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expenses of rebuilding the church be affirmed. And it is ordered, that, with regard to such allocation, and particularly the questions, whether such allocation ought to be made according to the real or valued rent of the persons liable to pay the same, and whether the feuars of the village of Gatehouse-of-Fleet are liable to such allocation, the case be remitted back to the Court of Session to reconsider these points, in case the appellants shall, within four months after the date of this judgment, apply to the said Court by petition for such reconsideration, the said Court, in the event of such reconsideration, having regard to the rule declared by the judgment pronounced by this House in the case of Peterhead, on the 24th June 1802; and it is further ordered, that in case the said appellants do not apply to the said Court within four months, as above directed, that the said interlocutors be, and the same are, wholly affirmed.

Ante, vol. iv.
p. 356.

For the Appellants, *Sir Saml. Romilly, Fra. Horner.*

For the Respondents, *Wm. Adam, H. Brougham.*

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HOPE STEWART of Ballechin, CATHERINE MERCER, Daughter of the deceased COLONEL MERCER and Others, heirs portions of CHAS. and ROBERT MERCER of Lethindy, and Others, . . . } *Appellants;*

Mrs ISABELLA ELDER, Spouse of the Rev. Dr GEORGE BAIRD, and Others, Representatives of the deceased WM. ELDER of Loaning, } *Respondents.*

House of Lords, 21st June 1816.

TRUSTEES FOR CREDITORS—LIABILITY FOR NEGLECT—FACTOR—RELIEF.—(1.) Held that trustees were conjunctly and severally liable to the creditors for neglect in not calling the factor appointed by them to account for his intromissions, by which the whole trust funds were lost to the creditors; (2.) Held that the acting or managing trustee was not entitled to claim relief against the other trustees, for the proportional amount found due to the creditors, in consequence of his liberating the factor, when apprehended, at the instance of the trustees on caption, without the consent of the other trustees. Affirmed on appeal.

An action was raised by the appellants for relief, to a proportional extent, of certain sums, which the late Mr Charles Mercer of Lethindy had been found liable in, as one of the trustees appointed by a body of creditors, against the representatives of his co-trustees.

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It appeared that a tenant on one of Mr Mercer's farms had become bankrupt. A meeting of his creditors was called, at which a full state of the tenant's affairs was laid before them, whereupon they appointed four trustees, of whom Mr Charles Mercer of Lethindy and William Elder were two, to manage that year's cropping, to sell the stock and stocking, and after paying the preferable claims of rent, to divide the balance among the creditors.

The trustees were instructed to appoint a factor. They did so accordingly, by appointing Mr Crockat, who entered upon his office, recovered the funds, but failed to account either to the trustees or the creditors for the same. Indeed, no demand was ever made in the way of diligence by the trustees for the creditors against Crockat, for a long period of years, while he, in the meanwhile, had fallen into a state of hopeless bankruptcy.

An action was then brought by the creditors, against the surviving trustees, for accounting and payment of their debts, which process ended in decree in favour of the creditors, declaring that the fund for division, after deduction "of hypo- Jan. 20, 1803.
 " thec rents due for the farm of Gowrdie to Mr Charles
 " Mercer, the proprietor, servants' wages, and other ex-
 " penses, amounted, with interest, at Candlemas 1802, to
 " £763, 5s. 10d.," and holding the trustees, as well as the
 representatives of those who were dead, conjunctly and
 severally, liable to pay the same. Under this decree, the ap-
 pellant, Catherine Mercer, as representing Charles Mercer, was
 charged by horning to pay the amount; and having paid the
 same, she thereupon raised the present action against the
 respondents, as representatives of William Elder, one of the
 deceased trustees, and against the representatives of John Scott
 of Logie, to make good their proportional share of this loss.

