Appeal allowed. Order appealed from discharged. Appeal from judgment of àBeckett J. dismissed with costs and his order restored. Respondent to pay the costs of the appeal.

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PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. HOSKEN.

Solicitors, for the appellant, *Willan & Colles.*

Solicitor, for the respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

Appl
R v White; Tweedie v A-G (2003) 7 VR 219

[HIGH COURT OF AUSTRALIA.]

NISSEN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

GRUNDEN AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Trustees—Executors—Commission—Jurisdiction to allow past and future—Removal of trustee—Retirement of trustee and appointment of new trustee—Employment of retired trustee at a salary—Breach of trust—Profit made by trustee out of trust—Appeal in administration action—Costs of trustee—Right to indemnity out of estate—Supreme Court Act 1890 (*Vict.*) (*No.* 1142), *sec.* 21—*Administration and Probate Act* 1890 (*Vict.*) (*No.* 1060), *sec.* 26.

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MELBOURNE, *May* 24, 27, 28, 29, 30.

Griffith C.J., Barton and Isaacs JJ.

The Supreme Court of Victoria has, under sec. 21 of the *Supreme Court Act* 1890 (sec. 16 of 15 Vict. No. 10) jurisdiction to grant commission both past and future to executors, administrators and trustees for their pains and trouble, and this jurisdiction is not limited in its exercise by the provisions of sec. 26

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of the *Administration and Probate Act* 1890 empowering the Court to grant commission in a summary way to executors administrators and trustees on passing their accounts: an order granting such commission may be made in an administration action.

Two trustees, N. and P., who were carrying on their testator's business under a direction contained in the will, with power to appoint a salaried manager, employed one of themselves, P., as manager, and paid him a salary for so acting. On objection being taken on behalf of beneficiaries that this was wrong, P. retired from his trusteeship and appointed S. to act as trustee in his place, and thereafter continued to act as manager, and received a salary as before.

Held, that the appointment of S. was not improper, and that he should not be removed.

A testator appointed as one of two trustees, who were given power to carry on his business, a person who had been in the habit of supplying meals to the employés in the business at a profit to himself, and that person, while he and his co-trustee were carrying on the business, continued to supply such meals and charged the estate such a price for them as gave him a reasonable profit.

Semble, that such charge might properly be allowed.

Trustees who have been guilty of breaches of trust in respect of which an order has been made in an administration action by a Court of first instance, but who, in respect of the matters in question upon an appeal from that order, are blameless, are entitled to be indemnified out of the estate for their costs of such appeal.

Decision of the Supreme Court: *Grunden* v. *Nissen*, (1911) V.L.R., 267; 33 A.L.T., 11, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by the four infant children of Knut Adolph Grunden, deceased, appearing by their next friend Lawrence Magnus Gillberg, against Carl Johan Hjalmar Nissen and Wilhelm Pallin, who were appointed executors and trustees of the estate of Knut Adolph Grunden, and August Sheldon, who was appointed by Pallin to act as trustee in his place, alleging certain breaches of trust by Nissen and Pallin, and that Sheldon had been improperly appointed a trustee, and claiming certain relief, including accounts and inquiries on the footing of wilful default, repayment of such amount as should be found to be due by the defendants, or any of them, removal of the trustees and appointment of a new trustee or new trustees,

and, alternatively, or so far as necessary, administration of the estate under the direction of the Court.

The action was heard by *à Beckett* J., who made an order substantially in favour of the defendants: *Grunden* v. *Nissen* (1).

On an appeal by the plaintiffs to the Full Court the appeal was allowed with costs against the three defendants and the order of *à Beckett* J. was varied: *Grunden* v. *Nissen* (2).

The facts sufficiently appear in the judgments hereunder.

From the decision of the Full Court the defendants now appealed to the High Court.

Irvine K.C. (with him *Hayes*), for the appellants. The Supreme Court had jurisdiction given to it by sec. 16 of 15 Vict. No. 10 (sec. 21 of the *Supreme Court Act* 1890) to allow to executors and trustees remuneration for their services, and although, until sec. 26 of the *Administration and Probate Act* 1890 was passed, the Court had been in the habit of not allowing remuneration except under special circumstances the jurisdiction still existed, and sec. 26 only afforded a short cut for an executor or trustee to obtain commission without recourse to an administration action. Since then it has become the general practice to allow commission. [He referred to *Chadwick* v. *Bennett* (3); *In re Clements* (4); *Winter-Irving* v. *Winter* (5); *Marshall* v. *Holloway* (6)].

[ISAACS J. referred to *In re Hawkins* (7); *Forster* v. *Ridley* (8).]

The main ground for removing Sheldon from his trusteeship was that his appointment was a scheme to enable Pallin to remain manager of the business. But, if Pallin had been doing something which was improper only because he was a trustee, there is no reason why he should not retire and appoint a trustee in his place, so as to be able to continue to do legally that which before was illegal. The Court will not remove a trustee merely because he has committed a breach of trust: *In re Wrightson*; *Wrightson* v. *Cooke* (9).

(1) (1911) V.L.R., 97; 32 A.L.T., 117.
(2) (1911) V.L.R., 267; 33 A.L.T., 11.
(3) 1 V.R. (Eq.), 109.
(4) 20 V.L.R., 321; 16 A.L.T., 51.
(5) (1907) V.L.R., 546, at p. 557; 29 A.L.T., 4.
(6) 2 Swans., 432.
(7) 3 W.W. & àB. (I.E. & M.), 73.
(8) 4 D. J. & S., 452.
(9) (1908) 1 Ch., 789, at p. 803.

