M'L. & Rob. 353; *Finlay's Trustees*, 14 D. 621; *Clyne's Trustees v. Clyne*, 10 D. 1325. It makes no difference that the solicitor employed was himself one of the trustees.—*Craddock v. Piper*, 1 Mac. & Gord. 664.

Lord Advocate (Moncreiff), and *Anderson Q.C.*, for respondents.—The law of Scotland was quite the same as what it is now understood to be; but the case of *Montgomery v. Wauchope* deranged it, until *Home v. Pringle* restored the law and placed it on the same basis as that of England, where it is well settled that a solicitor employed by his co-trustees is entitled to be paid only the costs out of pocket.—*Moore v. Frowd*, 3 My. & Cr. 45; *Lincoln v. Windsor*, 9 Hare, 158. The latter case qualifies and explains *Craddock v. Piper*, which was a strong case, and perhaps cannot be supported. The same rule against remuneration applies to co-partners as well as co-beneficiaries.—*Whittle v. Macfarlane*, 1 Knapp P.C. 311. Besides, where trustees enter into a contract *qua* trustees, and are acting within the scope of the trust, they are not personally liable, but are only liable to the extent of the trust funds, even where they are litigating with third parties. *Gordon v. Campbell*, 1 Bell Ap. 428. See the cases collected in Forsyth on Trusts, 264. The commission and factory did not bind the trustees to pay Mr. Manson as agent, but merely as factor and commissioner. Moreover, the circumstances under which these accounts were incurred, entirely destroy the presumption that the trustees impliedly promised to pay him. The appellant was the chief legatee, and it was for his own benefit that he kept up the suits, and he treated himself throughout as one who was conducting business of his own on his own account, and resenting all interference on the part of the trustees. He cannot be allowed, therefore, on finding that the lawsuits were unprofitable, to turn round now and charge his co-trustees.

LORD CHANCELLOR CRANWORTH.—My Lords, this is an appeal from an interlocutor of the Court of Session, assoilzieing the defenders from a demand which was instituted against them by Mr. Manson, a solicitor in the Supreme Courts of Scotland, claiming from the defenders, who were originally his five co-trustees, (some of them are now dead, and are now represented by their representatives, but we will treat them as if they were alive,) under a trust disposition in the nature of a will, by a gentleman of the name of Clyne, who was also a professional person, and who was engaged in litigation to a very enormous extent, there being between 20 and 30 causes

in which he was himself personally concerned. The claim on behalf of the pursuer Mr. Manson was, that his five co-trustees were responsible to him for the sum of £2400, which, he says, is the balance due to him in respect of his professional charges, for conducting the various litigations in which Mr. Clyne had been concerned. The whole of his demand, he said, was £5600, and he had received sufficient to reduce that to £2400; and that, he says, is due to him from the other five trustees, by reason of their having employed him as their commissioner, factor, cashier, and attorney, in the aforesaid trust: and the summons concludes that those gentlemen ought to be decerned and ordained, jointly and severally, to make payment to him of this sum of £2400.

Now, my Lords, it appears that by this trust disposition, which is dated on the day of the death of Mr. Clyne, who died on the 1st November 1833, he constituted six gentlemen—Sir William Baillie and five other gentlemen, who are all professional gentlemen in Scotland—his trustees, and conveyed to them everything he possessed, his real and personal property, on certain trusts—*First*, after paying debts, to pay the expenses of the trust. *Secondly*, to pay some small legacies, a gold watch, and some few other matters. Then, *thirdly*, to pay three legacies, which are the only important legacies that there are bequeathed, viz. £3000 to Sir William Baillie, one of the trustees; £1000 to his sister, Isabella Baillie; and £3000 to Mr. Manson, the present appellant; then to pay a number of other small legacies; and then to pay some annuities; and, finally, he gives the residue to be divided equally among the persons whom he calls “my legatees named in the commencement of this deed, viz., the said Sir William Baillie, the said Isabella Baillie, and the said David Manson.”

Mr. Clyne died upon the same day, and a week after his death the trustees met, the will was read, and they all six agreed to accept the trust. It should be stated, that of all the trustees no one took any pecuniary interest under the will beyond a mere nominal interest—a legacy of £10 each—except Sir William Baillie and Mr. Manson. Mr. Manson was a professional person, and it was stated that Sir William Baillie was a client of his.

