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Pleaded for the Respondent.—Mr Lowthian, though not entirely deprived of understanding, yet, besides being blind and almost deaf, was so far impaired in his mental faculties, as to be an easy prey to such as meant to impose upon him; and certain persons, who had insinuated themselves into his confidence, concerted a plan for deceiving him in regard to his settlements. But these settlements being executed in such a manner, in point of form, as not to be read so as to be understood, and no mention being made in the notary's docquet of the reading of the deeds, the same were null and void in law. And the Court below adjudged rightly, in refusing the examination of the appellant's agent as a witness on her behalf, because he was an incompetent witness according to the law of Scotland.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther, Wm. Honyman.*

For Respondent, *W. Grant, Geo. Ferguson.*

THE YORK BUILDINGS COMPANY, . . *Appellants;*

ALEXANDER MACKENZIE, . . *Respondent.*

House of Lords, 13th May 1795.

JUDICIAL SALE — COMMON AGENT — DISABILITY TO PURCHASE — FRAUD — HOMOLOGATION.—Held, that a common agent, in a ranking and sale, cannot purchase the estates sold under the ranking for his own account, though at a public judicial auction, and sale reduced, though he had been in possession unchallenged for thirteen years.

The estates in Scotland, belonging to the York Buildings Company, being brought to a ranking and sale, under the authority of the acts of Parliament, a part of them, consisting of the estates of Seaton, &c., was purchased by the respondent at a judicial auction, he being the common agent in the ranking and sale: The sale was reported to and con-

firmed by a decree of the Court; the respondent paid the purchase-money, had got charter from the Crown on his decree of sale, was infeft, and had been for eleven years in the quiet possession of the estate, without any objection stated by any one to the validity of the sale, and had expended large sums in buildings and other improvements, when the present action of reduction was brought to set aside the sale.

The grounds of the reduction were, 1st, That the respondent was disabled by law from purchasing, he being the common agent who conducted the proceedings in the ranking of the appellants' creditors and sale of their estates. 2nd, That he had acted fraudulently in concealing the value of the estate, or did not sufficiently promulgate its advantages. That he formed combinations to prevent others from bidding at or attending the sale, in order to secure it to himself; and, 3d, That he was guilty of neglect of his duty, as common agent at the sale, in allowing the estate to be knocked down to himself, and not moving for an adjournment, in order to give opportunity to other bidders to appear.

In defence, the respondent pleaded, 1st, That there was no law declaring the common agent in a ranking and sale disqualified from purchasing such estate at a public judicial auction. 2nd, That fraud was totally groundless, and the sale fair, open, and a large price given. 3d, That though the appellants wished an adjournment of the sale, yet, that the circumstances did not warrant such adjournment; and acquiescence for so many years in the sale, by the appellants and their creditors, is a sufficient bar against the plea of disability.

After proof and much discussion, the Court came, at first advising, to be of opinion that the sale was unexceptionable, by interlocutor of 6th December 1791. * But,

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* Opinions of Judges on pronouncing the different interlocutors.

Interlocutor, 6th December 1791.

LORD ANKERVILLE.—"There is an unbounded confidence placed in writers. It likewise falls within the justice of this Court, on the one hand, to inflict exemplary punishment on them if found in the wrong, and to protect them if in the right.

"I am happy to have been able to form a satisfactory opinion for assoilzing the defender in this case. There is no room for distinguishing between the upset price, at which the estates were set up for sale, under the direction of Mr. Mackenzie, as common agent,

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on reclaiming petition, the Court altered, and in respect that Mr. Mackenzie was common agent in the sale, they reduced the same, by interlocutor, on 6th July 1792. And finally, on reclaiming petition for Mackenzie, the Court pro-

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and the competition price. The question is, Was it wrong for the defender, as common agent, to be purchaser at the sale?

"Second point, Whether there was fraud in his so doing? seems a late thought. There was nothing wrong in the preliminary steps taken by him in the sale; and the whole evidence on this point of fraud is a mass of contradiction. It is evident we cannot take it against what is afforded by the *record* of the facts made at the roup."

LORD DUNSINNAN.—"I am of the contrary opinion. I admit that there was nothing fraudulent in the defender's conduct, and that he has been unjustly charged. Here the creditors were pressing, (and it was necessary to effect a sale in order to satisfy them.)—Vide Lord Colville's evidence. The defender had money to lay out; and, in my opinion, there is nothing in the circumstance of the rental to show that any undue advantage was taken. I lay the testimony of Braidwood aside altogether, and lay my opinion upon the duty of a common agent. His business as to the sale is, to make the subjects produce as much as possible. The incidents at the sale are likewise to be taken into view. The admitted facts are, that on the day of sale, precisely at the hour of four, the estate was exposed. The advertisement says between four and six o'clock. There is also the neglect of inserting a short advertisement in the Mercury. It was his duty to procure the highest price. A common agent may purchase where there is a competition; but the offering the upset price promotes nothing."

