WILLIAM JEFFREY, and the Representatives of ROBERT WATSON, Appellants.—*Warren.*

WILLIAM BROWN and Others, Respondents.—*Jeffrey.*

No. 44.

Trustee—Bankrupt—Sequestration—Appeal.—Circumstances under which (affirming, but qualifying the judgment of the Court of Session) it was held, 1. That the trustee on a sequestrated estate was liable personally to implement a contract entered into by him on behalf of the estate; and, 2. That an appeal against the interlocutor of a Lord Ordinary not brought under review of the Inner-House was incompetent.

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2D DIVISION. Lords Bannatyne, Pitmilly, and Cringletie.

THE respondents, Brown and others, were the proprietors of the ship Jean of Irvine, which, in 1806, they sold by a missive of sale to John M'Arthur and Company, merchants in Glasgow. Previous to the execution of the missive (which was not in terms of the Registry Acts), M'Arthur and Company had obtained possession of the vessel, and sent her with a cargo to New York, and from thence to the West Indies, and then to Liverpool; and in the course of these voyages a considerable freight was earned, but, at the same time, several debts were contracted on account of her. No part of the price had been paid. M'Arthur and Company having, before her return to Liverpool in December 1807, become bankrupt, and their estates having been sequestrated, Robert Watson was elected trustee. On her arrival the respondents took possession of her, and caused her and the goods aboard of her to be detained for payment of the freight, which they claimed in security of payment of the price, and relief of the claims which might be brought against them as the registered owners. An intermediate arrangement was then made between the respondents and Watson, with the approbation of the commissioners on the estate, by which the vessel was placed at the disposal of a Mr Mathie, for behoof of both parties. By Mathie she was exposed to sale by auction, and was purchased by the respondents at L.1200. They then sold her for L.1500; and thereafter the respondent, Brown, on behalf of himself and the other owners, on the 22d August 1808, addressed to Watson, as trustee, and to the commissioners on the estate of M'Arthur and Company, this letter:—'On the arrival of the ship Jean at 'Liverpool, we ordered our agent to take possession of the ship 'and freight, as security for the purchase-money agreed to be 'paid by John M'Arthur and Company, per minute of sale, 'amounting to L.2000, with interest. Since which we have sold 'the ship for L.1500, and our agent has secured the freight for 'our benefit; but, in consideration of your fulfilling the agree-

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'ment made with John M'Arthur and Company, of paying us 'the sum of L.2000 Sterling, the agreed on price, with interest 'thereon since it became due, and also freeing and relieving us 'from all debts contracted by John M'Arthur and Company, or 'their agents, for said vessel, from the time they took possession 'and fitted her out at Greenock until the sale took place in Liver-'pool, we hereby agree to give up all claim we have to the said 'freight, &c.; and we will authorize our agent to settle with you 'all accounts of said ship, on our receiving the said sum of 'L.2000, with interest. You will receive with this a letter, 'signed by the trustees for the creditors of the deceased Captain 'Service, who held a share in the said ship Jean, binding them-'selves to pay what proportion of debt may come against the 'vessel, so far as he was concerned; and also binding themselves, 'if there shall be any balance owing by the said Captain Service 'to John M'Arthur and Company, to pay said balance to John 'M'Arthur and Company's trustee, without deduction, as soon 'as this shall be ascertained. And both parties agree to the ex-'tending of this missive upon stamped paper, when called for.' In answer, Watson and the commissioners wrote to the respondents, that 'We the trustee and commissioners on the seques-'trated estate of John M'Arthur and Company, and we also the 'trustees for the creditors of the deceased Captain George Ser-'vice, agree to your proposal contained in your letter of the 22d 'August, by paying you the purchase-money agreed to be paid 'you by the said John M'Arthur and Company, as per minute 'of sale, dated 15th November and 25th December 1806, 'amounting to L.2000, with interest, upon condition of your 'procuring us an obligation from the trustees of the creditors of 'the deceased Captain George Service, who also held a share in 'the Jean, agreeable to the terms in your letter; and in all other 'respects, we hereby agree to your proposal.' In consequence of this acceptance of the offer, the respondents wrote to Watson, stating, that 'According to the agreement made between us 'and John M'Arthur and Company's commissioners, and you as 'trustee, of paying us the price of the ship Jean, say L.2000, 'with interest thereon since it became due, and your obligation 'to free and relieve us from all claims that may come against us 'from the time that J. M'Arthur and Company took possession 'of her in Greenock until she was sold in Liverpool, you will 'please remit us the balance of the price now due us. We have 'had L.1488. 18s. 7d. remitted us by Mr Hugh Mathie, in bills 'on London. After receiving the balance we will write our

