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they subscribed, in point of law, neither of all these were necessary in the present case. It is not necessary that the witnesses know, either the granter, or the contents of the deed. All that is necessary is, that they are informed of who it is that is to sign, and that *that* person is seen to subscribe the deed, or heard to acknowledge her subscription.

After hearing counsel, it was

Ordered and adjudged that the interlocutor of the Lord Ordinary of the 12th Jan. 1802 complained of be varied, by leaving out after (granted) to (with), and after (are) by inserting (either), and after (relevant) by inserting (or too vaguely stated), in page 5, and that with these variations, the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Wm. Alexander, W. Maxwell Morrison.*

For the Respondents, *Henry Erskine, Wm. Adam, Thomas W. Baird, Andrew Cassels.*

NOTE.—Unreported in the Court of Session.

JOHN PETTIGREW WILSON, Principal Tacksman of the Lands and Coal at Green, near Glasgow; JANET, GRIZEL, ELIZABETH, MARY, AGNES, and MARGARET PETTIGREWS, Joint Proprietors of the said lands; and WALTER WILSON, Merchant in Glasgow, Husband of the said MARGARET for his interest, ... } *Appellants;*

JOHN ALEXANDER, Merchant in Glasgow; JAMES HOPKIRK of Dalbeth, Merchant there; and THOMAS EDINGTON, of Clyde Iron Works, - - - - } *Respondents.*

House of Lords, 12th August 1807.

DAMAGES—RELEVANCY—BANKRUPTCY — LIABILITY OF TRUSTEE AND COMMISSIONERS FOR DAMAGES.—The trustee and commissioners on a bankrupt company estate, the chief assets of which consisted of a valuable lease of coal, entered into the possession of the lease, and wrought the coal for behoof of the creditors. In doing this, they wrought the coal in such a manner as to do great damage to the value of the coal and surface above. In an action of damages against them, they stated that the action was irrele-

vant against a trustee and commissioners, appointed by act of Parliament to manage the bankrupt estate to the best of their judgment. Held the action not relevant. In the House of Lords case remitted, with strong doubts expressed as to the correctness of the judgment.

The appellants, Janet and Grizel Pettigrew, had right to the lands of Green, as adjudging creditors of John Pettigrew of Green, their brother; and afterwards they, along with the other appellants, succeeded to those landsas heirs portioners. On 14th July 1790, while they held these lands as adjudging creditors, Janet and Grizel granted a lease to "John Petti-" grew Wilson, their nephew, (then only 13 years of age), " and to his father, Walter Wilson, as curator for him, *but* "*for his use and behoof solely*," for the space of 21 years, they being bound, in working the coal, " to leave a proper " number of stoops or pillars for the support of the roof of " said coal hereafter," &c.

Walter Wilson, the father, had no means of his own. He had no knowledge of the practical working of coal; and, by the lease, he had no pecuniary interest bestowed, and was only tutor for his son. He, however, in order to carry on the working of this coal, took into partnership one John Shiels, coalmaster in Camlachie, to whom he assigned (with the appellant, John Pettigrew Wilson's concurrence, then aged 14,) one half of the whole concern; and the business was conducted under the firm of Walter Wilson and Co., under which they commenced operations, and completed two pits. But neither of these having adequate funds, they had recourse, first, to loans from Misses Janet and Grizel Pettigrews; and, subsequently, with the same view, had to assume as partners Messrs. James Milligan and James Burnside, merchants in Glasgow; and then the firm was carried on under the title of the Green Coal Work Company. Within a year thereafter, Mr Burnside assigned his share to Mr. Milligan; and soon thereafter Mr. Milligan became bankrupt, and John Alexander was appointed his trustee, who raised action against the Green Coal Company for £1268, as the amount of certain sums alleged to be due by the Company to Milligan and Burnside, and obtained decree therefor in absence.

Under these circumstances, and the system of management adopted, the concern became ruinous to all; and, at last, Walter Wilson was advised to apply for sequestration, with concurrence of John Alexander, a creditor to the extent required by law. John Pettigrew Wilson was then un-

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der age, and was on this occasion induced to subscribe a mandate, authorizing this application, and a sequestration was accordingly awarded, on which John Alexander was appointed trustee, and James Hopkirk and Thomas Edington appointed commissioners.

In assuming the management of the estate, they resolved, with the consent of the creditors, to carry on and work the lease of the coal, which lease was the only estate belonging to the bankrupts.