LORD DREGHORN.—"There is an alternative conclusion in the summons, raised for restitution or damages."

"As to the first and general point, I have no idea that the common agent may not purchase at a judicial sale, although this may depend on circumstances. Mr. Corrie's opinion is sound; and I am persuaded, that if he (the common agent) had been desired to set up the estate again he would have done it. I am, therefore, for overruling the general objection. But we'll watch his conduct with a jealous eye; but as to his conduct previous to the sale, I am of the same opinion with Taylor, (a witness). As to Braidwood, (another witness,) it is a mistake to put it (his testimony) on perjury. The defender did not deceive him in any way. No ground therefore for fraud; yet the defender has not done his utmost; and I must give the opinion that Taylor declines to give, and think he ought to be decerned to pay the additional price, which we see would have been given. The pursuer demands equity, and we must give

nounced this interlocutor, " they repel the reasons of reduc- " tion, sustain the defence, assoilzie the defender, and de- " cern: And, in respect, one of the reasons of reduction was " a charge of fraud against the defender, find the pursuers it him. Ergo, we are not to deprive him, (common agent) of his estate altogether, after a possession of thirteen years.

" The second lot was knocked down when the defender himself desired Mr Taylor to stop the hammer. Ergo, the lot ought to have been set up again. I am for giving no expenses on either side, as the charge of fraud is groundless."

Lord Rockville.—" Braidwood is clearly mistaken. There is no evidence of fraud; and there appears to have been a great deal of activity on the part of the defender."

Lord Justice Clerk.—" There is not sufficient evidence to support a charge of fraud. The question turns entirely upon the duty of common agents. This office implies trust and confidence, and every mandate implies it. It is in his power to do great good or to do great harm, to the other parties concerned.

" Every trust is of the most sacred kind, and must be exercised with chastity and purity. There ought to be no clashing between duty and self-interest. A trustee is not entitled to take even those advantages which a stranger may take. His duty, as to the sale, is to bring the *highest* price. But a purchaser's object is to pay the *least*. I do not go on the parole evidence that has been adduced, but upon the record of the sale and the written evidence. His own letters show that he thought the upset price was below the value. He knew that Lot was worth £14,000 or £15,000. Ergo, he got an exorbitant advantage. Suppose he himself was not to offer, and that he knew that there was just *one man* in the room who would have got it at the upset price, his duty was to move the Ordinary to adjourn. If none but himself, and he had lain bye (from offering) it would have been adjourned of course. I do not approve of the concession, that he may purchase where a competition takes place. It is easy to get a friend to offer. Hence, the disability must be general. The proof led here, though insufficient to prove fraud, shows that these things are possible."

Lord Monboddo.—" I was the judge at the roup. The sale just went on as usual; and it must have been at least half after four o'clock before the 1st lot was called out. I think there is nothing in law to disable a common agent from purchasing the estate at a public roup. But the question is as to his conduct in this particular instance. He knew that Braidwood was to bid, and asked if Braidwood had come. It was his duty then to move for an adjournment, or delay the sale for sometime that night, and the

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"liable in the expenses of the defender's proof, and ordain "an account thereof to be given in; but find they are not "liable for any expense of process." (Vide bottom note). Against these interlocutors the present appeal was brought.

Session Papers.

judge would have complied. See answers by the defender to the condescendence, where he seems to put the cause on that issue."

LORD ESKGROVE.—"As to the abstract question of law, a common agent is not *ipso facto* disqualified from purchasing at the judicial sale which he manages. But there ought to be such a law. When done, it must be without collusion. As to the special facts in this case, I cannot discredit Braidwood's evidence, without supposing perjury, but it is contradicted in every circumstance, and I must lay him aside. The defender knew that he was to be an offerer for the first lot, and it was rather an early hour, half after four o'clock, before first lot struck off. But he ought to have moved an adjournment."

LORD HAILES.—"I am for assoilzing the defender."

LORD PRESIDENT gave his opinion at very great length, (vide Sess. Papers). He said that,—"This challenge was maintained on two grounds.—1st, On the general argument taken from the duty of a common agent, and the nature of his trust. 2d, Upon special circumstances upon which fraudulent conduct was inferred." (He then describes the nature of the office of a common agent, and his duties in regard to the particular estate over the sale of which he was appointed to act and preside, and then prcceeds) :—

"But the case of a judicial sale is very different; for there the common agent, holding him to be a trustee or tutor, in the strictest sense, is not *auctor in rem suam* when he purchases fairly at the judicial sale. His right flows from this Court, and his own authority is out of the question.