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'agent, Mr Hugh Mathie, to settle with you all accounts of said 'ship. We will write to Mr William Hamilton to get the 'minute of sale from Mr David Lang, with whom it lies, to en- 'able you to calculate the interest, and settle accordingly. We 'are,' &c. After giving credit for the L.1500, which had been received by the respondents from the purchaser of the vessel, and for the freights which they had drawn, there remained a balance due to them of the price and interest of L.679, which was paid to them by Watson. Various claims were afterwards brought against the ship, by persons who had advanced goods and money on account of her in the course of the above voyages, and for payment of which decrees were obtained against the respondents as the registered owners. An action of relief was then raised by them before the Admiralty Court against Watson, founding on the original missive of sale, and the subsequent transactions which had taken place, and concluding against him as trustee for relief of these debts. In defence Watson maintained, that as neither the original missive nor the subsequent letters were stamped, nor expressed in terms of the Registry Acts, the action could not be maintained; and, at all events, as he had not sufficient funds from which to pay the claim, he could not be subjected in payment beyond those in his hands. The Judge-Admiral repelled 'the defence founded on the allega- 'tion that the minute of sale is not stamped, in respect the libel 'is not founded upon that minute of sale, but on the subsequent 'transaction: Repels also the defence, that the subsequent mis- 'sives of agreement are not stamped, in respect the transaction 'was in re mercatoria, and in respect that that transaction was 'entered into with the pursuers and the defender for behoof of 'creditors of M'Arthur and Company, and with the consent and 'approbation of a number of the creditors, and that the defender 'ought to have retained in his hands funds sufficient to answer 'the present claim: Repel the defences upon the merits, and 'decern against the defender in terms of the libel;' and found Watson liable in expenses, amounting to L.44. Watson then presented a bill of advocation, which having come before Lord Cringletie, his Lordship refused it for the reasons explained in the following note:—'The Lord Ordinary has advised this bill, 'which he did not understand till he looked into the proceedings 'before the Admiral. The pursuers, by minute of sale in 1806, 'sold the ship Jean to M'Arthur and Company, at a price of 'L.2000; after which the purchasers sent her on a voyage from 'Greenock to Trinidad; from thence to New York; back again

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'to the West Indies, and thence to Liverpool. It is said, that 'the minute of sale is void and null, as not having been executed 'in conformity to the statutes for registering vessels, and that 'M'Arthur and Company did not complete their title to the 'ship, by becoming registered owners thereof. Be it so; in 'which case the pursuers continued to be owners, and of course 'had the only title to the ship, and all the profits earned by her. 'Before she arrived in Liverpool, M'Arthur and Company were 'bankrupts; the pursuers arrested the vessel when she did arrive, 'and, by agreement with the trustee for M'Arthur's creditors, 'she was then sold, and the price paid to the pursuers. But 'they had the same right to the freights that they had to the 'ship, and this right they gave up by their letter of the 22d 'August 1808, under the conditions therein mentioned, which 'offer was accepted by the defenders; and the Lord Ordinary 'sees it stated in the answers for the pursuers, and he does not 'see it gainsaid in this bill, that the defenders did receive the 'freight. How, then, is it possible to maintain, after the bar-'gain was implemented by their receiving the freight, that they 'are not obliged to fulfil the conditions under which they were 'permitted to receive it? To the Lord Ordinary the plea is un-'tenable. The stamp laws have nothing to do with the ques-'tion. The very nullity of the minute of sale gave rise to the 'bargain between the parties; for had the minute not been null, 'the pursuers would not have had right to the ship and freight; 'and that right to the freight they gave up by letter, which re-'quired no stamp, being a transaction in re mercatoria. As to 'the conditions expressed in the acceptance of the defenders, viz. 'the procuring an obligation from the trustees of Captain Ser-'vice, it does not appear distinctly how the matter stands. If 'the defenders did not think the transaction complete till they 'got that obligation, they should not have interfered with the 'freight. But they did interfere. The probability is, that the 'defenders did get that obligation; and one thing seems clear, viz. 'that the defenders have not shewn any injury by their not getting 'that obligation, if in truth they did not get it, which the Lord 'Ordinary rather inclines to think they did obtain.' Against this judgment Watson did not reclaim, and the decree having been extracted, and a charge given to him personally, he presented a bill of suspension, in which he maintained, inter alia, that he was not liable to personal diligence, unless the respondents could shew that he was possessed of funds, which he was not. The bill was passed upon caution, and the appellant,