In order to execute this trust, which, it is obvious, is one of a very complicated, and difficult, and expensive nature, it appears that immediately after the death, at the very first meeting which took place about a month or so after the death of Mr. Clyne, a meeting of the trustees instructed Mr. Manson to prepare a deed by which he was to constitute himself what we should call the acting trustee, the factor or commissioner, to do everything that was necessary to be done. A short time afterwards, this direction having been given on the 13th, on the 30th of December the deed was executed, and under that deed Mr. Manson was appointed commissioner or factor. The deed commences with a narrative or recital, as we should call it—“Considering that it is inconvenient for us” (so and so, naming all the trustees) “to attend personally to the detailed affairs and execution of the said trust, and to prosecute the objects and intention thereof: And we having entire confidence in the integrity and abilities of the said David Manson, as a proper person to act as our factor in the management and execution of the said trust, do therefore hereby make and constitute the said David Manson to be our commissioner, factor, cashier, and attorney, for the purposes after specified.” Those purposes are for the management of the whole concern, getting in all the property, completing titles, vesting the property in the proper persons, making all payments of debts and legacies, “and to defend us in any actions that may be brought against us as trustees, and generally to do, use, and exercise, all and sundry other things in relation to the premises, in the full execution of the said trust, which we, as trustees, executors, and disponees foresaid, or in any of those capacities, could do if personally present, ratifying hereby, and approving of whatever the said David Manson may have done in these respects since the 1st day of November last, and promising to ratify and confirm all and whatever things our said factor shall lawfully do or cause to be done in the premises: Providing always, as it is hereby expressly provided and declared, that the said David Manson shall be obliged to hold just count and reckoning and payment to us, as trustees foresaid, of his whole intromissions, in virtue thereof, after deduction always of his necessary charges and expenses, and a reasonable gratification for his trouble.” Therefore, the effect of that was, that he was constituted (whatever rights that gave him) the factor or acting trustee, and for that purpose he was to have reasonable expenses and gratification. Now I quite follow what was said by the Lord Advocate. It can admit of no manner of doubt, that that did not necessarily appoint him to be the person who should manage the lawsuits. At the same time, it appears that he did, being a professional man, undertake to manage the lawsuits; and I am not so perfectly certain that in regard to the existing lawsuits, inasmuch as the money that was to be recovered by them was the chief legacy which this gentleman bequeathed, it might not be any unreasonable inference, that it was meant that he should superintend at least the carrying on of all those lawsuits. In point of fact he did so; and the sole question, as it appears to me, is, when he did that, under what authority did he do it? Did he do it under the authority of his co-trustees? and if under their authority, was that an authority as to which there was to be an implication, that in so acting he was to be remunerated as professional men ordinarily are remunerated?

Now, let us look at the facts of the case. Certainly I think the appellant, the pursuer, has a right to this observation in his favour, that when you employ a professional person, *primâ facie*,

you employ him for reward, or, as it is called, upon the understanding that he shall be paid for his services. The question here is, whether the circumstances are such as to rebut that presumption. Now, observe in what position these parties stood towards each other. With the exception of Sir William Baillie they were all professional persons, five out of six, and Sir William Baillie was a client of Mr. Manson's. Sir William Baillie and Mr. Manson may be said to be the persons, who alone were interested in this property that was to be recovered and got in. There was another party, his sister, who was to have £1000, but each of those gentlemen was to have £3000, and if there was a residue, each of them was a residuary legatee; and therefore it was extremely important to Mr. Manson, on his own account, and on account of his client Sir William Baillie, to get in and realize this property to the largest possible extent. The other trustees had no manner of interest at all in it. They never could get—I was going to say a single sixpence—they might get £10, but, substantially, that may be disregarded; they had no interest, except as trustees, to get in the property for the benefit of Mr. Manson.

Now, that being so, Mr. Manson, under an authority expressed or implied, proceeds to act as a professional person. Are we to infer that he was to be paid for that by the other trustees? I must say that I concur with the Lords of Session in thinking that it would be the most monstrous conclusion to arrive at that we can well imagine. All these trustees are professional persons; and, looking to their own interest, it would be their object, as far as professional men have such an object, to be professionally employed; and that they should all volunteer to employ one of their own body, at their personal cost, to do all this work for the purpose of getting in property in which he was interested, and they were not, is the most extraordinary assumption that one can well conceive. If, on the other hand, you understand that they merely meant to say that they employed him as a factor, and that he might, out of the trust, be remunerated as commissioner, so far as it is lawful he should be remunerated out of the trust funds, and that he was to manage as he thought fit for his own benefit, that is an arrangement which *a priori* you would think extremely reasonable; and the question is, how far that assumption tallies with the facts that afterwards took place. It appears to me entirely in conformity with them.

If he was merely the servant, as it were, the professional person, acting for the other trustees, he was bound to take their instructions, and to act according to their directions. But, on the contrary, not to weary your Lordships by going over again that which has been repeated more than once in the course of the argument—I refer to the letters and minutes of proceedings—nothing of that kind took place; but when the other trustees took upon themselves to interfere at all to ask questions of Mr. Manson, or to remonstrate, or to make observations, he is very angry, and very indignant with them, and substantially says to them—What is that to you? you need not interfere with me.

