1793. *March* 8.
The YORK-BUILDINGS COMPANY *against* ALEXANDER MACKENZIE.

No 54.
The common agent in a ranking is disqualified from purchasing at the judicial sale carried on under his direction.

ON the bankruptcy of the York-buildings Company, Alexander M'Kenzie was appointed common agent in the ranking of the Creditors on their estates in Scotland.

In 1779, the lands of Seaton, belonging to that Company, were exposed to public sale, under the authority of the Court, when the common agent purchased the two first lots at the upset price.

A reduction of this sale was brought by the Company, on the two following grounds; 1mo, That the defender, in consequence of holding the office of common agent, came under a legal disability of becoming the purchaser; 2do, The pursuers *alleged*, That certain circumstances of the defender's conduct, at, and previous to the sale, amounted to fraud, or at least to culpable negligence, which, in his situation of common agent, must have the effect of setting aside the purchase. This second ground of challenge was a mere question of fact, and made the subject of a voluminous proof, in which the pursuers failed. In support of the first ground, which resolved into an abstract point of law, it was

Pleaded; 1mo, By the act of sederunt 1756, which introduced the appointment of a common agent, and by the uniform subsequent practice, it is the duty of the person accepting of that office, to take a proof of the value of the estate, to bring it to public sale, and to ascertain the interest of each creditor in the price. In taking these steps, he acts not only for behoof of the creditors at large, but of the common debtor, who, as he has not access to his funds, is deprived of the means of protecting his own interest. All parties concerned are presumed to place implicit confidence in his integrity, for if they were to watch over every step of his management, they might as well conduct the business without his assistance. As, therefore, the common agent is in reality the seller of the estate, and as the duties of seller and buyer are inconsistent with each other, Vinnius, B. 3. Tit. 4. he cannot be allowed to unite the two characters in his person.

2do, Besides, a common agent may also be considered as trustee for all concerned; and no trustee is allowed to purchase the subject of the trust, or at least if he does so, he is considered as holding it for behoof of the truster, that is, in the present case, for behoof of the pursuers and their creditors. This principle is recognised by the law of Rome, D. Lib. 18. Tit. 1. L. 34. § 7.; Matth. de Auct. p. 74.; of England, Abrid. Cases in Equity, vol. 2. p. 741.; Fox *versus* Mackreth, stated in Brown's Reports, vol. 2. p. 420.; Whelpdale *versus* Cookson, *anno* 1747., Vezey, vol. 1. 9.; Bovey *versus* Smith, Vernon, vol. 1. No 58. and 139.; Twining *versus* Morice, *anno* 1788., Brown, vol. 2. p. 326.; and of this country, Stair, B. 1. Tit. 6. § 17.; 28th February 1632, Laird of Ludquhairn, *voce* TUTOR AND PUPIL; February 1732, Cochran, IBIDEM; 19th June

No 54. 1745, Bee against Biggar; No 216. p. 6008.; 6th March 1767, Earl of Crawford, *voce* TRUST; 26th June 1789, Wilsons, *voce* TUTOR AND PUPIL.

3tio, And even although a common agent were not, strictly speaking, vested with either of these characters, it would be *contra bonos mores* to allow a common agent to purchase at the sale, as it would be laying him under such temptations to conceal the value of the subject, and afterwards to conduct the sale of it improperly, as his integrity might in many cases be insufficient to resist.

Answered, *1mo*, A common agent is no more the seller of the estate than the lawyer who appears at the different callings of the process of ranking, or any other person employed in forwarding the business. The sale is the act of the law, and if the character of a seller is at all essential to it, the Court itself, acting under the authority of the statute 1690, c. 12. can alone be considered as possessing it.

2do, The estates of the York-buildings Company were not conveyed in trust to the defender. His employment was limited to a particular purpose, namely, that of carrying on the process of ranking, and dividing the price among the creditors. He was therefore no more a trustee than a writer or solicitor, who is employed in any particular piece of business, who surely is not, on that account, disabled from purchasing the property of his employer.