The defence stated to this action was, that Charles Mercer of Lethindy took the chief management as trustee. That he took the chief superintendence of the factor, Mr Crockat's actings and intromissions; that he corresponded with him, urging an account of his intromissions; and that he had actual intromissions himself with the estate. That when the trustees were going to imprison Crockat in 1785, by his inter-

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ference, this was prevented, as well as the compulsitor used to compel him to account, thwarted. They also stated the defence, that David Dow and Andrew Stirton, who were also trustees, were not called to the action, but this defence was repelled, "in respect that there is no clause in the trust-deed declaring the trustees *not* liable for one another."

The Lord Ordinary (Hermand), thereafter pronounced this interlocutor:—"Finds that this is an action brought by the representatives of Charles Mercer of Lethindy, one of the trustees for the creditors of Charles Stewart at Lethindy Bank, a tenant upon the estate of Lethindy, to recover a portion of the sums for which decree was obtained against the said trustees in the year 1796, and which sums were paid by the pursuers: Finds that the factor, John Crockat, named by the trustees, acted chiefly by the advice and under the direction of Charles Mercer, who, after he had been apprehended upon caption, ordered by Mr Elder and Mr Scott, two of the trustees, was liberated by order of the said Charles Mercer, who, it is said, became cautioner in a bond of presentation for him: Finds, that by so doing, he is to be considered as having relinquished any claim he might have had against the defenders and other trustees. Sustains the defences, assoilzies the defenders (respondents), and decerns."

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On the reclaiming petition to the First Division of the Court, the above interlocutor was adhered to. A second reclaiming petition was also refused.

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

Pleaded for the Appellants.—1st, It is indisputable, that by the terms of the minutes of the creditors, which appointed the trustees on the bankrupt estate of Charles Stewart in 1775, and of the trust-disposition to these trustees granted in the following year; they became, conjunctly and severally, liable to the creditors for performance of the duties of their office, and to account for all intromissions, and to satisfy all legal claims that might arise from omissions or negligence in discharge of the trust. Accordingly, by the first interlocutor on the merits, the Lord Ordinary repelled the defences, "in respect there is no clause in the trust-deed, declaring the trustees not liable for one another." And in so far as respects the constitution and conditions of the trust, and the original responsibility of all the trustees to the collective body of the creditors in the first instance, and to each other in

relief, there can be no doubt that this *ratio decidendi* was well founded.

2d, It is not less clearly established from all the evidence, that the whole trustees so named, did accept and act. In particular, it appears from the whole tenor of the proceedings, that William Elder of Loaning, whom the respondents represent, did take a leading part in all that was done respecting the affairs of the bankrupt estate, both during the life of Charles Mercer of Lethindy, whom the appellants represent, and also after that gentleman's death in the year 1789.

3d, There is no proof to show that any of the trustees got possession of any funds or money belonging to the bankrupt estate, which fell to be divided among the creditors. The decree of the Court of Session against the trustees, pronounced in the year 1803, which has been quoted, while it found the whole surviving trustees and representatives of those deceased, "conjunctly and severally" liable to all and each of the creditors, modified the sum of expenses awarded against them, on the ground expressly assigned as the *ratio decidendi*, "that it has not appeared that any of the trustees
 "were guilty of a wilful abstraction or misapplication for
 "their own advantage, of any part of the common debtor's
 "funds, the great losses upon which were occasioned by
 "the mismanagement *and failure* of a person whom they
 "unluckily appointed to be their factor, and *for whose intro-*
 "*missions* they have been subjected." As to Mr Mercer in particular, it has been shown, that he did not even obtain payment of a great part of the rents, upon which he was a preferable creditor, by virtue of his hypothec, and which the creditors had given their consent by their minutes, should be paid to him by any two "or more" of the other trustees, from the proceeds of the crops and stock of the farm which the bankrupt had held. It also appears, that one, at least, of the trifling payments which he did receive to account of these rents, was, in obedience to this direction of the creditors, actually made by his colleague, Mr Elder, and that all the rest but one were made by John Scott of Logie. But it is to be presumed, that Mr Elder and Mr Scott made these payments out of the money they had collected from the produce of the farm. No account, however, either of Mr Elder's or of Mr Scott's intromissions, has been rendered.