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Mitchell K.C., and *Weigall* K.C. (with them *S. R. Lewis*), for the respondents. Sec. 21 of the *Supreme Court Act* 1890 does not apply to trustees at all. Even if there was jurisdiction under that section to allow remuneration to trustees prior to sec. 26 of the *Administration and Probate Act* 1890, the practice was the same as in the English Courts, and it was an almost inflexible rule that trustees should not be allowed remuneration. The only exception was where the trustee refused to act unless the Court would allow him commission: *Robinson* v. *Pett* (1); *Sharp* v. *Hobson* (2); *Marshall* v. *Holloway* (3); *Thomson's Compendium of Modern Equity*, p. 40. The power of a trustee to appoint another trustee in his place is a fiduciary power, and the trustee may not use it in such a way as to get directly or indirectly a benefit for himself. The appointment of Sheldon by Pallin with the intention that Pallin should continue to be employed as manager was therefore bad: *Brocksopp* v. *Barnes* (4); *In re Boles and British Land Co.'s Contract* (5); *In re Skeats' Settlement*; *Skeats* v. *Evans* (6); *Sugden* v. *Crossland* (7); *Greenlaw* v. *King* (8). A trustee is not permitted to make any profit on goods supplied by him to the estate: *In re Sykes*; *Sykes* v. *Sykes* (9).

Irvine K.C., in reply. As to the question of costs, the trustees are entitled to be indemnified as to costs, they having been blameless in the litigation: *Rules of the Supreme Court* 1906, Order LXV., r. 1; *Annual Practice* 1912, p. 1138; *In re Love*; *Hill* v. *Spurgeon* (10); *In re Jones*; *Christmas* v. *Jones* (11); *Turner* v. *Hancock* (12).

[GRIFFITH C.J. referred to *Walters* v. *Woodbridge* (13).

ISAACS J. referred to *In re Dunn*; *Brinklow* v. *Singleton* (14).]

Mitchell K.C., as to costs. It is only where the trustee defends the estate, or brings an action to obtain some property for the

(1) White & Tudor's Leading Cases, (6th ed.), vol. II., p. 214.
(2) (1911) V.L.R., 321; 33 A.L.T., 18.
(3) 2 Swans., 432, at p. 435.
(4) 5 Mad., 90.
(5) (1902) 1 Ch., 244, at p. 246.
(6) 42 Ch. D., 522.
(7) 3 Sm. & Giff., 192.
(8) 5 Jur., 18, at p. 19.
(9) (1909) 2 Ch., 241.
(10) 29 Ch. D., 348.
(11) (1897) 2 Ch., 190.
(12) 20 Ch. D., 303.
(13) 7 Ch. D., 504.
(14) (1904) 1 Ch., 648.

estate that the rule applies. Here the conduct of the respondents before action was such as to disentitle them to costs.

Cur. adv. vult.

May 30.

GRIFFITH C.J. The testator, Knut Adolph Grunden, who died on 20th July 1907, carried on the business of an oyster saloon keeper in Melbourne. By his will he appointed the appellants, Nissen and Pallin, his executors and trustees, and left all his property to them on trusts for the benefit of his infant children. He gave the executors authority to carry on his business of an oyster saloon keeper. He purported to appoint one Dahlberg as manager of the business, and authorized the executors to continue to employ him as manager as long as they should think fit. The whole estate of the testator at the time of his death was valued for probate at about £2,200, the value of the good will of the business being stated at £500. The executors carried on the business for a period of two years from the death of the testator, and at the end of that time the result of their management of the estate had been such that its then value was about £4,000, so that, on the whole, whether the executors made mistakes or not, their administration was distinctly beneficial to the beneficiaries.

Before that period Dahlberg had become ill. We were told that he had too much work to do by reason of the increasing business. The executors then appointed Pallin, one of their number, to act as joint manager at a salary of £4 10s. a week. That was about August 1908, and from that time onwards Pallin continued to receive that salary and to devote all his time to the management of the business. In October 1909 it was pointed out to the trustees that it was improper for an executor to receive a salary from the estate and that Pallin could not go on receiving it. Thereupon the trustees appear to have consulted together, and thought it desirable that Pallin should go on managing the business, and should receive a salary for doing it. Thereupon Pallin retired from the trusteeship, and the appellant Sheldon was appointed as trustee in his place. On 23rd March 1910 this action was brought in the name of the infant children by their next friend, who is their mother's brother, charging certain

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breaches of trust against the trustees, and asking for accounts on the footing of wilful default, for the removal of the trustees and alternatively or if necessary for administration of the estate. The action was first begun against Nissen and Pallin only, as the next friend was then apparently unaware that Sheldon had been appointed in Pallin's place. A number of breaches of trust were alleged by the plaintiffs in the indorsement on the writ. Some of them are quite trivial. For instance, they complained that the trustees had expended too much money on a tombstone, and that they had expended money on completing certain buildings left unfinished by the testator; that Nissen who had, during the testator's lifetime, supplied meals for the employés at the oyster saloon had continued to do so, and had made a profit during the period of two years which *à Beckett* J. estimated at £10; that the trustees had failed to keep proper accounts, and had made improper investments. In addition to these breaches which were either trivial or failed in proof were some others deserving of more consideration. One was paying the salary to Pallin while he was a trustee, which was at least an irregularity. Another was that the trustees had taken for themselves £220 as commission for their services for the period of two years ending on 31st July 1909, and a third was that Pallin while acting as manager had spent during the two years a sum of £25 10s. on what are commonly called incidental expenses, in reality on treating customers.