"If his precedent duty has been faithfully performed, there seems to be little in principle as in positive law for barring his offer as a purchaser at the judicial roup, for at the moment of the sale he has no duty incompatible with it. His functions are at an end, or suspended, *quoad* the sale; and the business is then in the hands of the judge alone, whose duty it is to take care that everything is fairly conducted at that period.

"It is believed there is no common law rule any where else, against the exposer being himself an offerer, even at a voluntary sale, though with us it has been found illegal, 7th Aug. 1753, Gray *v.* Stuart, &c. (Mor. p. 9560). But the case of a public judicial sale is very different. *Emere possunt quilibet non prohibiti.* Voet. lib. xxviii., tit. 18.

"The common agent, no doubt, is bound also in duty to watch over the proceedings, even at the moment of the sale; but he has nothing in his power at that period, other than publicly suggest-

Pleaded for the Appellants.—The sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity which precluded him from being a purchaser. The office of

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ing to the judge if anything appears to be wrong in the procedure; but, in the nature of the thing, there can be nothing wrong in offers being publicly made by intending purchasers, if these are not under the upset price; and there seems to be no implied restraint against the common agent from the nature of the duty which he has then to perform, more than against any indifferent person.

"Whether the judge himself lies under any restraint, is a question upon which a learned civilian has written a particular treatise, viz. *Matheus de Auctionibus, lib.* 1, *cap.* 10, *N.* 2, *&c.* But there is evidently more doubt as to the judge, because he would thereby make himself both judge and party; and although there are many instances of judges of this court having become purchasers at judicial sales, it is believed that in such instances the judge has declined sitting in Court when the sale was reported; and probably there is no instance of the Ordinary himself being a purchaser.

"It was admitted in the pleading that in case of competition, *i. e.* where other offerers appeared, the common agent might be the purchaser. This of itself shows that he lies under no general incapacity, and therefore, that we necessarily must have recourse to circumstances. The distinction aimed at between purchasing in competition, and at the upset price on first exposure, would scarcely be proper to be admitted as a general rule. It would be easy to manage matters so as to make a seeming competition without the reality; and, on the other hand, it may, and does often happen, that the upset price is the full value, and that the purchase at the first exposure is unexceptionable. A distinction of that kind would be arbitrary and unreasonable. The matter cannot be extricated without either a total disqualification, or none at all.

"The offers made by the defender appear to have been attended with benefit to the Company in three instances, viz., the third lot of Seaton, which yields £100 more than it would have done if the defender's offers were struck out. The first lot of Tranent, where a difference of £400 was produced by the joint purchase, in which the defender was concerned, and the purchase of Callender, where it is admitted on all hands that the defender's conduct was even meritorious. In the case of judicial sales at the instance of apparent heirs, it has been found that the pursuer is *a trustee* for the creditors, but this does not hinder him from being himself the purchaser at the upset price.

"Incapacities are not to be stretched, nor inferred by implication. But here, as far as analogy goes, it is against the rule contended for.

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common agent, in a ranking and sale, infers a natural disability, which, *ex vi termini*, imports the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all Practice is likewise against it. See the instances which have been discovered on a search. (Note or list of authorities lodged in process, by order of the Court).

"If expediency requires an alteration, it must be done by some positive rule in future, and not having a retrospect.

"Some such disability is to be found in the civil law; (Voet lib. 18, tit. 1, § 10); likewise our act 1695, for obviating the frauds of apparent heirs, and the act of Sederunt, 1708, concerning factors.

"The defender communicated his intention to Mr. Taylor and Mr. Hepburn, and it did not strike them that there was anything wrong, nor does it seem to have occurred to any of the agents present, that there was a disqualification, nor to Lord Monboddo, the judge, nor to the whole Court, when the sale was reported. The agents for the creditors, particularly the preferable ones, who were pressing for their payment, were entitled to hold him by his offer.

"This holds to the 2d branch of the cause, and here it is fair to consider both the defender's merits and alleged demerits.

"The researches made by him, and report published, were the first lights which this Court and the public received into the involved affairs of the Company. He refused to have any concern in acquiring debts, or raising money for creditors, though tempting offers were made, and though other gentlemen, members of this Court, were less scrupulous. Had he entered into combinations previous to the sales, to keep off purchasers, and to secure to himself and others the estates, or parts of them, at the lowest values, these would have been fatal to his cause. An instance of this kind occured some years ago, where a joint purchase, in consequence of previous agreement among different intending offerers, buying off one another, was, to a certain extent, set aside. (Murray of Broughton, 1st March 1783. Mor. p. 9567.)

"The joint purchase in this case, of the first lot of Tranent in consequence of an agreement *subsequent* to adjournment, is liable to no such objection, as it had the effect of raising the price."

