1806.

ROSE v. EARL OF FIFE.

WM. ROSE . . . . . *Appellant;*
EARL OF FIFE . . . . *Respondent.*

House of Lords, 25th April 1806.

FACTOR—REMUNERATION—DISCHARGE—LOCATIO OPERARUM.—A factor received a fixed salary named in his factory. He continued for thirty years to act; and, on the duties being increased, the Earl converted the salary into a bond of annuity for life. During this whole period of his service, annual accounts were given in, including his salary of £100, and discharges mutually granted, without any other claim being made. In a claim made by him for remuneration for services unconnected with his factory, Held that he could not legally claim such remuneration.

This was a claim by Mr. Rose, the Earl of Fife's factor, made for remuneration for extra labour over and above the certain fixed allowance he had for the general management of the Earl's estates and affairs. The Earl seemed to be conscious that the factor was entitled to something over and above the small salary of £100. He had turned that salary into a bond of annuity for life. He had, in another deed, left him a legacy. Thereafter, he had granted a bond for £500; and, finally, this last and the legacy, were cancelled.

Nov. 12, 1800.

The Lord Ordinary pronounced this interlocutor, in which the whole circumstances of the case are set forth: "Finds that the pursuer (appellant), during the great number of years that he was in the employment of the defender, acted under factories renewed at different periods, "with a fixed annual salary, which was regularly advanced, "till at last it was fixed at £100 Sterling per annum, besides "his maintenance at bed and board in the defender's family; finds, that by the factory granted upon the 24th Jan. "1771, the power granted to the pursuer was so enlarged "as to give him a very comprehensive and general management of the defender's whole estate; and that upon the "10th of December 1772, the defender granted a bond of "annuity to the pursuer, converting the salary allowed "him as factor, into £100 per annum for life, whether he "should remain in the defender's service or not; finds, that "during the whole period of his continuing in the defender's employment, accounts were yearly fitted and settled "between them, and discharges mutually granted; and, in "these accounts, the pursuer was regularly credited for his "said annual salary of £100, without mention or reservation of any claim for a further allowance, which the pur-

1806.

ROSE
v.
EARL OF FIFE.

"suer might suppose to be due to him on account of extraordinary services, or that would lead the defender to "understand that any further recompense was expected; "finds that, in these circumstances, it is to be presumed "that the pursuer rested satisfied with his salary converted "into an annuity for life, and with such other advantages "as he derived from his situation, or from the favour and "goodwill of the defender; and, therefore, that whatever "were the services or merits of the pursuer, he has not "shown any sufficient legal grounds for supporting the "claim in which he now insists; and, for these reasons, "sustains the defences, assoilzies the defender from the "present action, and decerns." On four representations, the only alteration made by the Lord Ordinary was, to reserve right to claim the annuity of £100, and *quoad ultra* adhered. On two several reclaiming petitions to the Court, the Lords adhered. *

Nov. 28, 1800.
Mar. 7, 1801.
May. 21, ——
June 5, ——
Jan. 13, 1802.
Jan. 11, 1803.

* Opinions of the Judges:

LORD PRESIDENT CAMPBELL said:—"This is a question as to recompense for services, and whether these are discharged or not? There is no express discharge, and, in the circumstances of the case, a discharge of these ought not be implied. The relative situation of the parties is, in my opinion, to be attended to. There was great address on the one side. Confidence and dependence on the other. Expectations of future rewards being held out, how was the pursuer to act in such circumstances? The deed of 1772 is of an ambiguous nature—an act of mere will, and it is difficult to say whether it be testamentary or *inter vivos*, or whether it is revocable or otherwise, whether it would have been the ground of an action or not, whether in full of salary, or in addition thereto. It is clearly not a settlement of accounts, suggested and signed by the whole parties. But, in the first place, it grants a salary, while Mr. Rose continued factor, which was to be during Lord Fife's pleasure. 2. A legacy, to take place at death, and so far is testamentary, upon narrative of regard, and, consequently, is good. If he was dismissed, there was to be nothing due between dismissal and Lord Fife's death. This last point of the deed is worth nothing, and would yield no price if carried to market, unless the explanation in a cancelled deed in his own possession can be admitted. The Lord Ordinary's fourth interlocutor reserves all defences against it. It is not given as a remuneration for services, but for love and favour; and, supposing it had, it would have related merely to his duty as manager of the estate only—not to extra trouble in the professional character of a law agent or political agent. The £500 bond afterwards executed, seems to me to have been meant for this, but it is now cancelled. In short, the pursuer goes on unrewarded for his services, and gets less than any country procurator

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. When a professional man is employed to do the duties of his profession, and to bestow his skill, his labour, and his time, for the benefit of another, the contract of *locatio operarum* is formed between them. There is no occasion for an express deed to bind them; the employment of itself, with the undertaking on the part of him whose services are made use of, necessarily imply a contract, which, as effectually as the most express

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might have charged for doing the third part of the business. If, therefore, the supposed discharge be not clear and direct, we ought to consider the justice of the case before making it out from circumstances. The allowance given in a similar case to Mr. M'Murdo, is proof of what the Court would do here, if not barred by the alleged discharge. As to the words management of affairs, they allude to the new commission given him in January 1791, and not to those extensive extra matters in which he became to be employed chiefly *after that period.* This could not then be in view, far less to discharge them. The £100 per annum, with a house and farm, was scrimp even for factor and chamberlain business; and the continuation of this sum during life was to make up for that deficiency in some degree, and also by way of inducement to his heirs to continue him. The £500 granted in 1773, which seems to have come in the place of the former deeds, or intended deeds of legacy, real or pretended, must have been understood by himself as the smallest consideration he could propose for the services performed *before that period,* and still could not be meant in full of after services, which did not then exist. I therefore think he is foreclosed as to salary *qua* factor, but not *quoad ultra.*"

LORD JUSTICE CLERK.—"I am for adhering."

