1803. *March* 1. WILSON, and Others *against* ALEXANDER, and Others.

No 57.
The trustee on a sequestrated estate, and the commissioners named by the creditors, are not personally liable in damages to the proprietor, on account of alleged mismanagement of the estate, after sequestration is recalled.

THE affairs of the Green Coal Company, in the neighboured of Glasgow, having gone into disorder, their estate was sequestrated, and John Alexander, merchant in Glasgow, was appointed trustee (14th March 1795), in terms of the bankrupt statutes. Certain persons were likewise nominated Commissioners, to assist the trustee; and a manager of the coalworks, with overseers for the workmen, were appointed, as it was thought better to continue the work for some time, than to sell every thing immediately.

After the coal had been wrought for several years, under the management of these persons, John Pettigrew Wilson, the principal tacksman, who had the chief interest in the estate, applied to the Court to have the sequestration recalled, which was done upon his finding proper security; and the trust-subjects were reconveyed to the Green Coal Company.

Soon after, Wilson, in conjunction with the proprietors of the colliery, raised a summons against the trustee, the commissioners, and the operative managers, narrating, that they had either wilfully and maliciously, or at least culpably and negligently, managed the coal in such ruinous way as to destroy the works by their mode of operation; that such conduct must have proceeded, either from a total want of common prudence, or from an evil intention to ruin the coalwork, with a view of giving advantage to neighbouring colleries, in which these persons had an interest; and concluding against the trustee, commissioners and managers, as personally liable for the damage which had been sustained.

THE LORD ORDINARY, (14th May 1802), "In respect the pursuers aver, and offer to prove, that the coal in question was worked and managed by the different persons called as defenders in the action, in a manner grossly improper, culpable and ruinous, thereby occasioning great loss and damage to the pursuers; and as the proof to be now allowed is entirely before answer, so that every defence competent to all or either of the defenders, will remain open for discussion, when the evidence shall be taken and brought under consideration; finds it at present unnecessary to enter into any such question; and therefore, before answer, allows the pursuers a proof *prout de jure*."

The trustee and the commsssioners severally reclaimed to the Court against the relevancy of this proof, and

Pleaded; The trustee upon a sequestrated estate is liable only in ordinary diligence. If he deviate from his duty, he is responsible to the creditors; and if damages arise in consequence of his conduct, he is liable, as a mandatary, to his constituents. He has nothing to do personally with third parties, as he is understood to contract with them *nomine factorio*, and therefore only to bind his constituents; Rankin against Mollison, February 17. 1738, No 17. p. 4064. Neither can a trustee be personally liable for damages, unless he exceed the

bounds of his commission, and be guilty of an illegal act. But, for this purpose, it is not enough to shew, that damage has actually arisen during his management. Were the law otherwise, a prudent person would never be found to discharge the office of a trustee, which, as in this case, is generally held by persons who must entrust the active management to others. No 57.

The Commissioners maintained, that they were not personally liable any more than the other creditors. Had the action of damages been brought during the dependence of the sequestration, it would have been necessary only to have cited the trustee as defender, since the operations complained of were conducted in his name. But since the sequestration was at an end, the whole creditors should have been called, because, if any were liable, they were all equally responsible for the damage arising from the improper working of the coal, during the time that they were in possession of the subject by means of their trustee. The commissioners cannot be personally liable, having never been either in the natural or civil possession of the subject, or received any emolument from the office, but being merely recommended by the creditors, as persons with whom the trustee might consult when he thought fit, or when he found any difficulty in the discharge of his office.

Answered; If damage has been done to the pursuers' property, they are entitled to reparation from some quarter or another; and there is no person against whom the claim can with so much propriety be made in the first instance, as against the trustee who had the management of the estate. There is a great difference between a factor and a trustee, though they may be both liable in damages to third parties for misconduct in the business of their constituents. A trustee under the bankrupt statutes is not merely an instrument in the hands of others. He is himself fully vested in the subjects; and as an adjudging creditor who mismanages an estate is liable in damages, so is likewise a trustee in a sequestration. It makes no difference that the damage is done by a manager under the appointment of the trustee. *Qui facit per alium facit per se*; and whoever undertakes to conduct a business, and receives a compensation for his trouble, must be responsible for those to whom he entrusts the active management of the concern.

With respect to the commissioners, it was *answered*, That they were creditors for whose advantage the operations were carried on; that they were persons of skill, whose opinion was relied on in the management; and that the damages were done, if not by their orders, at least under their immediate inspection. Unless the commissioners who took such an active part were to be liable, those creditors who took no share at all in the management cannot be responsible; and thus, although it were admitted that great damage was sustained, every one may be allowed to shift off the responsibility from himself, so that in the end no redress could be obtained.

The Court altered the interlocutor of the Lord Ordinary (4th February 1803), assoilzied the defenders, and found them entitled to expenses.

No 57.

And a petition against this interlocutor was refused, " without any prejudice to any other action or actions already brought, or hereafter to be raised at the instance of the petitioner, and to the defences against the same."

The trustee having, in the course of the argument, been described as an officer of the Court, it was *observed* on the Bench, That this was a mistake. The object of the bankrupt statutes is to take the management of sequestrated estates out of the hand of the Court, and to place it with the creditors, by whom the trustee is appointed, and by whose direction he is obliged to act, the regulations of the act of Parliament being always observed. It is quite beyond the province of the trustee to take upon himself the active management of a colliery; and the committee of creditors who were named as commissioners to advise and assist him in matters of ordinary management, were equally unfit for such an undertaking. It was necessarily put under the direction of operative men, who alone were responsible for their mode of conducting the operations. Both the trustee and the commissioners, therefore, must be assoilzied, whoever might be found liable.

Lord Ordinary, *Cullen.* Act. *Clerk.* Agent, *Ja. Smyth, W. S.*
Alt. *Cathcart, Connell.* Agents, *M. Montgomerie, T. Johnstone.* Clerk, *Home.*

J. *Fac. Col. No 91. p. 200.*

SECT. IX.

Impeding of Legal Diligence.

1714. *July* 15. William Carse *against* Sir John Halyburton.

No 58.
The user of a simulate disposition to stop poinding found liable, to the creditor offering to poind, for his damage.

William Carse, a creditor to Sir George Hamilton, being debarred from poinding his debtor's houshold plenishing by a disposition thereof, conform to an inventory, made to Sir John Halyburton, produced at the poinding, the Lords on the 17th of June last, No 19. p. 9125., *voce* Moveables, found the said disposition with symbolical possession *retenta possessione* of the disponer for three years and a half before the offering to poind, and two years and a half since, did not convey the real right of the property of the goods to Sir John; whereupon the said William Carse pursuer insisted against Sir John for payment of his debt, which was within the value of the plenishing contained in the inventory produced for stopping of the poinding.