"The division of the estate into lots, and bringing forward the sale of Winton, in the first place, is well accounted for, and was approved of by the Court. The creditors were clamorous for their money; it was necessary that some one part of the estates or other should be first exposed. There was then no prospect of an end to the war, or to an immediate rise in the value of land. Preferable creditors were not obliged to wait. Winton was the most saleable, from its situation; but setting up the whole at once, or even in

positive law. The principle is obvious. He cannot be both judge and party. He cannot be both seller at a roup and buyer; he cannot serve two masters. And he that is entrusted with the interest of others ought not to make that

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large baronies, would have been imprudent, as there were few monied men then looking after large purchases, their money being otherwise employed. Mr. Mackenzie acted in this, by the advice of intelligent men.

"As to what passed at the sale itself, the hour must have been fixed by the judge. It was within the time limited by the Court, and every person of business knows, that as it depends on the judge himself, at what precise hour within that limited time he will take his seat, so it was incumbent on every person intending to offer, to inquire either at the *clerk* to the process, or at the Ordinary's clerk, what hour the judge had fixed. This was no operation of the defender's, but of other official persons.

"In general, the time for the sale was the most proper of any, being the *middle of the winter session*, when all men of business are daily attending on the Court; and neither their own negligence, nor the punctuality of the judge, can be stated as a ground of complaint.

"After the Court was assembled for the business of this sale, the record itself bears that all the preliminaries were duly gone through, and the usual proclamations made.

"The parole evidence of what was done and said, and at what precise moment of time, at such a distant period, cannot be trusted. It would be most dangerous to admit of such a proof. The presumption is *omnia rite acta*, and the manifold contrarieties in this part of the evidence must prove decisive against the whole. One of the witnesses, *David Wight*, (p. 157, B.) says that the defender, when the first or second lot was under exposure, moved the judge to order it to be knocked down; were this fact true, it would be the strongest of any in the proof; but it is totally incredible, and not supported, although it must have attracted the notice of every man in the room. The judge himself, when the defender was declared purchaser, would have ordered the lot to be exposed again. (See Robertson, p. 118, E).

"In short, there is no sufficient evidence of any thing unusual having happened; and it seems to have been mere accident that the defender got the two first lots at the upset price. Had he not offered for these, it is probable that he would have bid for the two adjourned lots, and got them at the same rate. There must always be some one lot placed first, and some one last, unless they are all set up together; and it would be equally absurd to cut off the first lot, or the first two lots, upon the idea of their not being exposed,

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business an object of interest to himself; and as one who has the power will be too ready to use it, as an opportunity for serving his own interest at the expense of those for whom he is instructed to act, no such purchase so made by him as it would be to abolish the first hour, or the first half hour of the business.

"The strongest passage in the whole evidence against the defender, is what appears in the deposition of Mr. Taylor, (p. 193), that he could not rest the night after the sale, from apprehension lest, the defender having purchased these lots without any competitor, it might be ascribed to some previous plan or design to which the deponent might be expected to have an accession, &c. But the witness very plainly accounts for his own feelings. He was afraid of reflection upon the defender and himself, and, therefore, he wished there had been other offerers. But he does not say, or mean that the defender had done wrong in his opinion. On the contrary, he admits that he himself prompted him to offer for the second lot.

"It was natural enough to expect that there would be reflections upon the defender, if it turned out that he had an advantage; but it is a different question whether there is any legal ground for depriving him of it, especially *post tantum temporis*.

"The delay, in not questioning the sale, by whatever circumstances it may have happened, is material in his favour. A protest taken *de recenti*, *a caveat* entered against the validity of the sale. An objection stated either on the part of postponed creditors or common debtor, when the sale was reported, or as soon after as circumstances could be inquired into, might have had a different effect. The postponed creditors, whose agents were attending, though the company itself was absent, were supposed to have the same interest then that the common debtor is understood to have now. Why was there nothing done till the first strange edition of the summons was executed in 1784, and why was it then abandoned for five or six years longer?

"Matters are scarcely entire, because, independent of that sort of title which arises from long possession and acquiescence, there is a great hardship in stirring a question of this kind at a distance of time, and it is very difficult to separate one's ideas of present value and increasing advantages, from those which would have taken place recently, had the matter then come to issue. We have clear proof that the value of land in market, was very different then from what it is now; and besides, there is a certain degree of jealousy which attends the situation of a man, who has by accident, obtained a considerable advantage in any transaction with another, and there are ways and means of raising a cry, which, even when ill founded, seldom fails to make some impression.

ought to have the countenance or support of law. The danger and temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of mere necessity of the case, work a disqualification, nothing

"It may be very expedient to make a regulation in future, in order to remove even a temptation of doing wrong in the case of a common agent, as was done in the case of factors, and by the act 1695, in the case of apparent heirs; but such regulation cannot justly have a retrospect. It is enough to say that the present case is not reached either by positive regulation, or by common law; though, at the sametime, the defender's character of common agent, is so far to be attended to, that if the smallest slip appears in his conduct, or even irregularity imputable to him, this ought to be taken hold of as decisive against him; but when the proof (in this case) is minutely dissected, it amounts to nothing of the kind, and therefore he ought to be assoilzied."