4th, Although William Elder of Loaning, and John Scott of Logie, when convened in the original action before the Sheriff of Perth, in the year 1792, at the instance of John

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Butler and other creditors, did at first deny their responsibility as trustees, they afterwards abandoned this defence, and attempted to recover the funds of the bankrupt estate out of the hands of John Crockat, their factor, by personal diligence; and through the whole course of the subsequent litigation, both in the Court of the Sheriff and in the Court of Session, they pleaded upon the footing that they had been equally responsible with Mr Mercer to the creditors, while they maintained that no loss had been incurred by the creditors through the fault of any of the trustees, and that all the intromissions of the trustees had been fairly accounted for.

5th, The debt due to Mr Mercer was much larger than that due to any of the other trustees, and, accordingly, he appears to have been more solicitous and urgent than any of his colleagues in the trust, to obtain a settlement and division of the funds, by bringing Crockat, the factor, to account.

6th, The interference of Mr Mercer, in conjunction with his colleague, David Dow, on the 8th December 1785, to direct Allan, the messenger-at-arms, who had apprehended Crockat upon the decree taken against him by the trustees, not to carry him immediately to prison, if he lodged a bond with a cautioner, to present himself, with his accounts, on the 28th of that month, at the place appointed for a meeting of the trustees, was not calculated or meant to prevent or delay a settlement, but to obtain one. Accordingly, both the creditors and the other trustees, always regarded this measure in that light, and the caption was not put in execution by the other trustees, after the 28th of December, when the bond of presentation expired, if Crockat gave one. It is quite clear that Mr Mercer was not himself cautioner in any bond of presentation for Crockat, as the interlocutors have erroneously assumed. It is not less clear that no advice or instruction given by Mr Mercer at any time, could have a tendency to prevent Crockat, the factor, from accounting to the trustees, and paying over to them the funds of the bankrupt estate, as these interlocutors have likewise erroneously assumed; because, to make Crockat account, was the very object of all that Mr Mercer did in the business of the trust from first to last, whether the course which he took to accomplish his purpose, was judicious or not. Besides, the other trustees were informed immediately of what Mr Mercer and Mr Dow did; and as to the bond of presentation in particular, were

called upon to judge for themselves by intimation of that measure, at the time he and his colleague, who was upon the spot, gave their consent to it.

7th, The decree of the Court of Session pronounced in the year 1803, found the whole trustees and their representatives conjunctly and severally liable to the creditors for the dividends severally due to each of them from the bankrupt estate, without reserving any objection to the claim of relief which might arise in the case which has occurred, of one being compelled to pay for the whole, because no intimation was given of any such objection. By personal diligence on that decree, the appellants were compelled to pay the creditors, and their right of relief as constituted by that decree, is sufficiently instructed and fixed by that decree, which has been regularly assigned to the appellants.

Pleaded for the Respondents.—In considering the matter at issue in this appeal, it is to be kept in mind that this action is very different from one at the suit of the creditors against the trustees; the whole trustees were liable *singuli in solidum* to the creditors, not only for the intromissions but for the neglects of each other. But, in a question of relief, it is still competent for any trustee to show that the neglect, on account of which the trustees were jointly found liable, ought to be imputed to some one of his colleagues, and not to himself.

The first question that arises is, whether the decree in the former action against the trustees be, or be not, conclusive also in the present action of relief, at the instance of the representatives of one trustee against the representatives of another? But it is quite obvious from the nature of the former action, that no judgment pronounced therein, could operate as a *res judicata* in the present. In the former action, it was the object of the trustees to get free of their responsibility altogether, and not to affix that responsibility upon any one of their number. It is to be noticed, too, that after Mr Mercer's representatives were called as parties, no further appearance was made either for Mr Elder or Mr Scott; and Mr Hagart (one of the present appellants, and an executor of Mr Robert Mercer), prepared the pleadings in the cause as counsel for the defenders. In these circumstances, it is not to be expected that anything would appear in the defences of that former action, fixing any special responsibility upon Mr Mercer's representatives. The decret in the former action, merely decerns the trustees, conjunctly and severally, to pay certain sums to certain

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creditors of the common debtors. The same decree would have been pronounced if any one of the trustees had appropriated the whole of the trust funds; though it is obvious that this trustee never could have maintained an action of relief against his co-trustees.

