

In *Speight v. Gaunt*, above cited, Jessel, M.R., in commenting on the above passage, says: "Now, what is meant by either from necessity or conformably to the common usage of mankind? It means where in the ordinary course of business transaction an agent is employed." He instances the case of the appointment of a rent collector to collect rent, though the trustee might collect them in person; but he does not do so because it is the common usage of mankind to employ an agent to do so; he also instances the employment of stock-brokers to buy or sell stock. Then, as to the moral necessity from the usage of mankind, he quotes approvingly Lord Hardwicke's definition of this expression as being the case of a trustee acting as prudently for the trust as for himself, and according to the usage of business. Lord Hardwicke gives as instances the case of a trustee appointing the payment of rents to a banker in good credit who subsequently fails and the money is lost—there would be no liability on the part of the trustee; so also the appointment of stewards and agents. And he points out that none of these instances may properly fall under the head of cases of necessity, but there is no liability because the trustees acted as other persons acted in the usual method of business.

Jessel further cites the case of *Bacon v. Bacon*, 5 Ves. 331, and the judgment of Lord Loughborough, who held an executor was not liable for the loss of money transmitted to an attorney, who was a co-executor, to pay debts, and who had misappropriated the money; and Lord Loughborough laid down the rule that if the business was transacted in the ordinary manner, unless there was some circumstance of suspicion, the allowance of the payment was fair. Suppose he had paid the money to his own clerk, and the clerk had run away, he puts as being within the same principle of protection. Jessel sums up the effect of *Bacon v. Bacon* as being that where you must necessarily employ an agent, or where you might reasonably in the ordinary course of business employ an agent, and you use due diligence in the selection of your agent, you are not liable for the consequences.

In *Weatt v. Andrews*, 42 Chy. Div., at 678, Kekewich, J., says: "A trustee is bound to exercise discretion in his choice of agents, but so long as he selects persons properly qualified he

cannot be made responsible for their intelligence or their honesty; he does not in any sense guarantee the performance of their duties."

It is further laid down in *Re Brier*, 26 Chy. Div. 238, that if a trustee employs an agent under circumstances which justify the employment and a loss arises from the insolvency of the agent, the onus is on the person seeking to make the trustee liable for the loss to show that it was attributable to the default of the trustee. Now, in the case which I am asked to consider it will not be contended that the trustee was bound to sit at his desk to be ready at all times to receive payments due the estate, but that it is the ordinary course of business in almost every walk of life to have some clerk or bookkeeper or other agent to receive payments on occasions when the exigencies of a person's own business prevent him from being present and personally dealing with the debtor.

The next question that arises is, Was the trustee prudent, and did he act with reasonable caution and care in permitting the bookkeeper of his business firm to receive payments in his, the trustee's, absence on account of the trust? Would an ordinarily prudent man have selected the individual selected in this case? Here was the confidential bookkeeper of a prominent firm of solicitors, a man whom they as a firm entrusted with the responsibility of receiving sums of money on account of the firm, allowing him to receipt for the same, enter the amounts in their books, and deposit the same to their account in their bank. He had so acted for a considerable length of time; there was no suspicion of his integrity; the solicitors' business was a large one, and as ordinarily prudent men they as a firm exercised this discretion and trusted their bookkeeper. Was it unreasonable that one of the same firm should, in his capacity as a trustee, extend his confidence to the same bookkeeper and allow him occasionally, or frequently, if you will, to receive moneys for him, the trustee, in connection with the trust estate?

I can find nothing in the facts submitted to warrant me in saying that the employment of the bookkeeper in question under the circumstances was negligent or unreasonable, nor that the same thing would not have been done by any ordinarily prudent man in the conduct of his own business; nor that it was not a course