The case came before *à Beckett* J. who made a decree directing that the trusts of the will should be administered by the Court. Thereupon the action became definitely an administration suit. He ordered Nissen and Pallin to repay to the estate the sum of £220 which they had taken as commission. They had, of course, no right to take it until it had been allowed by the Court. He also ordered Pallin to repay to the estate £267, representing the salary he had received for 51 weeks. He directed Nissen to repay to the estate the £10 profit he had made during the two years, and he allowed the £25 10s. He also allowed the executors, Nissen and Pallin, a commission of £5 per cent. on the net profits of the business during the two years, adding the £267 paid as salary to Pallin and the £10, Nissen's profits, to what

would have been the net profits of the business if those sums had not been taken out, and he allowed a prospective commission at the same rate to the trustees for the time being. He refused to remove the trustees. As to the other breaches of trust he held that they had not been committed, except that in one case, that of the tombstone, he reduced the amount to be charged against the estate, and made the trustees pay a considerable portion of the price of it out of their own pockets. He further made an order for costs, in which very careful regard was paid to the extent to which the plaintiffs and the defendants had respectively failed and succeeded. I venture, with very great respect, to say that in my opinion the decree was an eminently just and fair order, except as to one small point in which the learned Judge fell into error and which was afterwards corrected by the Full Court. If he made any other error it was, I think, in being perhaps a little hard on the defendants, for instance, as to the £10, Nissen's supposed profits, and as to the £267 paid as wages to Pallin. As to the £10 reference was made during argument to the case of *Smith* v. *Langford* (1), decided by Lord *Langdale* M.R., a very eminent Judge, in 1844. In that case the testator, who was a victualler, had authorized his executors to carry on his business for the benefit of his family with full powers—exactly as in this case. One of the trustees was a brewer and the other a spirit merchant who had been in the habit of supplying the testator during his lifetime. After the testator's death they carried on his business and continued to furnish supplies of beer and spirits. The point was taken that it was not permissible for a trustee or executor to make any profit out of the estate. The Master of the Rolls was asked to make a direction that the executors should only be allowed the cost price of the goods, but he refused to do so. He said (2):—"That all he could do would be to direct the Master in taking the accounts to see that the supplies were proper and furnished at the ordinary market prices. That he could not suppose that the testator, who had himself directed his business to be conducted by these defendants, expected they would be deprived of the usual fair profit." That to the ordinary person seems to be eminently

(1) 2 Beav., 362.

(2) 2 Beav., 362, at p. 363.

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sensible, and I am not surprised that the decision stood for 60 years without being challenged. I suppose that case was known to lawyers in Australia 60 years ago. Doubt was cast upon it in the recent case of *In re Sykes*; *Sykes* v. *Sykes* (1). I venture, however, to think that the circumstances in Australia are to be taken into consideration. It was a common sense rule when laid down, and having been in existence 60 years ago in Australia, may possibly still be the law here, notwithstanding *In re Sykes* (1). I am not suggesting that trustees or executors may make profits out of the trust estate, but I think that the £10 might not unfairly have been allowed. As to the £267 I shall have something to say later.

That being the decision of *à Beckett* J., the plaintiffs appealed to the Full Court. They first took objection to the allowance of commission, both past and future. They contended that the learned Judge had no jurisdiction to allow it in an administration action, that commission can only be allowed for the past, and then only when a particular form of proceeding under the *Administration and Probate Act* 1890 is adopted.

The practice in the Court of Chancery was always not to allow commission to executors except in two instances, executors dealing with estates in the East Indies and estates in the West Indies, in which cases it was allowed because it was the practice in those countries to do so. The first Supreme Court in Australia was established in New South Wales by the *Charter of Justice*, issued at the time when Victoria formed part of that State. By that Charter the Court had conferred upon it the jurisdiction of all the superior Courts of England including the Ecclesiastical Courts, and, amongst other things, the Court was authorized "to allow to any executor, or administrator, of the effects of any deceased person (except as herein mentioned), such commission or percentage out of their assets, as shall be just and reasonable, for their pains and trouble therein."

The Crown, therefore, when creating Courts of Justice in Australia introduced definitely the system that executors were to be paid for their trouble in administering estates if the Court thought fit, the rule in England being that they should not be

(1) (1909) 2 Ch., 241.

paid for that trouble. That appears to me to throw an entirely different complexion upon the matter. It had never been asserted that the Court of Chancery had not jurisdiction to allow remuneration to executors, but it had been their practice not to do so, whereas in Australia, on the other hand, the rule was established that the Court might do so. That provision of the *Charter of Justice* was carried on into the Constitution of the Supreme Court of Victoria, and now appears in sec. 21 of the *Supreme Court Act* 1890. That jurisdiction is expressly given to the Supreme Court of Victoria, and there is nothing to show that it must be exercised in one room of the Court buildings rather than another, or in a particular form of proceeding. Ordinarily that jurisdiction could only be exercised in the course of the administration of an estate by the Court, unless by Statute a more summary proceeding were allowed. Such a summary proceeding was afterwards authorized in Victoria, and the provision now forms part of the *Administration and Probate Act* 1890. But the jurisdiction existed all along, and the contention that, when the summary form of procedure was permitted, the Judges were limited in the exercise of the old jurisdiction to the new form of procedure is, if I may say so, without failing in due respect, absurd.

As I have said, this jurisdiction was recognized in England, though the practice was not to exercise it. An old instance to which I will refer to is *Marshall* v. *Holloway* (1) before Lord *Eldon*. The counsel in that case included Mr. Hart, afterwards Lord Chancellor of Ireland, Mr. Preston, Sir Samuel Romilly and Mr. Sugden, afterwards Lord St. Leonards. So that counsel, at any rate, were not ignorant of the law that was being administered. One of the questions in that case was whether one Croft, one of the trustees of a will, should be continued as a trustee. He had been rendering services to the estate as an agent for some time, but was unwilling to continue them unless he received some remuneration. One of the questions considered by Lord *Eldon* was whether Croft should receive remuneration for his past services, and another was whether he should continue to be trustee and receive remuneration for future services. The decree recited that Croft alleged that the affairs of the estate took up so much

(1) 2 Swans., 432.

