

MANSON, APPELLANT.
 SIR WILLIAM BAILLIE, BART., } . RESPONDENTS.
 AND OTHERS, }

1855.
 11th, 18th, and 19th
 June.

The employing of a professional person implies an undertaking to remunerate him, but the inference may be rebutted by circumstances.

Six trustees appointed one of their own body, a solicitor, to act, with an allowance "of his necessary charges and expenses, and a *reasonable gratification*." He had an interest in the estate ; those who appointed him had not. He contended, however, that they were responsible for the expenses incurred by him in attempting to realize the property for his own benefit, and that he was himself to be absolved from all participation in that responsibility. Held, that he was *wrong*.

Craddock v. Piper, 1 M'N. & G. 664, questioned by the *Lord Chancellor* and *Lord Brougham*.

A trustee cannot withdraw from his trust unless under a provision to that effect.

UNDER the testamentary trust disposition of David Clyne, a solicitor in Edinburgh, six trustees were appointed, all professional persons excepting Sir William Baillie. At a meeting held immediately after the testator's death, they conferred on the Appellant, one of their own number, the office of Factor for the trust, which had for its chief purpose the prosecuting of certain law suits, in which the deceased had been personally engaged. The Appellant had a large individual interest in the trust estate. The question was whether, under the circumstances, he was entitled to charge his co-trustees in the same professional manner as if he had been a stranger, whom they had hired to act for them as their solicitor in the business of the trust.

The First Divison of the Court of Session, on the 11th February 1846, sustained the defence of the five trustees, whom the Appellant had sought to fix with liability, and found them entitled to expenses. The Factor appealed. The facts are very fully stated by the *Lord Chancellor* (a), in moving for judgment.

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Mr. *Patterson* and Mr. *Hodgson* for the Appellant, contended that the question of liability was one for a jury. The ordinary rule on the employment of a man of business was that he must be remunerated. There was nothing here to exclude the rule. They cited *Cradock v. Pyper*, before Lord *Cottenham*.

The *Lord Advocate* (b) and Mr. *Anderson* for the Respondents. The Appellant has made 3,000*l.* out of the trust estate, which is irretrievably ruined. There never was a case in which the salutary rule against trustees eating up the funds of the estate ought to be more stringently enforced.

[The LORD CHANCELLOR: This is not a demand against the trust estate, but against the trustees.]

The Appellant took the administration entirely into his own hands. He never apprized the other trustees of his proceedings.

[The LORD CHANCELLOR: Is it the law of Scotland that if a body of trustees employ an agent, they are not liable as individuals?]

[The Lord BROUGHAM: Here they say he was told that he was to look only to the estate.]

The case of *Cradock v. Pyper* does not apply, because there the proceedings, being in an administration suit, were under the control of the Court. We admit that the law on these matters was somewhat uncertain in Scotland till the case of *Home v. Pringle* (c).

(a) Lord Cranworth.

(b) Mr. Moncreiff.

(c) 8 Cl. & Fin. 264.

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[The LORD CHANCELLOR: The *Aberdeen Railway Company v. Blaikie*, in this House last Session (a), went on the same principle.]

We might also cite an earlier and, indeed, a leading case, which Lord *Cottenham* decided, *Moore v. Frowde* (b).

[The LORD CHANCELLOR: But here the other side say there was an express contract with the co-trustees.]

The Appellant has taken the trust money to pay the charges in his bill of costs. The case of *Cradock v. Pyper* was much considered in the subsequent case of *Lincoln v. Windsor* (c).

[The LORD CHANCELLOR: I am inclined to think that the true principle was considerably trenched upon by Lord *Cottenham*, when he said that a solicitor might act as a solicitor for his co-trustee, and be allowed professional charges. I apprehend that the true principle is, that each trustee shall be a check and control on each and all of the co-trustees, a principle which is placed in danger by the allowance of pecuniary profit.]

Mr. *Hodgson* replied. The fact of the Appellant being a legatee and a beneficiary under the trust seems no reason why he should not be paid for his professional services, particularly for cash out of pocket. He was employed on the footing of payment. The question ought to be decided by a reference to all the circumstances of the case, from which the only just inference is remuneration.

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The LORD CHANCELLOR:

My Lords, this is an appeal from an interlocutor of the Court of Session, assoilzing the Defenders from a

(a) *Sup.* vol. 1, p. 461.

(b) 3 *Myl. & Cra.* 45.

(c) 9 *Harc.* 158.

demand which was instituted against them by Mr. Manson, a solicitor in the Supreme Courts of Scotland. The Defenders were originally his five co-trustees 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, as it appears, engaged in litigation to an enormous extent, there being between twenty and thirty cases in which he was himself personally embarked. The proposition sought to be established by the pursuer, Mr. Manson, was that his five co-trustees were responsible to him for the sum of 2,400*l.*, which, he says, is the balance due to him in respect of his professional charges for conducting the various legal proceedings in which Mr. Clyne had been concerned. The whole of his demand, he said, was 5,600*l.*, but he had received sufficient to reduce it to 2,400*l.*, and that sum, 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 these gentlemen ought to be decerned and ordained jointly and severally to make payment to him of this sum of 2,405*l.*

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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 of November 1833), he constituted six gentlemen, Sir William Baillie and five others, all professional gentlemen in Scotland, his trustees, and conveyed to them everything he possessed, his real and personal property, upon certain trusts ; first, after paying debts, to pay the expenses of the trust ; secondly, to pay some small legacies ; thirdly, to pay three legacies, which are the only important ones, namely, 3,000*l.* to Sir William Baillie, one of the trustees, 1,000*l.* to his sister, Isabella Baillie, and 3,000*l.* to Mr. Manson, the present Appellant. After a be-

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quest of other smaller legacies, and some annuities, the testator finally 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.”

