

No. 45. the widow can prosecute her own interest without the least restraint; and so can the children with the assistance of the tutors and curators if they be under age, and without any assistance if they be of perfect age. It carried however by a narrow plurality, to sustain the pursuer's title.

Sel. Dec. No. 240. R. 314.

1767. March 6. EARL OF CRAWFORD *against* HEPBURN.

No. 46.
A trustee is bound to communicate easements.

The Earl of Crawford, being debtor in sums beyond the value of his effects, did in the year 1678, dispose to Thomas Moncrieff, for the Earl's own behoof, and for behoof of his creditors, contained in a list referred to, for their security and payment, his whole lands and other funds therein mentioned; empowering him with advice of the creditors, to sell the said whole lands, superiorities, teinds, offices, &c. to transact the debts disposed to them, to appoint factors, &c. Though this deed was conceived in form of a disposition in security only, yet as the debts far exceeded the subjects, according to the value at that period, the Earl abandoned all thoughts of redeeming his estate, and left the creditors or their trustee to manage as they thought proper. After some years experience, the creditors being dissatisfied with the management of Thomas Moncrieff, compelled him in a process to convey the subjects to other trustees named by them, who chose Robert Hepburn, writer to the Signet, their cashier, for receiving the rents from the factors, and distributing the same among the creditors. Robert Hepburn acquired some of the debts from Robert Cleland, one of the trustees who had transacted the same with the creditors, and other debts Robert himself transacted with the creditors. In process of time the value of the lands rose so high as to give the Earl a prospect of a reversion; and he having brought a process for redeeming the lands, the question occurred, Whether Robert Hepburn was bound to communicate the easements of the debts acquired by him? The Lord Ordinary, "In respect that the Earl of Crawford claiming easements of the debts acquired by Hepburn, does not undertake to prove that these debts were purchased by commission from the creditors, nor that any share of the common fund or annual produce of the estate was applied for purchasing them, finds Mr. Hepburn not liable to account for the easements." In reviewing this interlocutor, the Court thought the case worthy of a hearing in presence, which led them to alter the interlocutor of the Ordinary, and to pronounce, "That Mr. Hepburn is obliged to communicate to the Earl of Crawford the easements which the deceased Mr. Robert Hepburn his grandfather got in compounding the debts acquired by him."

This judgment is perfectly agreeable to equity and expediency, which did appear as follows. The trustees first named by the Earl, and those afterward by the creditors, were bound to direct their conduct for the common benefit of both, as both were equally interested in performance of the trust. They were bound first to make effectual the funds conveyed along with the lands, and to transact

debts where necessary. They were bound to levy the rents, and to sell the land to the best avail. And lastly, they were bound to pay the creditors in the first place out of the common fund; and to account to the Earl for the residue if any should be. Now, to permit such a trustee to transact debts for his own behoof, would tempt him to direct his whole management for his own profit. However innocent such an act may be in itself, it is poisonous in its consequences; for if opportunity be given for making profit in this manner, a trustee will soon lose sight of his duty, and have nothing in view but his own interest. Principles of Equity, Edit. 2d. p. 255. Instead of using proper means for selling the estate to advantage and dividing the price, he would be tempted to prolong the management in order to weary out the creditors, and make them accept of what he should be pleased to offer for their debts. Such notorious breach of trust, ruinous to the creditors, is not less so to the debtor. The rent of land never pays the interest of the price that can be obtained for it; and the trustees must have been sensible, that the delaying to sell the estate was an act of injustice with respect to all parties concerned. The creditors suffered by it, not only by being deprived of the use of their money, but by losing annually a part of the sums they would have got by a sale of the estate. The Earl suffered by having his debts accumulated upon him, instead of being kept down by a sale. The trustees therefore, who by this wrong conduct could have no view but to benefit themselves, ought to be deprived of their unjust gain; and therefore Hepburn ought to communicate the eases of the debts compounded by Robert Cleland as trustee. The case was less clear with respect to the debts acquired by Hepburn himself, cashier only for the trustees. But the connection was so intimate, that the Court was unwilling to make any distinction.

With respect to factors named by the Court upon bankrupt estates, there is an act of sederunt prohibiting them to purchase debts, and declaring that such a purchase shall be an extinction of the debt. The Court might justly and rationally name a factor under such a condition, because he is bound by his own consent in accepting the factory. But with respect to factors and trustees named by others, the Court has no power beyond the bounds of equity. Utility demands that trustees be barred from serving themselves by their management, instead of their constituents. But to annul debts purchased by them, is a punishment which the Court cannot inflict.

N. B. The family of Crawford were profitters by the misconduct of the trustees in forbearing to dispose of the estate; partly occasioned by the high price of land, and partly by a large sum got from the public for an heritable regality belonging to the family, which formerly was barren.

Sel. Dec. No. 254. p. 327.