

had an interest conferred on him by the deed.

The defenders argued that the case of *Ferrie* was distinguishable from the present one.

LORD LOW — “My opinion is that the question raised here is ruled by the decision in the case of *Ferrie v. Ferrie*. Mr Welsh founded upon certain differences which exist between the position of executor and the position of testamentary trustee, and no doubt there are differences. But the material point in this case is that the gentleman who acted as notary was nominated sole executor and intromitter in the settlement which he executed as notary. Now, of course, as sole executor and intromitter he was entitled to ingather and administer the whole estate, and that I think is the very disqualification to which the Court gave effect in the case of *Ferrie*. I think it cannot be doubted that a person who is nominated sole executor and intromitter under a settlement cannot competently act as notary in the execution of that settlement.

“But then it was argued that this was an exceptional case, the kind of case which Lord Deas shadowed in his judgment in the case of *Ferrie* as a possible exception to the rule there laid down. But even assuming that the case figured by Lord Deas would form an exception, this case does not come up to it, because it is admitted that other gentlemen competent to act as notaries were within reach, and among others the very medical gentleman who was attending the testator. So far from there being special circumstances in this case to make it an exception to the rule, it seems to me to be a strong case for the application of the rule, because Mr Macrae was not only the notary who executed the settlement, but he himself had prepared it. I shall therefore sustain the first plea-in-law for the pursuers and grant decree of reduction.”

Decree of reduction was pronounced.

A reclaiming-note was presented, but subsequently withdrawn.

Counsel for the Pursuers—M'Lennan—Forbes. Agent—Alexander Ross, S.S.C.

Counsel for the Defender—Cooper—Welsh. Agents—Forbes, Dallas, & Co., W.S.

Tuesday, January 12.

OUTER HOUSE.

[Lord Low.]

CAMPBELL v. M'INNES AND ANOTHER.

Agent and Client—Services—Remuneration—Agent Acting for Client under Curator Bonis—Steps for Recall of Curatory—Preparation of Trust-Disposition—General Professional Advice.

A law-agent who in good faith and upon reasonable grounds attempts,

upon the instructions of a ward, who is under a *curator bonis*, to obtain a recall of the curatory, will as a general rule be entitled to remuneration out of the ward's estate even although the object in view be not attained.

A law-agent who entertained a reasonably grounded opinion that a ward under a *curator bonis* was capable of managing his affairs, drew up, on the ward's instructions, a trust-disposition and settlement for him, advised him generally as to his affairs and investments, and took steps for obtaining the recall of the curatory. The latter were ultimately abandoned after an adverse opinion from a medical expert had been obtained.

Held that the law-agent was entitled to remuneration out of the ward's estate for his services only in so far as they related to the recall of the curatory.

The defender John Wilson, chartered accountant in Glasgow, was in February 1896 appointed by the Court *curator bonis* to the defender Andrew M'Innes. The medical certificate produced with the petition certified that the latter was “of unsound mind and the subject of such fixed and extravagant delusions as to make him quite incapable of conducting his business affairs or of giving directions for the management of them.”

In December 1901 the pursuer Alexander Campbell, S.S.C., Edinburgh, raised the present action against the defenders, in which he sued for the amount of an account representing (1) services rendered to the ward M'Innes in view of obtaining a recall of the curatory, (2) cost of preparing a trust-disposition and settlement for the ward M'Innes, (3) advising him in regard to certain property and investments. The pursuer averred—“Between August 1896 and October 1899 the pursuer, acting on the instructions of the defender Mr M'Innes, had numerous meetings and considerable correspondence with him and on his behalf regarding his affairs, and expressly in regard to his wish to have the curatory recalled and the settlement of his affairs by testamentary deed. An account of the business so done . . . is herewith produced. . . . Said account was incurred for the benefit of Mr M'Innes, and in the best interests of both him and his estate. The performance of the work set forth in the account was necessary to put him in a position to determine whether or not the curatory should be recalled as well as his testamentary powers.”