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of his time that he would not have undertaken them except on the assurance that an application would be made to the Court to authorize the allowance to him of a reasonable compensation for his labour and pains. Then the decree continued (1):—"It is ordered, that it be referred to the Master to settle a reasonable allowance to be made to the said Faithful Croft out of the said testator's estate, for his time, pains, and trouble, in the execution of the said trusts, for the time past." It was further ordered "that the said Master do inquire whether it will be for the benefit of the said testator's estate that the said Faithful Croft should continue to be a trustee under the said will, and to receive a compensation for the future employment of his time and trouble; and in case the Master shall be of opinion that it will be for the benefit of the said testator's estate that the said Faithful Croft should be continued a trustee, then the said Master is to settle a reasonable allowance to be made to the said Faithful Croft therein." It was said by Lord *Kenyon* in one case that the best way of ascertaining the jurisdiction of the Court is to see what orders the Court has made in time past. That case, at any rate, affords some evidence of what the jurisdiction of the Court was. Then there is a later case of *Forster* v. *Ridley* (2), decided in 1864 by *Knight Bruce* and *Turner* L.JJ. *Knight Bruce* L.J. said (2):—"Then comes the question whether the executors should have any allowance for their trouble and loss of time in managing the testator's leaseholds and carrying on his business for the space of time—two years, I think—during which they did so, and the circumstances are such and so peculiar, and so much took place on the subject, that I think there should in this particular case be some allowance." Then he went on to say that enough money had already been spent in litigation, and that the Court would not direct an inquiry, but would themselves fix an amount, as *à Beckett* J. did in this case. *Turner* L.J. said (3):—"The position of the case in respect of the question of allowance to the executors and trustees is, that the parties entitled to three-fourths of the property desired the executors and trustees to carry on the business; and I do not see what could have been

(1) 2 Swans., 432, at p. 453. (2) 4 De G. J. & S., 452.
(3) 4 De G. J. & S.. 452, at p. 453.

better than so to do, until the young man reached twenty-one. I think, therefore, that an allowance ought to be made for the loss of time and trouble by the executors and trustees in carrying on the business and I think it is better for us to fix that amount ourselves." He then said that there was a case in the Privy Council in which that Court had done the same thing.

Another instance of the allowance of remuneration for past services is somewhat remarkable. It is *In re Bignell*; *Bignell* v. *Chapman* (1), a case before the Court of Appeal, where an allowance was made to a trustee after her death, although, apparently, she had never claimed any during her lifetime. In that case a trustee had been carrying on the business of the testator in accordance with his will. She was appointed receiver, to give her absolute control of the business, and after that carried on the business for some time. Then she died without having received any remuneration, and her executors asked for remuneration to be allowed her. It was contended that such an allowance was impossible—that was also contended here. It was said that the services of an executor must always be gratuitous. The Court disposed of that contention summarily. *Lindley* L.J. said (2):—"The authorities only go to this, that the Court does not generally appoint a trustee to be receiver at all, and that generally he will not receive remuneration if he is appointed. But there is no inflexible rule."

In the face of those authorities it is idle to say that the Court of Chancery had no jurisdiction to make an allowance to trustees and executors for their pains and trouble, and that is sufficient to dispose of the objection to the judgment in respect of the allowance of a commission for the two years during which the trustees had carried on the business. Incidentally also they would show, I think, that *à Beckett* J., if those cases had been brought to his attention, might have allowed to Pallin some or all of the £267 for his services during that time as manager, but that question is not sought to be raised here.

As to future commission, the case is covered by the case of *Marshall* v. *Holloway* (3), to which I have already referred, and

(1) (1892) 1 Ch., 59. (2) (1892) 1 Ch., 59, at p. 63.
(3) 2 Swans., 432.

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also by the case of *Re Freeman's Trusts* (1), in which *Stirling* J., upon the appointment of trustees, authorized the payment of commission to them for future services. It follows that, so far as regards commission both past and future, the decision of *à Beckett* J. was within his jurisdiction, and there is nothing in the facts to show that that jurisdiction was not wisely exercised.

The Full Court however, as I understand, held that he had no power to allow past commission, except on a summary application under the *Administration and Probate Act* 1890, and had no power to allow future commission at all, and they also held that the appointment of Sheldon was improper, and ordered him to be removed from the office of trustee. The case was put to the Court as a fraud on a power. I have already stated the circumstances under which he was appointed. When it was brought to the notice of the trustees that Pallin could not receive a salary while he remained a trustee, it appeared to be necessary that he should either retire from his position of trustee or his position as manager. If he retired it was desirable that another trustee should be appointed. It was apparently honestly thought desirable that he should continue as manager. No objection was taken to Sheldon personally. It is said that he was a working stonemason, but that is no objection to his appointment, if he was otherwise fit, as he seems to be. But it is said that there was a corrupt bargain between Pallin and Sheldon to the effect that Sheldon should agree to keep him on as manager. I will read what *à Beckett* J. said on that point, which I entirely adopt: "Two views of the facts as to his appointment are open—one that Nissen with a view to benefit Pallin, without any regard to his fitness for the post, or advantage to the business, determined to keep him as manager, and to pay him more than his services were worth; the other, that Nissen thought it an advantage to the business that Pallin should manage it, and that it would be better for the beneficiaries that the business should be managed by Pallin as a paid servant than that he should share the control of it as trustee. On the evidence I take the second view. Taking that view, I see nothing inequitable, nothing in the nature of a fraud upon a power in resorting to the usual process by which

(1) 37 Ch. D., 148.