"Sustain the sales, assoilzie the defender, and find pursuer liable in expense of proof."

"For reducing the sale,—Justice Clerk, Eskgrove, Monboddo, Dunsinnan. For assoilzing,—Ankerville, Dreghorn, Rockville, Hailes, the Lord President."

Interlocutor 6th July 1792.

LORD PRESIDENT.—(Vide former notes).—"A total voidance, to the effect of exposing the lands of new, when they have acquired a new and much higher value, would be very unjust. If there was any thing, the conclusion for reparation and damages may be attended to. Upon reconsideration, there seems to be more ground for Lord Dreghorn's proposition than was at first thought. See Murray *v.* M'Whan, 1st March 1793, (Mor. Dic., p. 9567). where the very point was considered, and the decision was accordingly. The reparation ought to be such as to do material justice to all. Both parties have studiously avoided this point. In the case of voluntary sales, although we do not allow a party to offer for himself, yet, in England, and other countries, it is believed there is nothing in law against it. See act 1773, c. 50, § 10. A purchase made by the party himself, may turn out to be no sale at all, but still it is not illegal. Our practice goes too far in holding it to be unlawful. But a purchase made by an agent, may be held to be for himself or his constituent, according to circumstances.

"Taciturnity and homologation still very strong, as the (Company) estate was understood to be bankrupt, and still turns out to be so, and the postponed creditors do not even appear yet."

LORD DREGHORN.—"I am for adhering. A public judicial sale

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less than incapacity, being able to shut the door against temptation where danger is so imminent. The law has, therefore, wisely guarded against such temptation, by interposing the bar of disability in such situations. In the case of Keech

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is a safeguard against fraud. As to the conclusion of damages, the pursuer does not insist on it."

LORD HENDERLAND.—"As to one of the lots, Sir A. Hope and Mr. Walker were excluded from information. Yet there are no sufficient circumstances of fraud. Braidwood is mistaken in some circumstances; but my difficulty is on the other point. If an agent means to bid, he ought to ask leave of his constituent, and have his consent. This does not exclude a posterior consent, even inferred *rebus ipsis et factis*. I am therefore for reducing upon the point of law."

LORD MONBODDO.—"I am for annulling" (the sale).

LORD ABERCROMBIE.—"The challenge is upon three grounds: 1st, Legal incapacity. 2d, Fraud. 3d, That he has had an undue advantage, although by accident. As to the first, the act of Sederunt contains no prohibitions. Mr. M'Kenzie acted only as an indifferent party. Neither the judge of the roup, nor the Court thought it wrong. Sales at the instance of apparent heir, and by a factor for a foreign merchant, the agent may purchase for himself. Even if there was an incapacity in a common agent purchasing, it is a question, whether, under all the existing circumstances, the creditors are now entitled to complain. Matters are not now entire. The defender paid up the price, and sale approved of. His money was gone, and could not turn it in any other way. 2nd, Ground of fraud,—not proved. As to 3d point, it is the nicest. Had Hunter and Braidwood been at the sale, a higher price would have been given; and the question thence arising is, What should be the effect of this? Should it be now reduced to the effect of setting it aside altogether, and at this distance of time expose it again? I rather think he is not responsible for these accidents."

LORD DUNSINNAN.—"I am for reducing."

LORD JUSTICE CLERK.—"The common agent is not like an apparent heir, for the last acts for his own behoof, and is entitled to do so; but an agent has no such character. It was his duty, as agent for the creditors, to make the challenge. It is his business to bring the highest price. Charges of fraud not proved; yet such things may be—it is in his power to practice arts and contrivances."

LORD ESKGROVE.—"Disqualified from bidding at all, whether that true or not."

LORD SWINTON.—"I am of the same opinion."

"Alter, and in respect Mr. Mackenzie was common agent in the sale, reduce."

v. Sandford, 31st October 1726, Lord Chancellor King said, "It may seem hard that the trustee is the only person of all "mankind who might not have the lease; but it is very "proper that rule should be strictly pursued, and not in the "least relaxed; for it is very obvious what would be the

Cases in Equity, p. 741.

Interlocutor, 8th March 1793.

LORD ANKERVILLE.—"I am for adhering to the first interlocutor."