The defenders in answer stated—“The business for which the pursuer claims remuneration began in August 1896, five months after the granting of the curatory, and appears to have been undertaken upon the initiative of certain third parties interesting themselves in the said Andrew M'Innes and his affairs; the pursuer was fully certiorated at that time of the existence of the curatory, and of the proceedings and circumstances connected with the granting thereof. The said Andrew

M'Innes has continued since under curatory as being incapable of conducting his affairs or of giving directions for the management thereof. The pursuer had no authority whatever from the defender John Wilson to conduct the business charged in his account. He did not even communicate with Mr Wilson until 14th April 1898. The pursuer's account relates mainly to meetings and correspondence regarding the recall of the curatory. The pursuer, however, did not obtain the views on this subject of Dr Allan, the regular medical attendant of Mr M'Innes, until 2nd July 1898, when, in consequence of Dr Allan's opinion, the proposed proceedings were abandoned. The pursuer's account, apart from the subjects above mentioned, consists of certain charges for meetings, correspondence, . . . purporting to relate to matters connected with the administration of the ward's estate, such as the settling of stocks and heritable property, all of which resulted in nothing, and were of no benefit whatever to the ward or to his estate, which was being administered by the defender Mr Wilson as *curator bonis*."

Of consent the case was heard upon the documents and correspondence produced. From these it appeared that the pursuer had been in communication with the Board of Lunacy, and was led to believe that the condition of M'Innes had materially improved, and that from interviews which he personally had had with him he had formed a strong opinion that he was capable of managing his affairs. Notwithstanding his malady M'Innes was in fact capable of conversing rationally and correctly.

In May 1898 M'Innes was examined by Dr Clouston. In July 1898 Dr Clouston held a consultation with Dr Allan, M'Innes' own medical man, and in consequence of the report of these gentlemen the pursuer abandoned further proceedings for recall of the curatory.

The pursuer referred to *Hamilton*, 1842, 4 D. 627; *Myers*, 1845, 7 D. 886; *Rhodes v. Rhodes*, 44 Ch. Div. 94; *Forsyth*, 1862, 24 D. 1435.

The defenders referred to *Bryce v. Graham*, 1818, 3 W. & S. 323; *Mitchell & Baxter v. Cheyne*, 1891, 19 R. 324, 29 S.L.R. 267.

The Lord Ordinary (Low) found that the account sued for formed a valid charge against and fell to be paid out of the estate of M'Innes in so far as it related to services rendered by the pursuer with the view of obtaining a recall of the curatory.

*Opinion*.—"This case seems to me to raise questions of considerable delicacy.

"On the one hand, I am not prepared to say that a person who has been put under curatory by the Court as being of unsound mind and incapable of managing his affairs, but who has not been cognosed, cannot employ a law-agent to the effect of entitling the latter to remuneration out of his estate. On the other hand, I am clearly of opinion that the mere fact that a law-agent has acted upon the instructions of a person under curatory is not in itself sufficient to

entitle the former to claim remuneration against the estate.

"Whether or to what extent such a claim is to be admitted must, it seems to me, be a question to be determined upon the circumstances of the particular case, and I doubt if any definite rule of general application can be laid down. The defenders' counsel contended that the test was whether the services rendered had been to the benefit of the ward. That, no doubt, is a very important consideration, but I do not think that it is the sole test. I think that there may be cases in which the services of the law-agent have not resulted in any definite benefit to the ward, but in which nevertheless the claim of the former for remuneration ought to be recognised. For example, where a law-agent has in good faith and upon reasonable grounds attempted, upon his ward's instructions, to obtain a recall of the curatory, I should think that in the general case he would be entitled to remuneration out of the estate even although the object in view was not attained. To hold otherwise would, I think, be contrary to the interests of that unfortunate class of persons to whom *curators bonis* are appointed.

"Still every claim of this sort must be carefully scrutinised, and allowed only if it appears that the services were rendered in good faith, and that the circumstances were such as to render it just and reasonable that the account should be charged against the estate.

"There is no suggestion against the good faith of the pursuer, nor, looking to his professional position and reputation, is there any reason to suppose that he acted otherwise than in accordance with what he regarded to be his duty.

"The account may be divided into three branches—(1) for services rendered in view of obtaining a recall of the curatory, (2) for the preparation of a trust-disposition and settlement, and (3) for advising the ward M'Innes in regard to certain property and investments.

"In regard to the first of these branches, it was pointed out—(1) that the pursuer's employment began within a few months of the appointment of a curator, and that the appointment was made upon medical certificates to the effect that M'Innes was of 'unsound mind and subject to such fixed and extravagant delusions as to make him quite incapable of conducting his business affairs or of giving instructions for the management of them,' and (2) that certain persons who were in the habit of seeing M'Innes, and with whom the pursuer put himself in communication, gave him an account of M'Innes' condition which should have shown him that it was vain to attempt to have the curatory recalled.

"In these circumstances it was argued, that although the pursuer might have been entitled to make and charge for preliminary inquiries, he was not entitled to keep the matter going on for some two years, and to run up an account of over £30 for work which was altogether unprofitable to M'Innes.