an existing trustee may go out, and a new trustee may come in, the new trustee being an independent person of good character, under no subserviency of stipulation or of expectation justified by the relation in which the new trustee stood to any of the parties. As soon as Pallin ceased to be trustee he ceased to be a person to whom it was unlawful to pay wages. He could no longer have an effectual voice in assessing his own value. The conflict between interest to get as much as he could and duty to pay as little as he could had ended. His trusteeship did not disqualify him as a wage-earner, but only as a wage-payer." That appears to me entirely to dispose of the contention of the plaintiffs that Sheldon's appointment was improper. The case was heard on oral evidence, and no reason is suggested why the learned Judge's conclusions of fact should be dissented from. As to the £25 10s. it is unnecessary to say more than that I quite agree with the conclusions of *à Beckett* J. The appeal to the Full Court therefore failed altogether and should have been dismissed with costs, and that is the order which this Court should make so far as the plaintiffs' appeal is concerned. I have said that a small error in the judgment was corrected, but that was on the defendants' appeal.

As to costs, there is no doubt that costs should be awarded against the next friend. Probably, however, that would be futile, except as to the £25 security for the appeal to the Full Court paid into Court. A further question is whether the Court ought to allow the trusteess to be indemnified out of the estate ? It is a very hard thing that the estate of the infants should be wasted in the way in which it has been and is likely to be by the proceedings in this suit. On the other hand the general rule is well recognized that trustees and executors are entitled to receive their costs of of an administration action out of the estate. That is established by a number of cases, of which *Turner* v. *Hancock* (1) is a well known one. That is the rule by whomsoever the action is brought. It may be brought by one of several beneficiaries or by a creditor; the trustees are equally entitled to be indemnified. But that rule may be departed from if the trustees have done anything to disentitle them to indemnification. So far as the

(1) 20 Ch. D., 303.

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decree goes that rule was applied by *à Beckett* J. He carefully weighed the difficulties and conduct of the defendants and awarded costs accordingly. I think, as I have already said, that his order for costs was most just. From that time the action became a mere administration action, and the next friend of the unfortunate plaintiffs thought fit to appeal, taking a step in the administration action in which he failed. The question then is whether the defendants are entitled to rely on the general rule. I was at first disposed to think that there might be some way of relieving the estate from the burden, but that can only be done by doing injustice to the trustees who so far as these proceedings are concerned are entirely blameless. In the case of *In re Jones*; *Christmas* v. *Jones* (1) the matter litigated was whether the executors were entitled to charge against the estate a sum of £710. Nearly the whole of the claim was disallowed, but *Kekewich* J. thought that that was not sufficient under the circumstances to deprive them of their right to be indemnified out of the estate. A case before the House of Lords of *Lord Muskerry* v. *Skeffington* (2) is a very strong case on the subject. In that case the appellants had been appointed trustees of a settlement and a petition was presented to the Lord Chancellor of Ireland representing that they had declined to act in the trust, and praying that they might be removed and that other persons might be appointed in their stead. An order to that effect was made, but the trustees appealed to the House of Lords and the appeal was allowed. Lord *Cairns* L.C. referring to the question of costs said (3) :—" I think that, as trustees, they are entitled to be indemnified for the costs they have thus incurred. If those to whom the irregularity is chargeable in Ireland had been the persons whose names occur as the petitioners in the cause petition, namely, the minor children of the late Lord Massereene, if they had been personally chargeable with the irregularity, and had been persons of age to answer for it, your Lordships might have been disposed to order the costs which have been incurred to be paid by them. But, of course, the irregularity is not chargeable to them ; and I regret that I cannot offer to your Lordships any

(1) (1897) 2 Ch., 190.
(2) L.R. 3 H.L., 144.
(3) L.R. 3 H.L., 144, at p. 151.

other advice than that the costs should be made good out of the funds of those minor children, who, I am of course aware, are not chargeable with what has taken place, but whose interests must suffer because those who are chargeable are not within the reach of your Lordship's jurisdiction." Lord *Westbury* expressed his pain at the proceedings and added (p. 152):—"That pain is increased by the regret that we cannot throw the costs upon the persons who most improperly presented the petition to the Court of Chancery in Ireland, containing that grossly inaccurate allegation that the trustees had declined to act, and who, in the name of the infants, opposed the very proper application of the trustees to set right that which had been wrongly done. My Lords, the necessity of indemnifying the appellants renders it imperative upon us to give them their costs out of the trust estate." Although therefore it is very hard upon the infants, I do not see how, the trustees being blameless in these proceedings, so far as regards the appeal to the Full Court, we can deprive them of the benefit of the general rule that in an administration action trustees are entitled, in the absence of misconduct, to be indemnified out of the estate.

The appellate proceedings may be summed up as an appeal to the Court to enforce some supposed rigid cast iron rules binding on the Court which prevent it from doing justice. I take leave to say that there are no such rules. No case has been cited, nor do I know of any, which shows that the Court is precluded from doing justice by any such cast iron rules. I think, therefore, that the appeal must be allowed, and that the judgment of the Full Court must be discharged except so far as it gives further relief to the defendants.

BARTON J. The judgment just delivered represents completely the opinions I formed during argument, which were fortified upon consultation, and I do not propose to add to it.

Law, though sometimes a necessary medicine, is generally a nauseous one; and it resembles some other medicines in this, that it is apt to induce ailments more disagreeable than those for the cure of which it is invoked. I trust that the respondent, when he reflects on the order of this Court, will realize this truth, and will

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also realise that attempts to administer medicine to others may sometimes result, quite justly, in having to swallow it oneself. A little sensible conversation, conducted in a spirit of fair play, would probably have resulted in an arrangement completely satisfactory to all really concerned, unless personal differences were held more important than the interests of the beneficiaries; and I decidedly think that an endeavour to that end should have been made. The litigation was rashly entered upon, and still more rashly continued after the decree of *à Beckett* J.

