

was impossible to contend that he was not subject to that sum, nor did they seem very strenuously to resist that they were bound to account for all the interest that this factor had really made of this sequestrated property; for, undoubtedly, it cannot be contended that he was entitled to any additional profit arising out of this administration, he being allowed a very handsome salary for the administration of this estate. The Duke contends, that he is either to account for the interest he has made, or that he ought to be charged the legal interest; and it is agreed by the Counsel for the appellant, that if he will consent to account for the profits he has made, they shall be satisfied. It appears to me, therefore, with respect to the fourth objection repelled by the Court of Session, that it ought to be allowed, and that the case ought to go back, in order that an inquiry may be made as to the real interest this gentleman has made of the sequestrated estate. And I should propose, therefore, that your Lordships should order that the interlocutors complained of, so far as the same repel the three first objections stated by his Grace the Duke of Roxburghe, should be affirmed; but that it should be declared by this House, that the said Archibald Swinton ought to account to the trustees and executors of the said Duke for all the interest made and received by him upon the rents, feu-duties, and profits of the said sequestrated estate received and to be accounted for by him as judicial factor. And that the several interlocutors, so far as the same are inconsistent with that declaration, be reversed, and that the cause be remitted back to the Court of Session in Scotland, to do that which is consistent with this finding.

SPOTTISWOODE and ROBERTSON—A. MUNDELL,—Solicitors.

(*Ap. Ca. No. 6.*)

---

YOUNG, ROSS, RICHARDSON and Company, Appellants.  
*Adam—John Campbell.*

No. 4.

WILLIAM MUIR, Trustee of JAMES AUCHIE and Company,  
Respondent.—*Stephen—Whigham.*

*Bankrupt—Statute 54. Geo. III. c. 137.—Repetition—Proof.*—A creditor of a Company under sequestration having adopted legal proceedings for recovery of his debt against one of the partners in Jamaica, (whose estate had not been sequestrated); and the Provost Marshall of the island having incurred a liability for the debt, by suffering the partner to escape, and having paid the debt; and the trustee on the estate of the Company having brought an action against the creditor for repetition of the money, alleging that the debt was paid out of the proceeds of the Company's estate delivered to the Provost Marshall; and having produced a correspondence between himself and his attorney to prove that fact.—Held, 1. (reversing the judgment of the Court of Session), That the creditor was not bound to repeat; and, 2. That the correspondence was evidence against, but not in favour of, the trustee.

March 2. 1824.

1ST DIVISION.  
Lord Alloway.

JAMES AUCHIE, John Auchie, and William Dollar, carried on trade as partners in Glasgow, under the firm of James Auchie and Company; and in Jamaica, under that of Dollar, Auchie and Company. William Dollar resided in Jamaica, and managed the business of the partnership there.

On the 25th of July 1812, a sequestration under the Bankrupt Act was awarded by the Court of Session of the estates of James Auchie and Company, and of Dollar, Auchie and Company, and of John Auchie and James Auchie, two of the three partners, as individuals. On these estates Muir was appointed trustee. The private estate, however, of William Dollar was not included in the sequestration, because he had never resided in Scotland since he became a trader, and he had never carried on business there as an individual.

At this time the appellants, Young, Ross, Richardson and Company, printers at Ruthven-field, near Perth, were creditors of the Company, (and consequently of each of the individual partners), by bills granted by the Company for L.1844. 14s. 6d. Having received information that William Dollar had private property in Jamaica, they indorsed the bills to a Mr Auchinvole residing there, who raised an action in the Courts of that island against the three partners, (all of whom it was necessary, in point of form, to call as parties), with the view of attaching the estate of William Dollar; and on the death of Auchinvole, it was insisted in by Alexander Woodburn.

The appellants then caused intimation to be made to the Provost Marshall of Jamaica, not to permit William Dollar to leave the island. He was, however, allowed to do so; and having proceeded to Cadiz, he there met with his partner and uncle, James Auchie, with whom he entered into an arrangement, by which he addressed a letter to certain gentlemen in Jamaica, as his attornies, authorizing them 'to deliver or hold 'at the disposition of Mr William Muir, trustee, and the commissioners on the estate of James Auchie and Company, and 'Dollar, Auchie and Company, the whole property, debts, &c. 'and every thing belonging to the said estate, or me as an individual.' In consideration of this letter, Muir, by his attornies, Bogle and Scott, granted a bond, which (after reciting the proceedings of the appellants) was in these terms:—'Whereas 'the said Andrew Bogle and Michael Scott, as attornies aforesaid, have consented, at the request and on the requisition of 'the persons acting in this island for the said William Dollar, 'to indemnify the said William Dollar against the said claims of

March 2. 1824.

‘ Messrs Young, Ross, Richardson and Company, or of the afore-  
 ‘ said Fulton Auchinvole, and against all costs and charges incur-  
 ‘ red, or to be incurred in defending the same, or relating there-  
 ‘ to, on the persons in this island acting for the said William  
 ‘ Dollar delivering over to the said Andrew Bogle and Michael  
 ‘ Scott all the estate and effects whatsoever of the said Companies,  
 ‘ or of the said William Dollar individually, under their controul,  
 ‘ in behalf of the said William Dollar: Now, the condition of  
 ‘ the above written obligation is such, that if the said Andrew  
 ‘ Bogle and Michael Scott, their heirs, executors, and adminis-  
 ‘ trators, some or one of them, do and shall at all times hereafter  
 ‘ well and truly save, defend, keep harmless and indemnified, the  
 ‘ said William Dollar, his heirs, executors, and administrators,  
 ‘ and his and their lands, tenements, and hereditaments, goods,  
 ‘ chattels, and effects, of, from, and against the aforesaid claim  
 ‘ and demand of the said Messrs Young, Ross, Richardson and  
 ‘ Company, or of the said Fulton Auchinvole, and of, from,  
 ‘ and against the said actions so instituted therein and depend-  
 ‘ ing as aforesaid, and all or any action, actions, or process  
 ‘ whatever, hereafter to be commenced, sued, or taken out in  
 ‘ respect thereof; and, all costs, charges, damages, and expenses  
 ‘ already or hereafter to be incurred or sustained by the said  
 ‘ William Dollar, his executors or administrators, for or in  
 ‘ respect thereof, or in anywise relating thereto; then the above  
 ‘ written obligation to be void and of no effect; or else to re-  
 ‘ main and be in full force and virtue.’