LORD CRAIG.—"I think there was no legal incapacity. But his capacity of common agent may be joined to other circumstances. If there be fraud, length of time in making the challenge would not wipe it off. But the circumstances are not sufficient to make out a case of *fraud*. Independent of actual fraud, there may be circumstances of impropriety in his conduct which may be sufficient. It is here that the difficulty lies. But the length of time and acquiescence are strong circumstances on the other side; and, taking the whole together, there is not a sufficient relevancy."

LORD MONBODDO.—"I have altered my opinion, and am now for first interlocutor."

LORD DREGHORN.—"I was for a middle opinion, but this was rejected by the Court. The summons is alternative. I am for the first interlocutor; but think we ought to award him to pay the difference in price. Clear, that being common agent is no good objection."

LORD JUSTICE CLERK.—"I am for the last interlocutor."

LORD SWINTON.—"I admit that a common agent may bid at a public roup; but this was not a public roup, *quoad hoc*. He knew that Braidwood was not in the room, and should have stopt. That an agent may buy at a public roup, is not properly a rule, but an exception from a more general rule, that agents, trustees, &c., cannot acquire to himself the subject of the trust."

LORD ESKGROVE.—"I am of opinion the common agent cannot acquire for himself. Such is the law of England."

LORD DUNSINNAN.—"Of same opinion."

LORD PRESIDENT.—"I am for the first interlocutor."

LORD HENDERLAND.—"The Roman law has been misunderstood. I am for adhering."

LORD ABERCROMBIE.—"I am for the first interlocutor. Had the parties at the time called on Mr. Mackenzie, to say, whether he would agree to pay what others were ready to pay, namely, £13,000, or asked the estate to be re-exposed, the Court would have ordered him either to do the one or the other."

"Alter.—Repel reasons of reduction, and find Mr. Mackenzie entitled to the expenses of proof."

Vide President Campbell's Session Papers, Vol. 69.

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"consequence of letting trustees have the lease on a refu-
"sal to renew to *cestui que* trust." And Lord Chancellor Hardwicke, in Welpdale and Cookson, in 1747, says, "He
"would not allow it to stand good, although another person,
"being the best bidder, bought it for him at a public sale.
"I know the dangerous consequence; nor is it enough for
"the trustee to say, you cannot prove any fraud, as it is in
"his own power to conceal it."

The common agent in a judicial sale is an office of trust in the strictest sense of that term. His office is derived partly from the creditors who elect him, and partly from the Court, who confirm by an act of Court, his election; and he is responsible for the faithful discharge of his duties both to the one and to the other; and, consequently, falls within the rule of those cases. The same principle was recognized in the Roman law; and the law of Scotland stands on the same footing in regard to the acts of tutors, guardians, factors, and trustees, offices all of them of the same character with that of a common agent.

Pleaded for the Respondent.—The respondent's decree of sale, by which he possesses the estate in question, and which declares that the sale had been legally and orderly proceeded in, and adjudging him to be the purchaser, ought to be a sufficient bar to this action. This express declaration of the decree is not words of mere style, but a judgment pronounced on facts, stated to the whole Court, by one of their own number, appointed to witness and direct the proceedings. As matter of concluded record, it ought therefore not to be allowed to be redargued even if that, in point of fact, were possible, by lesser or parole testimony, as both incompetent and dangerous. In the law of Scotland, a decree of sale has hitherto been deemed the strongest and best title to land that could be adduced. No person thinks of inquiring further. "If all parties are cited, it is an ab-
"solute and sovereign security." The regularity of the proceedings are not impeached; and if, in these circumstances, the present sale was set aside, the land rights of Scotland would be entirely shaken. The declaration of the Court, as judge of the sale, that the common agent was the purchaser, and the adjudication of the estate to him as the highest bidder, implied that he was competent to bid, and of consequence to purchase. He did this in presence of the Court, and in presence of the appellants. If he then did a thing which was in itself either illegal or improper, why did

Dallas.

the Court *pars judicis*, or the appellants, not object. It is obvious that the Court would never have permitted its officer to do a thing which by law was considered illegal. They would never have awarded the estate to belong to him and his heirs for ever. Yet, nevertheless, it is maintained that this decree of sale is null and void. But the ground upon which this is rested, the respondent humbly apprehends to be perfectly unmaintainable; because the respondent's holding the office of common agent inferred no incapacity to become purchaser. Such rule of disqualification is established by no statute, and by no act of Sederunt, or other regulation of Court. The office has been known since 1756, when it was first instituted, but no doubt was ever entertained until the present question that a common agent might buy the estate so circumstanced; and where there has been a general opinion of this held, and the pratice in conformity with that general opinion, and where the party has acted *optima fide*, the *past* acts of the Court ought to remain undisturbed, leaving the legislature to do as to the *future*, whatever expediency may dictate. It would be plainly wrong to make out a case here from the law of England; yet it is from analogy alone that the appellants hope to succeed in the present case; but the English cases cited regard trusts, where the disqualification rests on the maxim, that one cannot be *auctor in rem suam*. In such cases, the trust is private, the act private, and hence the necessity of fencing the office with such safeguards; but here the office is a public judicial office, every act and step is public and judicial, patent to all, to be scrutinized by every one who had a mind. The English cases therefore do not apply, or bear out the doctrine, that the common agent is not *eo nomine* disqualified. Looking, therefore, to the fairness of the transaction, to the absence of all fraudulent design, of which the Court unanimously acquitted him, to the appellants' own conduct in standing by, looking on and permitting him to buy the estate, without ever hinting disapprobation or dissent, and thereby confirming and homolgating the sale; and, finally, looking to the time he has been allowed quietly to possess on the decree of sale, the same ought completely and absolutely to bar any further question.