Jeffrey, (who was Watson's brother-in-law), thereupon bound himself as cautioner, in the usual terms, for implement of the decree, and payment of expenses. On the case coming before Lord Pitmilly, his Lordship repelled the reasons of suspension, and found the letters orderly proceeded. Watson then tendered his resignation of the office of trustee, which was accepted, and Jeffrey was appointed in his place. A representation was then lodged in name of both these parties, Watson praying to be allowed to withdraw from the process, and Jeffrey to be sisted as a party. An additional representation was afterwards lodged for Jeffrey; but the Lord Ordinary refused (except as to sisting Jeffrey) both of these representations, adhered to his interlocutor, and found both Watson and Jeffrey liable in expenses. Jeffrey then presented a petition against these judgments to the Second Division; but Watson did not reclaim, so that they became final as to him; and the Court, on the 7th of July 1819, on advising the petition, with an additional one, adhered. On the same day Watson presented a petition to the First Division, praying for decree of exoneration, which was granted. Against this the respondents reclaimed, on the ground that their claim against Watson personally ought to be reserved; but the Court refused their petition as unnecessary. Jeffrey then reclaimed a second time; but his petition not having been regularly boxed, was refused as incompetent, and as to this judgment their Lordships adhered upon the 2d of March 1820. The decree having been extracted, and Watson being dead, a charge was given to Jeffrey, who thereupon presented a bill of suspension, in which he maintained, that he was not personally liable either as trustee, seeing that he had no funds; nor as cautioner for Watson, because he had only bound himself that he should account qua trustee, so that he could not be more extensively liable than him; and the respondents were bound to proceed against the creditors on the estate.

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Lord Cringletie refused this bill with expenses, 'in respect 'that it is now a res judicata that Mr Watson is personally liable 'for the sums charged for, and that the complainer was not only 'his cautioner in the suspension complaining of the judgment of 'the Judge-Admiral decerning against him personally, but also 'sisted himself in said suspension, in which the letters were found 'orderly proceeded, whereby this suspension is an attempt to 'open up a res judicata;' and his Lordship at the same time issued the following opinion:—'The Lord Ordinary cannot assent 'to the proposition, that a trustee is not liable for the expense

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'of a law-suit in which he embarks. It is his duty to lay by a 'sum to meet a contingent claim, and if he do not lay it by, he 'is answerable. He alone knows who his constituents are, and 'what the funds under his management. If, therefore, he engage 'in a law-suit, from which money is to be recovered from his con-'stituents, the burden ought to lie on him who knows who they 'are, and who ought to have provided for it before commencing 'the law-suit, and not the opposing party, who neither knows 'who are the constituents of the trustee, nor the funds under his 'care. As for the principal sums decreed for, the judgment is a 'res judicata, and proceeded on the principle, that the trustee 'bound himself personally to the chargers.'

Jeffrey then presented a second bill, which was refused by Lord Bannatyne, who stated the grounds of his judgment in these terms:—'In explanation of the grounds on which the Lord 'Ordinary considers the first bill to have been properly refused, 'and holds himself bound to refuse the present, the Ordinary 'thinks it right to notice, first, That while, were the question 'open either as to Robert Watson, the original trustee, between 'the claim against whom and the now complainer, who, while 'he has succeeded him as trustee, became a party in the suspen-'sion, as cautioner for him, there is no room for distinction in 'the circumstances of this case; while the claim rests on an ob-'ligation come under by Watson himself, there seems no room 'for doubting as to his personal responsibility, and the less hard-'ship in his being so found, that he had himself to blame for 'parting with the funds which should have answered it; and 'even after doing so, was entitled, as he and they seem to have 'contemplated at the time of his coming under it, to call on the 'creditors among whom they were divided, to indemnify him. 'Secondly, That were there otherwise grounds for the pleas of 'the complainer, they appear to be quite inadmissible, in oppo-'sition to the decreet in foro of this Court, obtained in discuss-'ing the suspension of the Judge-Admiral's decreet; and even 'supposing this last to have been challengeable, as ultra petita 'of the libel in that Court, a challenge on that ground would 'now be inadmissible, as a plea competent and omitted in the 'discussion of the suspension.'