But even if the defender could be viewed as a trustee in the strictest sense of the word, the purchase in question would not have been reducible on that account; for, although a trustee cannot purchase the property of the truster by private bargain, there is no reason for extending the prohibition to the case where the subject is sold by a public auction, fairly advertised, when, in consequence of the competition of purchasers, there is no possibility of his having an unfair advantage; and this must particularly be the case where the auction is carried on under the superintendence of the Supreme Court, where, of course, all the proceedings are attended with the most public notoriety. Accordingly, both by the civil law, and our own, a tutor, who exercises the most sacred of all trusts, may purchase the goods of his pupil for his own behoof, when exposed to public sale, L. 5. Cod. De Contrah. empt.; Erskine, B. 1. Tit. 8. § 19. In like manner, a creditor, *pigneratitius*, in the Roman law obtaining the authority of a Judge to sell a pledge by auction, for payment of his debt, might himself become the purchaser, Voet. Lib. 20. Tit. 5. § 3.

As to the authorities quoted by the pursuers from the law of England, they are either misunderstood, or do not apply to the present case. Indeed, it would seem, that the English are less scrupulous in this matter than we are in this country. By a late statute, 17th Geo. III. c. 20. it appears not only to be lawful for the proprietor exposing his goods by auction, either to bid himself, or to employ another to bid for him, but that he is even liberated from the duty on sales, if he become the purchaser.

3tio, Admitting for a moment, that it is inexpedient to allow the common agent to purchase at the sale, as the law has not declared his doing so illegal, it

No 54.

is not a competent ground of reduction; for, in order to found a right of challenge at common law, it is necessary to prove, not merely that the situation is suspicious, but that fraud has actually been committed. If, in any case, the temptation to over-reach, arising from the situation of parties, was a ground of reduction at common law, bargains between a member of the College of Justice and a litigant, concerning a depending law-suit, should have been reducible on that account; yet the Legislature thought a positive enactment necessary to check this traffic; and even still, as the statute has not annexed nullity, but deprivation of office, as the penalty of contravention, such transactions have uniformly been sustained, 20th December 1683, Purves, No 47. p. 9500.

Besides, from a search of the records, it appears, that, since the year 1756, common agents have been offerers at judicial sales, carried on under their direction, in no less than 135 instances, in eighteen of which they became the purchasers, yet in no one case has this conduct been challenged, either on the head of fraud, or legal disability; a circumstance which shows not only that the practice is in favour of the defender, but that the suspicion arising from his situation is altogether groundless.

After a hearing in presence, the Lords "repelled the reasons of reduction."

But, on advising a reclaiming petition, with answers, the Court, by a narrow majority, "in respect Mr Mackenzie was common agent when the sale of the two lots of Seaton in question took place, reduced the said sale."

The pursuers not being satisfied with the *ratio decidendi* of this last interlocutor, both parties reclaimed; and, on advising the mutual reclaiming petitions, with answers and minutes, several Judges observed, that a common agent had such advantages over other bidders, both in obtaining better information, and in other respects, that he ought not to be allowed to purchase; that, as a lawyer cannot act for both parties, so neither can a common agent do justice both to the creditors and to himself, if he intended to become the purchaser; that, although he was not disabled by any municipal regulation, yet his disqualification was founded on reason; that the circumstance of so many common agents having been offerers at sales, was an additional ground of suspicion, and shewed the necessity of excluding them. And as the rule is universal, that no trustee can take advantage of a sale in his own favour, to the prejudice of the truster, so neither can a common agent, whose situation, in that respect, must be considered as precisely similar.

On the other hand, a majority of the Court were of opinion, that, although it might be proper that an act of Parliament, or act of sederunt, should be made, prohibiting common agents from becoming purchasers in future; yet, as at present they are under no legal disability, it would be equally contrary to justice, and to the principles of our law, to give a retrospect to such a regulation; that an apparent heir, purchasing adjudications by private bargain, would not have been subjected in a passive title, previous to the act 1695, c. 24. nor would a factor on a sequestrated estate, buying a debt affecting it, have been considered as entering into an illegal transtaction before the act of sederunt 25th De-

No 54. cember 1708 and that the sale in question was valid on the very same principle.

THE COURT, by a narrow majority, "assoilzied the defender, and, in respect one of the reasons of reduction was a charge of fraud, found the pursuer's liable in the expence of the defender's proof." See TRUST.