"I recognise a great deal of force in that argument, but it appears upon the other hand (1) that the pursuer obtained certain information from the Board of Lunacy which led him to believe that the condition of M'Innes had materially improved, (2) that the pursuer, from interviews which he himself had with M'Innes, formed a strong opinion that the latter had become capable of managing his own affairs, and (3) that notwithstanding the malady from which he suffered M'Innes was in fact capable of conversing rationally and coherently.

"Such being the position of matters, I have come to be of opinion that, subject to taxation, the pursuer is entitled to payment of that branch of the account which relates to the proposed proceedings for recall of the curatory. I have not arrived at that conclusion without difficulty, but the considerations which have turned the scale in my mind are in the first place that there is no reason to suppose that the pursuer was merely running up an account, or acting otherwise than in the way which he honestly believed to be for the interest of his client, and in the second place, as I have already indicated, I regard services rendered in good faith with the view of having the curatory recalled as presenting a favourable case for allowing remuneration out of the estate.

"The next branch of this case is that which relates to the trust-disposition and settlement. I am of opinion that these charges cannot be allowed against the estate.

"It is a serious matter to make a will for a person who has been found—although not by the verdict of a jury—to be of unsound mind. And the pursuer himself seems to have been impressed with that view, because he took the opinion of Dr Clouston, who had an interview with M'Innes in regard to the capacity of the latter. Dr Clouston reported that M'Innes showed 'evident signs of brain disease,' and that he (Dr Clouston) could not at present say 'that the will he proposed to make' (that is, the will already prepared by the pursuer) 'would be one whose provisions were not directly affected by his disease.'

"Now, I think that plainly the pursuer would not have been entitled to prepare a will after obtaining such an opinion from Dr Clouston, and as he took it upon himself to prepare the will before he got Dr Clouston's opinion—a step which he himself appears to have thought necessary—he is not, in my judgment, entitled to be remunerated out of the curatorial estate.

"I understand, however, that Dr Clouston was consulted not only in regard to M'Innes' capacity to make a will but also with a view to an application for recall of the curatory. I am therefore of opinion that the pursuer is entitled to recover the fee which he paid to Dr Clouston.

"There remain certain charges of comparatively small amount for advising M'Innes in regard to certain stocks and a proposed sale of house property in Glasgow.

"I think that there might very well be

circumstances in which a person under curatory would be entitled to have independent legal advice, and a law-agent would be held to be justified in giving (at the expense of the estate) such advice in regard to the way in which the curator was managing his affairs, but I am not aware that such circumstances existed here. There has not been a proof in the case, as it was obviously desirable if possible to avoid the expense of a proof, but there has been a full production of the correspondence, and of course I was ready to hear any explanations which counsel desired to give, and I should also have been ready to allow inquiry in regard to any particular point which required to be cleared up. There is, however, nothing in the correspondence relating to the business matters with which I am now dealing, nor did the pursuer's counsel make any statement as to the circumstances under which the pursuer was consulted, nor does the consultation appear to have had any result. The correspondence shows that M'Innes had the greatest distrust of his curator (whom he believed to be acting dishonestly), and to have desired the pursuer's assistance to protect him against the curator. There is, however, no reason to suppose that there was any foundation whatever for M'Innes' distrust of the curator, and in the absence of special circumstances I am unable to sustain as a good charge against the estate that part of the account which relates to advice given in regard to the management of the estate.

"I shall therefore find that the account sued for forms a valid charge against, and falls to be paid out of, the estate of the said Andrew M'Innes in so far as it relates, but only in so far as it relates, to services rendered by the pursuer with the view of obtaining a recall of the curatory, and with that finding I shall remit the account to the Auditor for taxation."

Counsel for the Pursuer — Craigie.  
Agents — Alexander Campbell & Son,  
S.S.C.

Counsel for the Defenders — Hon. W.  
Watson. Agents—Webster, Will, & Com-  
pany, S.S.C.

*Tuesday, February 16.*

OUTER HOUSE.

[Lord Kincairney.

THE EXCHANGE LOAN COMPANY v.  
TORRANCE.

*Contract—Loan by Money-Lender—Action for Recovery—Excessive Interest—Harsh and Unconsonable Transaction—Re-opening of Transaction by Court—Money-lenders Act 1900 (63 and 64 Vict. cap. 51), sec. 1.*

*Circumstances in which, in an action by a firm of money-lenders for recovery of money lent, and interest, the Court, holding that the interest charged was*