Conceiving, therefore, that the former decree cannot be founded on as a *res judicata*, the next subject of inquiry is, if the representatives of Mr Charles Mercer are not barred *personali exceptione* from maintaining the present action.

It distinctly appears in this case, that Mr Mercer took the chief direction in regard to Mr Crockat, the factor; when Crockat was pressed by the other trustees to come to a settlement, he uniformly applied to Mr Mercer for his interference, to screen him from legal prosecution, and from rendering his accounts; though it might be difficult, from what is known of the *general tenor* of Mr Mercer's conduct, to charge him with the sole consequences of the neglect of the trust concerns; yet what happened after Crockat's arrest, appears to the respondents to be conclusive against the appellants.

It is certain that Mr Elder did not interfere in the general management of Mr Crockat, and that he referred the matters of detail to the sole control of Mr Mercer; yet, when the decisive steps of suing Crockat, and arresting him upon ultimate diligence, were adopted, it appears that these were the exclusive acts of Mr Elder, necessarily taken in the names of the whole trustees, but almost without the knowledge of Mr Mercer.

Mr Mercer personally took no interference in the measures previous to the execution of the caption against Crockat; but Crockat, as usual in all cases of difficulty to himself, immediately applied for relief to his friend, Mr Mercer; accordingly, after the caption was executed, Crockat was liberated by the separate act of Mr Mercer and Mr Dow; it must follow as a necessary consequence from this act of theirs, so imprudent in itself, and so much against the interest of the trust, that in so far as the other trustees were interested, they thereby took the whole responsibility upon themselves, unless it can be shown that this act was homologated by their co-trustees.

It is not pretended that Mr Elder attended any subsequent meeting, nor is there any evidence that he afterwards interfered in the management of the trust affairs; it appears from the letters written by his son, Provost Elder, that he considered himself to be relieved from all responsibility, in

consequence of Mr Mercer's interference, to prevent the execution of the diligence against Crockat, and, in the Court below, the respondents challenged the appellants, to condescend upon any one instance, in which Mr Elder, after this period, had acted as a trustee. It was urged in the Court below, that Crockat, at the time of his arrest, was unable to pay up the balance which he owed, and that no good could have resulted from carrying the diligence against him into full effect; but it is impossible, at this distance of time, to ascertain if these averments be well founded or not; it is certain that even at that time, a great part of the money was still uncollected by Crockat, and one effect of enforcing the diligence would have been, at least, to procure production of his accounts, with the bills and other documents then in his hands. Another advantage would have accrued from carrying the diligence against Crockat into effect. It would have acquitted the trustees from the charge of negligence, the sole ground on which they were found liable personally to Mr Stewart's creditors.

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But, in the last place, there is evidence in the cause, that Mr Mercer himself received and appropriated some part of Stewart's funds. It is not known to what amount this was, but it appears from the letter of Provost Elder to his father, already stated, that "Crockat told Allan" (the messenger who arrested him), "and *showed him by his accounts*, that Mr Mercer and Mr Logie had all the money collected by him "except £20." Though there be no further evidence to show that Mr Mercer's intromissions were to that extent, the statement is rendered very probable by the letter from Mr Mercer to Mr Scott of Logie, of 2d April 1785. Hence it is quite uncertain to what extent he could, in any view, have relief from his co-trustees; and under this uncertainty, the present action cannot be maintained.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *John Leach, Jas. Simpson.*

For the Respondents, *Sir Saml. Romilly, James Keay.*

NOTE.—Unreported in the Court of Session.