Lord Ordinary, *Swinton.* Act. *Lord Advocate, Dean of Faculty, J. Clerk, W. Erskine.* Alt. *Solicitor-General, G. Fergusson, Maconochie, Tait.* Clerk, *Sir James Colquhoun.*

R. D. *Fol. Dic. v. 4. p. 216. Fac. Col. No 47. p. 97.*

*** This case was appealed:

THE HOUSE OF LORDS pronounced the following judgment, May 13. 1795, "It is ORDERED and ADJUDGED, by the Lords spiritual and temporal, in Parliament assembled, That the several interlocutors complained of in the appeal be, and the same are hereby reversed; and it is hereby declared, that the decreet of sale, and the charter under the Great Seal, proceeding on the said decreet of sale in favour of the defender, with the instrument of sasine in his favour, following thereupon, all which are challenged by the summons in the process, ought to be set aside and avoided, to such extent and degree, and in such manner as is hereafter provided; and the defender ought to refund to the pursuers all the rents and profits which he hath received out of the estate in question, and an adequate consideration for the enjoyment of such parts thereof as he occupied himself; but without prejudice to the title of the defender, to reclaim all such sums of money as he hath paid for the original price of the estate in question; and also for the permanent improvement of the same, with the interest thereof, to be computed from the times when the same were respectively advanced and paid, according to such rate as the Court of Session shall appoint; and likewise without prejudice to the titles and interests of the lessees, and others who may have contracted with the defender *bona fide*, and before the dependence of the present process; and also without prejudice to the title of the common creditors, to have the value of the estates in question, and the amount of the intermediate produce thereof, applied in payment of their demands, as fully as the same might have been done, if the aforesaid decreet, and instrument following thereon, had not passed, the expenses incurred by the pursuers in recovering the same being first deducted; and it is further ordered, That an account be taken of the rents and profits of the estates in question received by the defender, and of the yearly value of such parts thereof as have been in his occupation, and of all sums of money received by the defender for the sale of timber, stone, coal, or other parts of the inheritance, and that interest be computed upon all such sums respectively, from the respective times of their being received, at such rate as the Court of Session, according to the course of that Court, shall think fit to order; and it is further ordered, That an account also be taken of the several sums of money which the defender hath actually paid as the original price of the said estates, and also of such further sums of money as the defender hath actually laid out for the permanent benefit and

improvement of the said estates; and that interest be computed, at the above-mentioned rate, upon the said several sums, from the times when the same were actually disbursed; and that one of the said accounts be set against the other, and such rests be made in taking the same, as justice may require; and that either party do pay to the other such sum of money as shall be found due, on the balance of the said accounts; and if nothing shall be found due to the defender, or upon payment of what shall be so found due, that the defender do reconvey the said estates to the pursuers, subject to the demands of their creditors, and to the leases, and other contracts, as aforesaid, in such manner as the Court of Session shall think fit to direct; and it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, and that the said Court do give all necessary and proper directions for carrying this judgment into execution."

No 54.

1795. *February* 4. TRUSTEE of DICKSON *against* CREDITORS of RAE.

No 55.

THE LORDS found, that a creditor who had received partial payments on interim warrants, was not entitled to deduct the expense of obtaining and extracting these, out of his payments, so as to load the common fund.

Fac. Col.

*** This case is No 38. p. 13345.

SECT. XIII.

Effect of conveyance to the Purchaser of the Debts affecting the Estate.

1788. *July* 10. CREDITORS of HUGH SETON *against* WALTER SCOTT.

No 56.
The debts affecting a bankrupt estate, conveyed to the purchaser at a judicial sale, upon payment, are extinguished to every other effect, except that of securing the purchaser.

THE bankrupt estate of Appine was purchased at a judicial sale by Mr Seton. On the Creditors receiving payment out of the price, conveyances of their debts were made in trust, for the behoof of Mr Seton, to Mr Scott, his agent or man of business. Mr Scott afterward laid out considerable sums of money on Mr Seton's account; and for Mr Scott's farther security, Mr Seton executed deeds by which he consented and declared, that Mr Scott should continue vested with the rights to the Appine debts, until those due to himself were paid.

Alexander Farquharson, the heir of the cautioner for the price of the estate, then obtained from Mr Scott a disposition to the Appine debts, for the sole purpose of securing his relief against that cautionry obligation.