At the very commencement of the proceedings, Mr. Clyne having died in November, and the factory deed having been executed at the end of the following month of December, in the course of the following year, Mr. Meiklejohn, one of the trustees, I suppose, feeling a doubt upon the subject, writes to Mr. Manson, and says—"I cannot allow myself, for one moment, to remain under any implied imputation of liability for these expenses." To which Mr. Manson, in a letter of the 10th of June, answers—"There are some points in your letter which I do not think it necessary to enter into; but I will observe, that if the agent, who knows intimately every affair connected with the trust, were not to be allowed to take any ordinary step in its arrangement, there would be little occasion for his appointment. At the same time, whenever any important matter requires a meeting of the trustees, I shall be most ready to call them together for deliberation, but in simple matters it appears to me unnecessary, more especially as such matters fall entirely within my own knowledge." And in an earlier part of the letter he says—"You certainly do not think that I am one of those who would wish to embark in an unnecessary, doubtful, or groundless litigation? My interest is quite the reverse"—alluding to the fact, that all these proceedings, in truth, were proceedings for his benefit, and not for the benefit of the other trustees. The rest of the letter is merely a courteous way of telling the other trustees, or the trustee whom he was addressing, that he need not interfere with the matter; that he, Mr. Manson, would take care that if there was anything important he should be apprised of it, but, in the mean time, he might look to his business—Mr. Manson would look to his. That is the fair interpretation of the letter.

A very short time after this, Mr. Logan, another of the trustees, apparently not liking the aspect of affairs, writes to Mr. Manson to say that he declined to have anything further to do with the trust. He had no power of withdrawing from the trust, but certainly he had the power of withdrawing from any further employment of Mr. Manson, if employment there had been. One need hardly say, that there cannot be anything so absurd as the proposition, that a person is bound to employ any one as his agent, so long as that person is desirous of continuing to act as agent. In the letter of the 5th of August 1834, Mr. Logan says that he does not see that any inconvenience can result from his ceasing to act as a trustee, and then he says—"I have to request that you may be kind enough to give directions, that my name may not be used in any future proceedings connected with the trust." To suppose that Mr. Logan can be liable after

that is quite absurd. Even if he had employed Mr. Manson, as I think he had not, as a professional man, that was an express revocation.

Then there is another proceeding, which takes place a year or two afterwards. In the year 1837 some proceedings had been taken against a gentleman of the name of Mackenzie, who appears to have been a very respectable person. I do not know whether he was connected with Lord Mackenzie or not. Mr. Manson had instituted a process of horning against that gentleman, and, under the circumstances, the trustees remonstrate with him about it, and say—It is a most monstrous proceeding to take such a step as this without consulting us; and Mr. Manson assumes a very high tone, and seems to say, that he will not listen to any of those complaints, and that he shall proceed against the trustees. How he meant to proceed I do not know, but he said that he would proceed against them if they made any complaint, or called in question the propriety of the course he was taking. He was substantially taking upon himself the whole management of the matter, as if it was his own concern; and so I think it was. He understood at the time that he was the party interested. He had authority, so far as it was necessary, from the trustees, and of course that must be taken, with reference to the circumstances of the case, to mean an authority to act as he might think fit, but not so as to make them personally responsible for the matters which he was conducting in the mode which he thought most advisable for the interest of himself, and those who would become entitled to the estates if they were recovered.

My Lords, the conclusion at which this gentleman arrives is really absolutely preposterous, because, whereas these were proceedings which were instituted solely for his own benefit, and the benefit of his client Sir William Baillie, and in which the other trustees had not a particle of interest, the result of this suit would be to make the other trustees personally responsible for all the expenses which had been incurred in attempting to realize the property for his benefit, and to absolve him from the payment of one shilling of those expenses. I do not wonder that the Lords of Session thought it a most outrageous attempt, and I do not wonder at the conclusion at which they arrived. I can therefore have no hesitation in moving your Lordships that the interlocutor of the Court below be affirmed, and be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. During a certain period of the argument I had some doubts, which, I believe, were rather partaken in by my noble and learned friend.

LORD CHANCELLOR.—Before I understood the facts.

LORD BROUGHAM.—Exactly. Now that I understand what the real facts of the case are, I have no doubt whatever, any more than the Judges of the Court below appear to have had. It would be one of the most extravagant conclusions that could be drawn from the facts in this case, taking all the circumstances into consideration, and the relative position of the parties, if we were to hold that these trustees had ever had the least idea of making themselves personally liable, and I will go further, and say, or that Mr. Manson himself ever conceived that they had made themselves personally liable. The two letters to which my noble and learned friend referred—the one of Mr. Logan, and the other of Mr. Meiklejohn, and the other longer letter respecting that unintelligible charge of libel, or something in the nature of slander against himself,—all those letters go in the same direction.

My Lords, a case has been referred to more than once in the course of this argument, especially on the part of the appellant. I mean that of *Craddock v. Piper*. I think that was a case before Lord Cottenham. If that case has been at all adopted in any of the decisions of your Lordships' House, I should be very slow to express any doubt which I may have upon it. If it has never been so adopted or countenanced in decisions here, then I may be permitted to state that I have great doubts respecting the soundness of that decision, owing to the length to which it goes.

I do not think, Mr. Anderson, that the case of *Craddock v. Piper* has ever been adopted by this House?

Mr. Anderson.—No, my Lord, *Craddock v. Piper* is not much approved of by the profession.

LORD BROUGHAM.—*Montgomery v. Wauchope* is entirely done away with?

Mr. Anderson.—Yes, my Lord, it is done away with by the case of *Home v. Pringle*.

Interlocutor affirmed, with costs.

Party, *Appellant's Agent*.—Rolland and Thomson, W.S., *Respondents' Agents*.