LORD CRAIG.—"I am of the same opinion. The matter of remuneration was finally fixed by agreement."

LORD HERMAND.—"I rather incline to think that there was no agreement except as to the factory. My difficulty is in regard to the discharges."

LORD MEADOWBANK.—"I am sorry to be of opinion with the interlocutor; but a claim for labour, after discharges *de anno in annum* cannot be listened to."

LORD BALMUTO.—"I am for altering."

LORD WOODHOUSLEE.—"I think there was here, on the part of the Earl, a studied plan to deceive the pursuer by these bequests, and therefore I am for altering."

LORD BANNATYNE.—"He ought to have made his charge at the end of every year."

President Campbell s Session Papers, vol. 108.

and formal deed, binds the professional man on the one hand, having undertaken the charge, to that degree of diligence which belongs to the contract, and, on the other, as distinctly imposes an obligation on the employer to pay the regular hire for what is done; but the appellant has been proved to have performed a vast variety of professional acts wholly unconnected with his duty as a factor, and these, while they were most valuable to Lord Fife, proved a very extensive sacrifice of time and talents on the part of the appellant, who had been led to expect the full power of applying his professional skill in the lucrative service of other clients. Of this proposition the judges of the Court of Session were well satisfied. Many of them had an opportunity of knowing the extent of the appellant's employment, when at that bar they acted as counsel for Lord Fife; and they were unanimously impressed with the conviction of the extent, variety, and value of the appellant's services beyond the limits of his duty as factor. 2. But this obligation incumbent on Lord Fife, rests not entirely on the implication of a contract, with the circumstances of employment and unexceptionable performance. Other circumstances strongly confirm this obligation or contract upon Lord Fife. These circumstances were, that the Edinburgh agents and the country writers were employed at a great expense, with salaries, &c. in the Earl's business, at the time of his succession. That it was his declared resolution to change that system, and devolve the same business on one who should labour, and earn by it his "penny fee," and that the appellant was selected and chosen for that purpose. 3. The conclusion which follows from these circumstances, is a demand for recompense in favour of the appellant, and this appears so reasonable, that nothing could resist it but the objection which is stated, namely, that the factory named a sum for his remuneration, and the bond of annuity for £100 during his life, was a sufficient recompense for all. But it is quite apparent that the factory did not refer to the new duties subsequently imposed. Nor could the bond of annuity infer an obligation to do other acts than those belonging to the factor.

Pleaded for the Respondent.—The salary or annuity, for which the appellant had credit in the accounts which were annually settled between the parties, for a period of thirty successive years, was allowed to and received by him, in full of all demands he could have for trouble in the respondent's affairs. Every circumstance demonstrates this. The mutual

1806.

JOHNSTONE, &c. v. STOTTS.

discharges regularly annexed to the accounts are in the most general, comprehensive terms, without qualification or reservation, in any instance, to countenance the present demand as for extra services. It is in vain to allege, that the allowance so stated was only in respect of trouble had in the department of stewart or factor; for these accounts relate to every transaction in the respondent's affairs, where money came into the appellant's hands, or was expended by him; and it is difficult to conceive any piece of business unattended by some expense, particularly a variety of articles in these accounts, as for the appellant's travelling charges and the like, regarding the very matters for his personal trouble and assistance in which he now asks recompense. The payments made by him to other persons, who were joined with him in the business and transactions alluded to, including what they received as for agency, are stated, and yet it is not alleged that, in all that long course of time, he made a charge for his own trouble, independent of, or besides his salary, or hinted that such a demand was reserved. Why did he refrain for thirty years from making this demand for extra trouble? Simply because he knew that the claim was quite untenable and groundless.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Wm. Adam*, *John Clerk*, *George Jos. Bell.*

For Respondent, *T. Erskine*, *Henry Erskine*, *J. P. Grant.*

NOTE.—Unreported in the Court of Session.

PETER JOHNSTONE of Carnsalloch, Esq., and Others, Murray of Broughton's Trustees, } *Appellants*;

WATSON STOTT and EBENEZER STOTT of Kelton, and their Attorneys, } *Respondents*.

House of Lords, 2d May 1806.

CRUIVE FISHING — ILLEGAL ENGINES — IMPORT OF REMIT FROM HOUSE OF LORDS.—Circumstances in which the Court were held entitled, under the remit of the House of Lords, to regulate the construction of the cruives, dikes, and boxes, and the construction and position of the inscales, as well as the spars and hecks used in