Soon after entering on the management of the working the coal, it appeared to the appellant, John Pettigrew Wilson, the lessee, and also to the Misses Pettigrew, that they were doing so in a manner ruinous to the value of the coal and to their property. They therefore interfered; the latter advanced and paid off many of the debts of the creditors, and offered good security by bond, to pay the remaining claims ranked on the estate, while John Pettigrew Wilson, in these circumstances, applied for a recall of the sequestration. A long litigation ensued, this application being vigorously opposed by the trustee and commissioners, but terminated ultimately against them, the Court being satisfied that the caution offered was sufficient, and the sequestration was recalled accordingly.

The present action of damages was brought at the appellants' instance against the respondents, after a notarial protest, intimating the claim, which set forth, that ever since the trustee and commissioners had commenced the management and working of the coal, they had neglected, in making the excavations or rooms, to make proper pillars or stoops of sufficient strength and thickness in the pits to support the roof, by means of which, not only great damage and injury had been done on the surface to the mansion house, offices, &c., but also below, by the loss of the most valuable seam of coal, from the falling down of the roof, and consequent influx of water. In defence, it was denied, in point of fact, that they had not managed the working of the coal properly. They further averred, that, as trustee and commissioners for the creditors, they relied on their men of skill doing what was necessary for the safe and profitable working of the coal, for behoof of the creditors. Objection was also taken to the relevancy of the summons, that there was no relevant ground in law to subject the trustee and commissioners in damages.

The Lord Ordinary, before answer, ordered a condescendence of the facts offered to be proved. In this condescendence the appellants stated, that, before the respondents en-

tered on the management of the works, the working of the coal had been conducted in a regular manner. In particular, in this pit, the rooms or excavations, *prior* to the sequestration, had in general been limited to four yards in breadth or wideness, and the stoops or pillars, left for supporting the coal roof, were about five yards square. After the operations of the respondents had gone on for some time, this mode of working was reversed. The rooms, in place of being made four yards, were made five yards at the very least in wideness; while the stoops or pillars left, which ought to have been increased of course beyond five yards square as formerly, were now reduced to be from two to four yards square; nay, some of them were made only four feet, and others three feet, or one yard, in breadth or thickness. So much was this system carried on, that the colliers began to be apprehensive, from the cracking of the pillars, of their safety, by the falling of the roof, so much so, that they, on 8th March 1797, removed the horses and part of the machinery. And, next day, a total fall of the roof occurred, by all which the loss of a valuable seam of coal was sustained —also by influx of water, damage to the works otherwise, and also damage to dwelling houses and offices at Green above had occurred; and, finally, that these had been all occasioned by the defenders, or James Faulds, who managed under their directions and authority. In answer to this condescendence, the trustee stated a separate defence, namely, that a trustee for creditors under a sequestration was not personally liable to make good the obligations he had entered into, *qua* trustee, nor even responsible for damage done by any person acting for behoof of the creditors. The commissioners had also separate defences, stating that, by virtue of their office as commissioners, they had no control over the trustee in this matter by the statute, and therefore not liable. The Lord Ordinary, before deciding on the relevancy of these facts, ordered a proof *prout de jure*. A representation from the respondents being refused, they reclaimed to the Court, maintaining, that as their objections to the relevancy resolves into a general question of law, any parole evidence offered cannot throw light on the question. They insisted that, as trustee and commissioners acting for a general body of creditors, under the authority of the bankrupt act, they could not be made responsible for doing that for which, on all hands, they had authority for doing. Besides, mismanagement against them is not to be presumed, for they are appointed to act for the benefit and profit of all. At the

May 14, 1802.
May 19, ——

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meeting of the creditors, the trustee was instructed immediately to appoint some fit person to manage the works. This was done. Faulds was appointed, and acted for the creditors, not for the trustee or the commissioners. If, therefore, any mismanagement had occurred, so gross and so culpable as to infer damage at all, it must be a claim against the creditors, and not against the trustee, &c.

Feb. 4, 1803. The Court, of this date, pronounced this interlocutor:—"Alter the interlocutor of the Lord Ordinary complained "of, assoilzie the whole of these petitioners (defenders), find "them entitled to their expenses, and allows an account "thereof to be given in, and decern." On reclaiming petiMar. 1, 1803. tion the Court adhered. And the accounts of expenses were June 11, 1803. adjusted of this date.

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

Pleaded for the Appellants.—The only question for discussion is, the relevancy of this claim of damages. In discussing that question, the appellants are entitled to assume the facts they aver as proved,—namely, that very considerable damage was sustained, after the date of the sequestration of the Green Coal Company, and before the respondent, Mr. Alexander, the trustee, surrendered his possession to the appellant John Pettigrew Wilson, owing to the culpable conduct of the trustee, the commissioners, and the managers and overseers *appointed by them to* superintend the works. In these circumstances, the whole of the parties are answerable for the loss. A trustee is responsible to the bankrupt, after all the creditors are paid. The bankrupt here seeks that satisfaction, and the trustee must account to him for any misconduct in the execution of the trust reposed in him. He entered as trustee into possession of the lease, and, in virtue of the lease itself, he is responsible to the proprietor or landlord, in the present action. The commissioners are likewise liable, having not only recommended Mr. Faulds, but advised those measures which occasioned the damage; and it is therefore contended that the relevancy is beyond all question.