Under this arrangement, Bogle and Scott, as the attornies of Muir, received possession of the whole effects belonging to the Companies and to William Dollar. Soon thereafter the appellants got judgment for L. 3644. 2s. 1d. currency, and obtained writs of execution, directed to the Provost Marshall, to levy the amount out of the ‘ goods and chattels, real and personal, of John Auchie  
 ‘ and James Auchie, of that part of the united kingdom, &c., and  
 ‘ William Dollar, late of the city and parish of Kingston, but at  
 ‘ present an absentee from the island, merchants and copartners  
 ‘ lately trading in Great Britain under the firm of James Auchie  
 ‘ and Company, and in the said city and parish of Kingston under  
 ‘ the firm of Dollar, Auchie and Company.’ In consequence, however, of the Provost Marshall having incurred a liability for the debt, by suffering William Dollar to leave the island, the appellants claimed and recovered the amount from him. In point of fact, the money was put by the attornies of Muir into the

March 2. 1824:

hands of the Provost Marshall, who granted a receipt to them for the amount on the back of the writ of execution.

Thereafter Muir, founding on the 51st section of the Bankrupt Act, declaring, that ‘in case any creditor shall, after the first deliverance on the petition for sequestration, obtain any legal or voluntary preference or payment on or out of any estate or subject belonging to the bankrupt, directly or indirectly, situated without the jurisdiction of the Court, he shall be obliged to communicate and assign the same to the trustee, for behoof of the creditors,’ &c.; and alleging that the appellants had, by their proceedings in Jamaica, recovered payment out of the estate of the bankrupts, he brought an action against them in the Court of Session, concluding for repetition of the amount.

In support of this claim, he produced a great deal of correspondence between himself and his attornies, with a view to shew that the whole effects situated in Jamaica belonged to the Company and not to Dollar, and that the debt had been paid from that source.

In defence, the appellants maintained,—

1. That as the Provost Marshall had incurred a liability to them for the debt, and as they had received payment from him in virtue of that liability, it could not be held that they had recovered payment out of the Company estate; and that if the attornies of Muir advanced or lent to him the amount, or gave it to him under the arrangement with William Dollar, the appellants could not be affected by that circumstance. And,

2. That it was proved by William Dollar’s own letter, and by the correspondence produced, that he possessed private property, and that it had been transferred to the attornies of Muir, under an obligation to relieve him of payment of the debt, whereby Muir was in fact substituted in the place of Dollar.

The Lord Ordinary found, ‘That it is sufficiently instructed by the documents produced by the pursuer, that the sequestrated estate of Dollar, Auchie and Company, was debited with the payments made to the defender, and that the defenders have not sufficiently instructed, that the funds from which they received their payment belonged to the individual estate of Dollar, and not to the funds of the Company; therefore, as this is a preference which they have obtained over the other creditors, repels the defence, and decerns in terms of the libel.’ And on the 5th of March 1818 he adhered, ‘for the reasons already stated, and in respect that the debt which was recovered by

‘ the legal procedure in Jamaica, was a Company debt of Dollar, March 2. 1824.  
 ‘ Auchie and Company, contracted in this country, and for which  
 ‘ Dollar could be liable as a partner of that Company; and the  
 ‘ production in process instructs, that the funds of the Company  
 ‘ were applied to the payment of this debt.’

To these interlocutors the Court adhered on the 17th December 1818, and refused a petition without answers on the 22d January 1819.\*

Young, Ross, Richardson and Company having appealed, the House of Lords found, ‘ That there is no evidence that the appellants obtained any payment of the sum of L.3644. 2s. 1d. Jamaica currency, in the pleadings mentioned, out of any estate or subject belonging to the bankrupts, in the pleadings named, directly or indirectly; and that, on the contrary, it appears, by the documents produced by the respondents, and referred to in the interlocutor of the Lord Ordinary of the 5th of March 1818, (which, although not evidence to affect the appellants, are evidence against the respondents as produced by them), that all the effects of the bankrupts in partnership, and also all the separate property of William Dollar in the island of Jamaica, were possessed by the agents of the respondents in the said island, and that the produce thereof had been remitted to the respondents, or remained in the hands of their agents, at the time when the appellants are alleged to have received, by their agent, from the Provost Marshall of the island of Jamaica, the said sum of L.3644. 2s. 1d. Jamaica currency; and it therefore appears, from documents produced by the respondents, that the appellants could not have obtained payment of the said sum of L.3644. 2s. 1d. by levy of the same, under the judgments in the pleadings mentioned, out of the effects of the partnership; and there is no evidence that the appellants received the said sum of L.3644. 2s. 1d. in any manner, except, as the appellants have admitted, that the same was received by their agent from the Provost Marshall of the island of Jamaica, in consequence of his neglect of duty, for which he was personally responsible. And it is therefore ordered and adjudged, that the several interlocutors complained of be reversed; and that the defenders in the said action be assoilzied.’

J. CHALMER—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 7.*)

---

\* Not Reported.