After hearing counsel sixteen days in this case,

Lord Thurlow said:

My Lords,

"The proceedings in this cause, both in the Court below and here, have drawn to a great length. That is not won-

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erful, considering that the reputation of the respondent had been supposed to be involved, and the largeness of the property at stake. It would be impossible for me, were I inclined, to pursue the argument in all its points, or the evidence in all its bearings, with the precision it would require.

"My Lords,—The subject, if I understand it, depends on two single points: The first is, That a period of eleven years elapsed since the cause of action arose—*that* circumstance raised a strong prejudice in my mind. The second is, The circumstance of an action having been brought in 1784, in the manner in which it was, seemed to deserve a considerable degree of reprehension, and also, had a considerable effect upon my mind; but it is absolutely necessary, in considering such topics as these, to apply them to some conclusion, and to examine with some accuracy, in what manner they support them. It is said, the length of time that has elapsed ought to entitle the respondent to a decree, exclusive of anything else, because he is not answerable for the length of time which has taken place, and is entitled to all the advantages possible to be derived on his part, in respect of the uncertainty of the evidence. Whatever evidence remains doubtful, the balance of the scale ought to go in favour of the respondent. I will go one step farther, to say, if any ground could be made of what they call homolgation, that the consent and acquiescence for that length of time, would have gone a great way towards substantiating that principle, only rendering void the transaction in one part; but, beyond that, it is impossible to apply the circumstance of length of time.

"My Lords,—A great deal of reliance has been placed, and ought to be given, to the character of the respondent, which is said to be irreproachable, and which has not hitherto in point of fact been impeached. So far as that circumstance goes, I am willing to admit it. I find it was considered in the former judgment, and was said by all the judges, that he was regarded as a man of character; but when that character comes to be applied to the present question, the mind of the respondent is an ingredient that seems to run from the beginning to the end of the business. It is said, the situation in which he stood, and the duty he owed to those who had an interest in the sale, put him under no circumstances peculiar or distinct from those which a mere stranger would have stood in, and that he thought himself at liberty to take any species of advantage, and carry them to every extent a stranger might have done; but, in the construction of law, the very circumstance of being regarded in that point of view, appears to have misled him to take such advantages, which, even in the case of a stranger, would have been regarded as sharp, and which in the case of a common agent, the general principles of law will not allow.

"My Lords,—Another difficulty arose, in which both parties seem to have taken lines so exceedingly opposite, that when one comes

to consider the opinion of the judges, it is impossible they should meet in any one point. On the one side, it was supposed the circumstance of being common agent created some legal disability in him to enter into the purchase at all, that, therefore, it was unlawful, and must be cut down. On the other side, they seem to imagine, if they could dispose of that, and if they could prove there was no rule of law, which made a contract so entered into unlawful, they had broke up the whole question made on the other side. In consequence of this, both sides considered, and laboured a great deal to prove whether he was or was not a trustee.

"My Lords,—It is undoubtedly clear that no man can be trustee for another, but by contract: but it is equally clear, that under circumstances, a man may be liable to all the consequences in his own person which a trustee would become liable to by contract. But the ground upon which this is rested, is stated in a very few words, and lies in a very small compass. The contract of sale, according to all the *forms* of it, was a valid and good one, and the estate was by that means vested in Mr. Mackenzie. The York Buildings Company, being the party interested in the subject, without disputing the effect of the law, say, whatever the law may be, yet, from the manner in which this estate was purchased, and under the circumstances of the case, in point of equity, he ought to be compelled to do that which is right upon the subject. In order to affect him with a plea of equity upon this, they state that he was the common agent for the sale of that estate.