Pleaded for the Trustee.—The ground of the present action is, That the coal was improperly worked during his management in the sequestration, and the trustee is called as a defender, not *qua* trustee upon the bankrupt estate of the Green Coal Company, in order to found the claim against the creditors at large (for the sequestration has been recalled, and the respondent has ceased to be trustee)

but as being personally liable for the damages. But it is clear in law that an agent or trustee is not personally liable for any act done by him in the capacity of agent or trustee. The damage is not said to have been done by the respondent. He personally had no concern with the working of the coal. In appointing Mr. Faulds the manager and man of skill, he acted by the authority of the creditors. If he has done wrong, the creditors, and not he are liable.

Rankin *v.* Mollison, Feb. 17, 1738. Mor. 4064.

Pleaded for the Respondents, Hopkirk and Edington.—This action is altogether incompetent against the respondents as commissioners, who, in giving their advice to the trustee, acted gratuitously, and in terms of the statute by which they were nominated. They merely discharged a statutory duty to the best of their ability, in advising the trustee in what appeared to them most proper and advantageous for all parties concerned. And, whether right or wrong, there is no ground in law upon which they can be subjected in damage for having acted to the best of their judgment. No relevant circumstances are stated to make them liable, and it would have been unjust and oppressive to have allowed a proof before the relevancy of those facts were disposed of.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,—

"My Lords,

"This case involves questions of great importance to the law of bankruptcy in Scotland. I have considered the case with great attention; and I think it would be hazardous, from what I see of the notes of the speeches of the judges, and from the arguments which have been adduced, to come to a final decision at present thereon. I think it will be more wholesome that it should be remitted by your Lordships to the Court below, with directions to proceed farther therein.

"Certain of the pursuers were owners, or landladies of a colliery in the neighbourhood of Glasgow. This they let to another of the pursuers, John Pettigrew Wilson, a minor, and his father, as curator for him, for the minor's use and behoof solely. (Here his Lordship read some paragraphs of the coal lease, and the clause about leaving the stoops or pillars). Your Lordships see, that Walter Wilson, at this time, undertook, at his own hand, to conduct and manage the colliery for his minor son.

"Having no funds to carry it on himself, partners were associated with him in the colliery. Two pits were sunk, and the coal worked for several years, when the company became bankrupts, and Walter Wilson, then the sole remaining partner, applied for seques-

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tration, the other remaining partner having previously become bankrupt. The respondent, John Alexander, under the act 33d of the king (which contains a great improvement of two former acts, relative to sequestrations in Scotland), was chosen trustee by the creditors. Two other gentlemen, also respondents in the appeal, were chosen commissioners, also in terms of that act. The trustee is paid for his trouble by the Scots bankrupt law; the commissioners more resemble the assignees in this country in this respect, and are not paid; they advise the trustee for the benefit of the creditors. The trustee and creditors resolved to make the lease of the coal available for the general behoof. They entered into possession, and commenced working the coal.

"Unless I misapprehend the law upon this subject, the trustee is not merely such for the creditors, but also for the bankrupt. Though his primary duty is to make the most he can of the effects for the creditors, yet in Scotland, as well as in this country, the bankrupt has, in certain cases, an allowance; and any surplus that may remain belongs to him. In England, the assignees, like the trustee in Scotland, are chosen by the creditors; and, though they have no salary, they are liable to account to the creditors, and to the bankrupt, for their wilful default and wilful misconduct.

"In this action, a condescendence was given in, the whole import of which I cannot attempt to state with precision. The Court was of opinion that it did not state facts on which they could give relief. It states, however, that the coal was worked in a very unworkmanlike manner; that proper stoops or pillars were not left, and that the roof having fallen in, the colliery was in consequence thereby ruined.

"This condescendence was the subject of a great deal of argument, both in the Court below and at your Lordships' bar. It was matter of discussion, whether it charged the defender with malicious, as well as wilful default, and upon this point the words, *animus injuriandi*, which occur in it, were matter of discussion.

"This paper is not accurately expressed. I should wish those who entertain the opinion, that the trial by jury would be easily introduced into Scotland, to prove this condescendence. In upwards of fifty pages, they will see very little of what could be laid before a jury without immense difficulty. Before the trial by jury could be of advantage in Scotland, they must first alter their mode of pleading in that country.