A week after the death of Mr. Clyne the trustees met, the will was read, and they all six agreed to accept the trust. It should be stated that none of them took more than a nominal interest under the will, except Sir William Baillie and Mr. Manson. Mr. Manson was a professional person, and Sir William Baillie was his client.

In order to execute this trust—one of a very complicated and difficult and expensive nature—it appears that, within 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 be constituted what we should call the acting trustee, commissioner, or factor, to do everything that was necessary to be done. This direction having been given on the 13th December, the deed was executed on the 30th; and, under that deed, Mr. Manson was appointed commissioner or factor. The deed commences with a recital, that, “considering that it is inconvenient for us” (naming all the trustees) “to attend personally to the detailed affairs and execution of the said trust, and to prosecute the intention and objects 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 disponies 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, 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, after deduction always of his necessary charges and expenses, *and a reasonable gratification for his trouble.*" The effect, therefore, of the appointment (whatever rights it might give him) was, that he was constituted 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 Mr. Manson was not necessarily appointed to be the person who should manage the law suits. At the same time, it appears that he did, being a professional man, manage them; and I am not so perfectly certain, that, in regard to the existing law suits, inasmuch as the money to be recovered by them was the chief legacy bequeathed, it might not be unreasonable to infer that he should superintend, at least, the carrying out of all those law suits. In point of fact, he did so; and the sole question, 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

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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?

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, 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 those 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. Sir William Baillie and Mr. Manson may be said to be the persons who alone were interested in the property that was to be recovered and got in. There was a lady, his sister, who was to have 1,000*l.*; but each of those gentlemen was to have 3,000*l.*; 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*l.*, 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 extraordinary 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 funds remunerate himself as commissioner (so far as it was lawful), and that he was to manage as he thought fit for his own benefit, that is an arrangement which, *à 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 sort occurred, but when the other trustees took upon themselves to interfere and ask questions of Mr. Manson, or remonstrate or make observations, he was very angry and very indignant with them, and substantially said to them, "What is that to you? you need not interfere with me.

At the very commencement of the proceedings, Mr. Meiklejohn, one of the trustees, feeling, I suppose, a doubt upon the subject, writes to Mr. Manson,

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“ I cannot allow myself to remain for one moment under any implied imputation of liability for these expenses.” To this, 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 were, in truth, 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 apprized of it ; but in the meantime he might look to his own 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 declines 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 another 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 he adds : “ 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 to Mr. Manson after that, is quite absurd ; even if he had employed Mr. Manson as a professional man (but I think he had not), that was an express revocation.†

There is another occurrence which takes place in the year 1837. Proceedings had been taken against a gentleman of the name of Mackenzie, Mr. Manson had served a charge of horning upon that gentleman, and under the circumstances the trustees remonstrated with him about it, saying, “ It was a most monstrous proceeding to take such a step as this without consulting us.” Mr. Manson assumed a very high tone, and seemed to say that he would not listen to any of those complaints, and that he should 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 which 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 as 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

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personally responsible for the matters which he was conducting in the mode which he thought most for the interest of himself and those who would become entitled to the estates if they were recovered.

Really, my Lords, the conclusion at which this gentleman arrives is almost preposterous; because, whereas these were proceedings which were instituted solely for his own benefit and the benefit of his client, Sir William Baillie, the other trustees not having a particle of interest; and 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 affirmed with costs.

*Lord Brougham's
opinion.*

The 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 of by my noble and learned friend.

The LORD CHANCELLOR: Before I understood the facts.

The 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 entertained 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, which Mr. Manson ventilates, referring to another person, I forget who,—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*, before Lord *Cottenham*, I think. If that case had been at all adopted in any of the decisions of your Lordships' House, I should be very slow to express any doubt which I might have upon it; but 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 to the length to which it goes.

My Lords, I hope the profession will very soon have the benefit of a work, which I believe is in contemplation by a learned person who was for many years a member of the Scottish bar, who, I believe, is not at present a gentleman in our profession, but is about to be called to the English bar, I mean Mr. Robert Stuart, who, I am happy to find, intends to publish a work of very great importance to the profession, and which will be of the greatest use to your Lordships in dealing with appeal cases,—I mean in the nature of a digest of all the decisions in your Lordships' House; chiefly, no doubt, in Scotch cases, but with large references to

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English cases bearing upon this subject. I have been very much gratified at hearing of his intention, and I do hope and trust that the work will be published for the benefit of the public and of the Court.

Interlocutor affirmed with Costs.

DEANS & ROGERS.—ROBERTSON & SIMSON.