ISAACS J. I agree that this appeal should be allowed. The Full Court thought that there was no jurisdiction to grant commission at all in these proceedings. They said nothing as to the amount of commission, nor did they disturb the view of *à Beckett* J., as to what was a reasonable and proper amount, so that we have a clear question of whether there is jurisdiction in the Supreme Court to allow commission in such proceedings as an administration action. I am of opinion that there is ample jurisdiction, and I come to that conclusion both on principle and on some very distinct Victorian authorities.

Looking at the matter first of all from the standpoint of principle, it cannot be denied that in the Court of Chancery in England the usual practice was, and, I think, is, not to allow a trustee remuneration for his loss of time and the trouble he bestows in working out the estate. We are so accustomed in Victoria to a particular form of remuneration that I think we are apt to lose sight of the real point of the principle in the English cases. A trustee there in claiming his just allowances carries in a claim for some specific items, and regarding this class of claims the Court has said that, as a rule, it will act on the principle that a trustee cannot profit by his trust, that he cannot employ himself and make a charge for his services, and then ask the Court to allow that charge. The rule and the reason for it are stated in many cases, but most distinctly I think in *Broughton* v. *Broughton* (1), by Lord *Cranworth*, who, after stating the rule at some length, said:—"It has often been argued that a sufficient check is afforded by the power of taxing the charges, but the

(1) 5 D.M. & G., 160, at p. 164.

answer to this is, that that check is not enough, and the creator of the trust has the right to have that, and also the check of the trustee. The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made."

Upon that ground the Court has laid down the general rule that a trustee cannot employ himself, and then say that the work was necessary and that the amount of time and labour he bestowed was reasonable and the charges fair.

But that is quite different from the rule that obtains in Victoria of allowing commission upon the administration of the general estate as a whole. In England however the principle I have referred to was only allowed to operate for the benefit of the estate, and not to its disadvantage and the Court's disallowance of remuneration ceased when special circumstances presented themselves which made it apparent to the Court that some remuneration was necessary or reasonably necessary to attract, as I may term it, the requisite services for the benefit of the estate. The cases referred to by the learned Chief Justice are instances of that exception being allowed to operate. In one of them, *Marshall* v. *Holloway* (1) Lord *Eldon* L.C. in his decree after stating that Croft alleged that he would not have undertaken the trust but for the assurance that an application would be made to the Court to authorize the allowance and payment of a reasonable compensation for his labour and time and would not continue to act therein unless such an allowance were made, went on to order "that it be referred to the said Master to settle a reasonable allowance to be made to the said Faithful Croft out of the testator's estate, for his time, pains and trouble, in the execution of the said trusts, for the time past."

It will be found that those words are very like the words of the principle introduced later into Victoria by legislation.

The case of the East and the West Indies, as was pointed out by *Sir Lancelot Shadwell* V.C. in *Denton* v. *Davy* (2), raised special circumstances, because it was very important that estates in those places should receive the benefit of someone's services,

(1) 2 Swans., 432, at p. 453. (2) 1 Moo. P.C., 15, at p. 40.

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and that was a special circumstance which lifted the cases out of the ordinary rule.

That being the general attitude of the Court—not a rigid invariable rule, but the general rule which the Court departed from whenever in the special circumstances of a case the benefit of the estate required it—it would apply very properly in Victoria if nothing but the ordinary practice of the Court of Chancery were applicable here. But in 1852 when the Supreme Court of Victoria was organized by 15 Vict. No. 10, passed by the Victorian legislature, that Court was given unlimited common law jurisdiction and the equitable jurisdiction of the Court of Chancery. By sec. 15 it had ecclesiastical jurisdiction, and in sec. 16 provision was made for allowing to persons administering estates of deceased persons "such commission or per-centage as shall be just and reasonable for their pains and trouble therein." That was not an allowance for any individual items but a general commission or percentage for their efforts in administering the trust estate. That was a distinct change—a change of public policy, it may be called—introduced by Parliament itself, and I may observe that no amount of disregard of that public policy by the Court and no want of exercise of the jurisdiction conferred could in any way abrogate that provision. Authorities are numerous to that effect. In *Hebbert* v. *Purchas* (1) Lord *Hatherley* L.C. said:—"Neither contrary practice nor disuse can repeal the positive enactment of a Statute." Of course, one need hardly say that contemporaneous usage may help to interpret any ambiguous or obscurely worded Statute. But where, as in this case, it was a clearly worded and everyday working Statute, conferring jurisdiction upon the Court, I, for my part, cannot understand how any practice of the Court can prevent that jurisdiction being exercised in favour of a person claiming the benefit of it. But it was pointed out by Mr. *Mitchell* that in *In re Hawkins* (2) *Molesworth* J., after referring to the general practice not to allow remuneration and the principle that a trustee should make no benefit by his trust, said that the practice had been not to interfere with the general principle, and added (3):—

(1) L.R. 3 P.C., 605, at p. 650.
(2) 3 W.W. & àB. (I.P. & M.), 73.
(3) 3 W.W. & àB. (I.P. & M.), 73, at p. 74.

"This is a case in which the long habit not to do a thing should have the effect of a law against doing it, unless under special and exceptional circumstances."