"In March 1797, a protest was taken by Mr. Pettigrew Wilson, and delivered to Mr. Alexander, the trustee, stating, that he had been working the colliery in a ruinous manner, and that, if this mode of working was continued, damages would be insisted for. The condescendence states, that the same mode of working was continued for a time; and that, at last, the workings were discontinued altogether, by their being drowned with water, from the ruinous manner in which they were wrought.

"The condescendence contains many suggestions and hints that there was a combination between the trustee and the commissioners to do this. In the case of such a combination, in this country, we should no doubt hold both to be liable in damages. It would certainly be a great wrong to say, that they were to be charged in this manner by hints and suggestions merely. I lay little stress on this.

"The law of Scotland allows sequestrations to be recalled, as bankruptcies are superseded in this country. In the circumstances of this case, the bankrupt did make an application to the Court to have the sequestration recalled; and, after a long contested litigation, he was successful; the sequestration was set aside, and he got back his property. I do not enter at present into the matter, Whether this contest was blameable or not? I mention this as leading to another subject of inquiry.

"I apprehend it to be clear, that unless the enactments of the bankrupt law in Scotland are totally different from ours, there can be no doubt that the creditors, during the subsistence of the sequestration, have a right to call upon the trustee to make good all losses arising by his wilful default. There is this difference in Scotland from our bankrupt law, that, by the 33d of the king, the statutory remedy is pointed out. I apprehend that the bankrupt might also avail himself of this statutory remedy.

"In this country, it would not be necessary to show that the misconduct was malicious, if it could be shown to be wilful. After a bankruptcy was superseded, it would not be possible for an assignee, to an action brought against him for wilful default, to say, that it was now too late; that he could not be charged because the funds were out of his hands. It would be quite sufficient here to answer, I do not know how you are to make good those damages, but you are liable to me for them.

"I have looked into the notes which have been handed to us, of the judges' opinions in this case. I do not think that a great deal of attention has been paid to this case. These notes are extremely scanty. I may here mention, that, in my opinion, no regulation would be more advantageous, in cases of appeal, than for some mode to be devised for the Court to send to us an authentic statement of the grounds of judgment.

"I find principles laid down in these notes, and in the printed cases, so contrary to our ideas of the law on this subject, that it would be rash to decide at present without some inquiry into the foundation which these may have in the law of Scotland. In the printed cases, it is stated 'to be indisputably clear that an agent or 'trustee is not personally liable for any act done by him in his capa-'city of agent or trustee.'

"It is also said, in the notes of the judges speeches, that a trustee could only be charged for malicious, not for wilful default; it is stated, from a high authority, that he could be liable only out of the

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funds which he had to administer. If all this had been stated in a case of bankruptcy in this country, I should have said it was very extraordinary and extravagant indeed.

" It was also laid down, that however the case might be during the sequestration, after it was recalled, the bankrupt could have no remedy against the trustee, but that he must apply for redress to the individual creditors. This may be well founded; but is so contrary to our ideas on the subject, that I feel it very difficult to advise your Lordships to come to any decision that would give the least hope of establishing such a doctrine.

" There is a material difference too between the conduct of Mr. Alexander, previous, and subsequent to, the protest. If it should be said, that the trustee, acting by the advice of the commissioners and of the managers approved of by them, ought not, without notice, to be liable; yet, if he were distinctly informed, as here, that the agent was ruining the works, and still persisted in the same course, in this country, this would be held to be wilful default. I am of opinion, therefore, that the case has not been distinctly considered with regard to its different periods.

" There is another material point on which we have no information. The bankrupt, in this case, was lessee of a colliery, and bound by his tack to keep and leave sufficient stoops to support the roof, and the trustee came in place of the bankrupt as lessee. If an assignee in this country, in such a case, though with the consent of all the creditors and of the bankrupt, were, by improper workings, to bring down the roof of the colliery, he, in so far as the landlord was concerned, would bring down the roof upon his own head, if I may so speak, that is, he would be liable to the consequences.

" Under these difficulties, I take this course to be best, to remit this cause for further consideration, because I cannot venture to state what hazard we may run in construing these acts for Scotland. Though, if they are not ruled by decisions, I think they must be governed by the same principles as in this country."

(His Lordship here moved the words of the judgment).

It was ordered and adjudged that the cause be remitted to the Court of Session in Scotland, to review generally the interlocutors complained of, of the 4th Feb., 1st March, and the 11th June 1803 respectively, and, after such review, to affirm, reverse, or vary the said interlocutors as shall be agreeable to justice.

For Appellants, *Samuel Romilly, Wm. Alexander, David Monypenny.*

For Respondent, the Trustee, *Henry Erskine, J. Connell.*

For Commissioners, *David Cathcart, Ad. Gillies.*

NOTE.—Unreported in the Court of Session.