To these judgments the Court adhered on the 5th of July 1821.*

An appeal was then entered against all the judgments, both by

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* See 1. Shaw and Ballantine, No. 120.

Jeffrey and by the representatives of Watson, in support of which they maintained,— June 11. 1824.

1. That in so far as the action was founded upon the original missive of sale, it could not be supported, because that missive was neither stamped, nor was it framed in terms of the Registry Acts; and the same objections were applicable also to the letters which had passed between the respondents and the trustee, in so far as they could be held to relate to a sale of the vessel.

2. That as the trustee had been induced to enter into the transaction, on the footing that a good and binding sale had been effected by that missive, which, in point of law, had not been the case, he had been led into it errore juris; and as he would be entitled upon that ground to maintain an action of repetition, so he could not be liable to implement it.

3. That supposing there had been no error, it was ultra vires of Watson, as trustee, to enter into any transaction which was of the nature of an adventure or speculation; because the object of the Bankrupt Act was to realize the funds of the estate for division among the creditors, and consequently the powers of the trustee were limited accordingly; so that the agreement was liable to challenge upon this ground, and therefore could not be enforced. And,

4. That at all events, both from the mode in which the action was libelled, and from the nature of the office which both Watson and Jeffrey held, they could not be liable to any greater extent than the trust-funds of which they might be in possession, and were not bound to find funds in order to satisfy the claim of the respondents; and therefore, as they had no trust-funds, the judgments of the Court finding them personally liable were erroneous.

To this it was answered,—That the appeal was incompetent, in so far as regarded the representatives of Watson, who had not reclaimed against the interlocutor of Lord Pitmilly; and on the merits,—

1. That although the missive of sale was narrated in the summons, yet it was not founded upon that document as being legally binding; but, on the contrary, was rested on the contract with Watson, which was entered into on the footing of the missive not being effectual: That this contract was not one for the sale of a vessel, but was a bargain by which the price and freights of the ship were sold to Watson on behalf of the creditors, in consideration of the payment to the respondents of a certain sum of money, and of relieving them against claims on the vessel; so

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that the letters in relation to it fell under the exception in the Stamp Act, as referring to an 'agreement made for or relating 'to the sale of goods, wares, or merchandise,' and could not be affected by the Registry Acts. That, besides, it was proved by other evidence, and by the judicial admissions of the appellants, that such a transaction had taken place; and consequently, independent of the letters, it was binding and effectual.

2. That it was not relevant to allege that the transaction had taken place under an error in point of law, and in fact it had not so.

3. That as a trustee on the sequestrated estate was vested with the full powers of the creditors, and as it was quite competent for the creditors to enter into any contract with a third party, the trustee under such powers could do so; and if he had exceeded his powers, he was undoubtedly liable personally to implement the contract, so that the plea of ultra vires could not be available to the appellants. And,—

4. That although it was true, that the trustee on a bankrupt estate did not become personally liable for payment of the debts of the bankrupt, yet if he entered into any contract with a third party, he was personally bound to implement it; and it was no answer to say, that he had no funds for doing so, because he was bound, before making the contract, to see that he had the means of performing it, and consequently was compellable by the diligence of the law to implement it, reserving to him his relief against the creditors.

The House of Lords ordered and adjudged, 'That in so far 'as the interlocutors complained of, or any of them, are interlocutors of the Lord Ordinary not submitted by the said Robert 'Watson to the review of the Judges of the Division to which 'the said Lord Ordinary belonged, the said appeal be dismissed 'this House as incompetent; and that the other interlocutors 'complained of be affirmed, without reference to any special 'finding in any of the said interlocutors; as to which the Lords 'do not, viewing all the circumstances, think it necessary to come 'to any determination; and it is further ordered, that the appellants do pay to the respondents the sum of L.100 for their 'costs.'

Appellants' Authorities.—Stirling, July 26. 1733, (2930.); Carrick, August 5. 1778, (2931.); Keith, Nov. 14. 1792, (2933.); 1. Bell, 446.; 4. Ersk. 3. 3.

J. CHALMER—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 58.)