That is to say that, notwithstanding the words of the Statute, the law remained exactly the same as it was before. It is not necessary to say anything more about that observation than this, whatever effect such a decision might have had under other circumstances, subsequent events have entirely annulled the effect of it. One is the decision of the Full Court in *Chadwick* v. *Bennett* (1). That was in 1868, two years after the decision in *In re Hawkins* (2). *Stawell* C.J. said (3):—"Three grounds have been urged in support of the present appeal. The first that the Court had no jurisdiction to make the order. Upon that point, I think the Court, even in the absence of any legislative enactment, had power to make some allowance. The very fact of the Court of Chancery allowing commission on assets recovered in those countries in which commission is given, shows that the Court has jurisdiction to allow it if they consider it advisable; because it is not upon any statutory enactment that the Courts in England grant this commission, but as a matter of policy. Apart from this, there is an Act in this country which allows commission, and although it has been permitted to slumber for many years, yet it embodies the Charter of Justice altering it in a very slight degree; and that Charter of Justice has been acted on in New South Wales and in this country also for some time before its separation from New South Wales." Then follow these words which come in more directly later on:—"Then as regards the discretion respecting the amount, the Court having jurisdiction, although this is the first instance in which the power has been exercised, yet if the primary Judge, who had all the facts before him, considered it wise under all the circumstances to allow the commission, I do not think the Court of Appeal ought to interfere with that discretion."

The *Administration and Probate Act* 1872 included a section now practically sec. 26 of the Act of 1890. In 1873 the Act came into force and in October of that year there came before

(1) 1 V.R. (Eq.), 109. (2) 3 W.W. & aB. (I.P. & M.), 73.
(3) 1 V.R. (Eq.), 109, at p. 113.

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Molesworth J. the well-known case of *In re Pender* (1). His Honor said:—"Since then the Act No. 427 was passed, mixing up real and personal estate in a common fund, and sec. 25 of it enacted that it shall be lawful for the Court to allow a commission to executors and administrators for their trouble. He thought the language of the Act left it discretionary in the Court to grant or withhold the commission on consideration of all the circumstances. The legislature must be taken, however, to mean that for the future the allowance of commission was to be the rule, and the disallowance the exception." In *In re Rolfe* (2), *Molesworth* J. said:—"But the Act, especially as to trustees being mentioned, indicates a policy to pay executors, administrators and trustees. I am inclined in this case to draw a line at the time of the Act coming into operation, 1st January 1873, as to pains and trouble taken after it, not to exclude the applicants because they undertook the office before, but not to remunerate for pains and trouble for which they had no reason to expect payment when the pains and trouble were bestowed, and without more minute distinction, to take the trouble at the date of the receipt." He made the order retrospective to the date of the coming into operation of the Act. Then he says:—"Since the passing of the Act, I had to deal with a case of *In re Pender* (3), in which the codicil appointing the trustees and executors was executed after January 1873, and the testator had expressly promised them remuneration, and they stated that they accepted the office expecting to get it. I therefore allowed commission."

In 1881 *Holroyd* J. had in *In re Swan* (4) to consider the matter. He quoted the following passage from the decision of *Molesworth* J. in *Chadwick* v. *Bennett* (5):—"The Act here authorizes the Court at its discretion to grant a commission to executors. It contemplates only the proceeding of accounting in the matter of the executorship in the ecclesiastical jurisdiction of the Court, as that in which directly such an allowance should be made. I do not think that the Court, in its different jurisdictions, should act upon different principles, and I think that in all its

(1) 4 A.J.R., 141, at p. 142.
(2) 5 A.J.R., 92, at p. 93.
(3) 4 A.J.R., 141.
(4) 7 V.L.R. (I.P. & M.), 49, at p. 53.
(5) 1 V.R. (Eq.), 111.

jurisdictions it is competent for the Court to allow a commission to executors." Those are the words of *Molesworth* J. affirmed by *Holroyd* J. I therefore think there is no doubt whatever, upon principle and authority, that there was jurisdiction on the hearing of the action to grant commission independently of the specific power contained in the section referred to.

The Full Court said not a word on the facts as to there being any reason for disturbing the decision of *à Beckett* J., and no reason has been satisfactorily shown to us.

In regard to the £25 10s., I take *à Beckett* J. as deciding that, upon the whole, that expenditure had the effect of promoting business. It is, however, a small matter, and, in connection with it, we may well bear in mind the celebrated aphorism of *Selwyn* L.J. quoted by Lord *Lindley* (then Master of the Rolls) in *Perrins* v. *Bellamy* (1), as corrected by him in *National Trustees Co. of Australasia Ltd.* v. *General Finance Co. of Australasia Ltd.* (2):—"The great use of a trustee is to commit *judicious* breaches of trust." I can see no loss to the estate from it in the result.

As to the removal of the trustees it was argued that the appointment of Sheldon was void because the purpose of the appointment was contrary to the power. No case was shown to us where a trustee was removed upon similar materials. But it was said that Pallin retired from the trust in order that he might become manager, that Sheldon knew that it was the intention of Nissen to appoint Pallin as manager and that Pallin's intention was to become manager, and therefore there was some plot in which Sheldon was an accomplice. The propriety of the appointment may be regarded from two standpoints. First of all, Mr. *Weigall* said that there was a fraud, as it is technically called, upon the power and, therefore, that the appointment is void. If Sheldon had been a mere dummy, if he had lent himself as a matter of form to the retirement of Pallin, so that Pallin, for Pallin's benefit, regardless of the interests of the estate, might take up a lucrative position, then I should say that would have been a very good reason for removing Sheldon. But the facts do not, in my opinion, bring this case within the recognized prin-

(1) (1899) 1 Ch., 797. (2) (1905) A.C., 373, at p. 375.

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ciples of a void exercise of a power. Two or three cases, to which I will refer, I think will establish that. In *Roach* v. *Trood* (1), *Baggallay* J.A., in delivering the judgment of the Court of Appeal, after referring to *Topham* v. *Duke of Portland* (2) said:—"As was observed by Lord *Hatherley* in the course of his judgment, a former appointment had been set aside on the ground that the appointee was a mere instrument for effecting the purpose of the donee of the power, which was foreign to that which was the true purpose of the power, and that while he gave implicit credence to the statements of both the appointor and appointee that the absolute appointment in favour of the latter had been made without any agreement between them, he inferred from all the evidence before him, and particularly from that of the appointee herself, that she was still under the same influence, and would still be a passive instrument to effect the purposes of the appointor." It has been found here by *à Beckett* J. and confirmed by *Madden* C.J. and *Hodges* J. that these people were honest—that there was no design of a corrupt or morally bad nature, and there is no suggestion in the evidence, and I am not sure that there is any suggestion at the bar, that Sheldon was going to be a passive instrument. But it was said that some benefit was to be given to Pallin. I would refer for some very valuable observations to *Palmer* v. *Locke* (3), where *Brett* L.J. pointed out that a bare promise by the donee of a power to fetter himself is no fetter at all. It is void. It must be remembered, I should say in passing, that the purpose of the appointment of the trustee here was not to appoint Pallin manager. It did not appoint him manager and Pallin acquired nothing by the appointment itself. It is not like the appointment of property the effect of which is to give the property. *Cotton* L.J. in the case to which I have just referred said (4):—"How can you say that a man is properly a trustee of a power? As I understand it, it means this, in the words of Lord *St. Leonards*, that it must be fairly and honestly executed. A donee of such a power cannot carry into execution any indirect object or acquire any benefit for himself directly or indirectly. That is, it is something given

(1) 3 Ch. D., 429, at p. 442.
(2) L.R. 5 Ch., 40.
(3) 15 Ch. D., 294, at p. 301.
(4) 15 Ch. D., 294, at p. 302.

to him from which he is to derive no beneficial interest. In that sense he is a trustee, and he is liable to all the obligations of a trustee in this sense, that he must not attempt to gain any indirect object by the execution of the power in a way which in form is good, but which is a mere mask for something that is bad. . . . But it is not every possible benefit to the donee of a power from the exercise of it which will make the execution of the power bad." I think those last observations apply very strongly to the present case, and the most that can be said is that Pallin when he appointed Sheldon trustee in his place had the purpose of releasing himself from being a trustee, though his motive in so doing may have been to have himself afterwards appointed as manager.

That essential distinction is pointed out by *Turner* L.J. in *Topham* v. *Duke of Portland* (1):—"It is one thing to examine into the purpose with which an act is done, another thing to examine into the motives which led to that purpose; and what we have to do in this case is, to look to the purpose of the act which was done, and not to the motive which led to it." When these two things are kept distinct it will be seen that the purpose was to put Sheldon in the position of trustee instead of Pallin and so merely to release Pallin from the position of trustee in which he was, as was pointed out in the letter of 16th September incompetent to act as manager. That was the purpose of the appointment. Pallin may have had, and no doubt had, the intention of becoming manager by the appointment of a trustee. But that is a different thing and is not corrupt, and the appointment itself should not be set aside on that ground. It then comes to whether Sheldon should be removed. The only grounds upon which a trustee will be removed are stated by the Privy Council in *Letterstedt* v. *Broers* (2). Having no authorities before them and nothing to go upon they quoted *Story's Equity Jurisprudence*, sec. 1289, as follows:—"But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a

(1) 1 DeG. J. & S., 517, at p. 571. (2) 9 App. Cas., 371, at p. 385.

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course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." The Privy Council then go on to say (1):—"It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate." That principle was repeated by Lord *Blackburn* in the House of Lords in *Ewing* v. *Orr Ewing* (2). He said they had to go on principle and that he adopted for the House of Lords what the Privy Council had laid down. In these circumstances I think the decision of the Full Court as to the removal of the trustee also was wrong and that the appeal ought to be allowed.

I would like to add that I feel that this deplorable litigation was entered upon without sufficient care to see whether matters could not be accommodated without litigation. It has been said on both sides that it is the welfare of the infants that is being cared for. But I think their welfare would have been much better cared for had some businesslike arrangement been made or attempted before legal proceedings were instituted. I cannot help thinking that if an accountant on behalf of the next friend had gone over the books, asked for information and attempted to arrange matters, the parties would have seen, as the Court sees now, that it would be very much better for the children that money should not be squandered, as unfortunately it has been, in law costs.

Something has been said in regard to the correspondence before action. As to that I think that it may be said that more prompt and definite information should have been given by the defendants, but, I also think that on the other side there was a display of hostility calculated to arouse resentment, and the first letter from Mrs. Lagerloff has a very strong appearance of an embryonic statement of claim. I can only express my regret that it has come to this at last, that we are forced to look on at the fund intended for the maintenance of the children being dissipated in law costs.

Appeal allowed. Order appealed from dis-

(1) 9 App. Cas.. 371, at p. 386. (2) 10 App. Cas., 453, at p. 530.

charged except so far as it discharged the direction to the defendants Nissen and Pallin to repay the sum of £42 15*s. paid by them in respect of certain shares. Judgment of àBeckett J. restored with this exception. Plaintiffs' appeal to the Supreme Court dismissed with costs against the next friend. Deposit of* £25 *to be paid to defendants towards such costs. Defendants to have their costs out of the estate so far as not recoverable from next friend. Respondents' next friend to pay costs of appeal. Appellants to have them out of the estate so far as not recoverable from him.*

Solicitor, for the appellants, *J. Woolf.*
Solicitors, for the respondents, *R. E. Lewis & Son.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FOOTSCRAY QUARRIES PROPRIETARY LIMITED . . . . . } APPELLANTS;
DEFENDANTS,

AND

NICHOLLS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Negligence—Employer and employé—Evidence—Employers and Employés Act 1890 (*Vict.*), (*No.* 1087), *sec.* 38.