A great deal of argument was used on one side and the other, as to the depositions of the witnesses, and as to the situation he was stated to have filled. But upon the results, if one were to go no farther than the history of the cause, it is exceedingly manifest that the common agent did take upon himself the employment of carrying on the sale to the utmost advantage for the benefit of the creditors, and also for the benefit of a reversion for those who were entitled to it. All the gentlemen seem to admit that this was his duty, and taking it to be so, one side said, *That* being your situation, it is utterly impossible for you to maintain (perform?) that duty in such a manner as to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed, unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply a contrary rule. The common agent has, in point of fact, gained an advantage by it. I take it to be sufficient to support this ground of equity, that he had such a duty, and that, in the execution of it, he did gain an advantage, and that advantage he so gained, was to the prejudice of those in whose behalf he should have been executing his duty. It seems to be enough to prove, in point of conscience, he ought to be compelled to set that matter right.

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"Now, my Lords, supposing the equity to stand in the way, there is also another principle of equity which seems not to have been taken into consideration by the Court, and has not been provided for by any of the decrees in dispute, because it was reversed in the Court below. I mean the second interlocutory judgment.

"My Lords,—The ground of equity I mean to state was this, that whoever comes into a Court of equity to ask for reparation for wrongs done, ought to come prepared to show the justice of his case. For it is impossible that any man can come into a Court of equity to rescind a contract, and at the same time desire to retain the price he paid for the contract, or desire to affect any person he has suffered to contract, under that colour or title; because, taking these grounds together, they appear to absolve the whole business. Certainly, this question does not depend merely upon the grounds of complaint that were made. I will reduce the complaints made to a very few heads, viz., That, in bringing this estate to sale, he did not bring it under the view of the Court or of the public in the best manner, for the purpose of obtaining the real value of the estate. The first article, and that which seems the easiest is, that which they call the grassums. The estates belonged to persons who forfeited them in 1715. They were bought by the York Buildings Company, but were managed in such a manner as to reduce the affairs of the Company. They had been so managed, that the old rents of the estate were reserved. Instead of increasing the rents, they thought proper to take their profits by means of grassums, and by this means it was a year's rent upon sixteen years' lease, and half a year's rent on eight years' lease. The consequence therefore was, that the upset price was about two-and-twenty years' purchase, instead of twenty-five. There were some articles, timber and other things, which are not of great consequence to the decision of the cause. The counsel for the respondent took pains to persuade your Lordships he had calculated them in much the same manner in which they had been calculated before, and he insists, if any dilapidation had been suffered, it must have been done accidentally, and he offered to prove, that at that time Mr. Mackenzie appeared to have had no intention of purchasing the estate. My answer is, supposing the fact to be, that the dilapidation was accidental with respect to the party, the advantage gained by it was not accidental with respect to him. Supposing it to have been made purposely, a common agent being bound to make the utmost of the estate, cannot derive to himself an advantage to the prejudice of his employers, so that objection would not be removed; but when one comes to observe, on the part of a common agent, who has taken such an advantage as this, as far as this goes, it ought to be carried against the common agent, considering the situation in which he was placed. I know, in some cases, the reports have gone so far as to say, that where distinct evidence was given to prove that a trustee or an executor took an advantage in an

article where it would have been impossible to have procured the same advantage for the ward, that even *that* was set aside; but I am not prepared to say, that a case might not by possibility exist, where no advantage of that sort had been taken, but I am content to go the whole length my Lord Hardwicke went, upon similar occasions, to say, you must, in determining upon this, not only consider the points I have mentioned before, but consider the reason which a man in that situation has, not only to commit the fraud, but to conceal it. Therefore, it stands upon no other ground than this, that an advantage has been taken, which the confidence of the agent ought to have prevented; and it does not appear to stand quite in so fair a light, or to be capable of the alleviation or colour that was attempted to be put upon it on the other side. Perhaps it is true, that four or five, or any number of strangers, may combine to bid for the estate by one voice, under an agreement, that if they do not bid against each other, they will divide the profits among themselves; and it would be extremely difficult, if not impossible, to find any sort of equity that would overturn a public and judicial sale upon that species of transaction; but I take it to be abundantly clear, that a common agent (who had made himself, from the duty of his office, perfectly master of the estate,) entering into such a bargain as that, must be deemed to have behaved iniquitously. I admit, that according to the fashion of thinking in that country, a common agent is not thought to deal sharply with an estate under such circumstances. Let that stand as an excuse for him, and prevent obloquy; but it is impossible to adopt *that* in a court of justice. It is not only violating a duty, but it is a corrupt violation of it; for he has kept back purchasers that would have been bidders against him. That was really a violation of his duty, with respect to the two articles that were here bought by him.

"I own, it appears to me, the case has been much too strongly made out against him in that way. It is said, the appellants cannot be suffered, at the distance of eleven years, to plead the incompetency of the respondent. I say, the effect of the distance of eleven years before the suit arose entitled him to no advantage. Where there is a disputable point, a person under such circumstances would be entitled to the advantage of it; but there is no such point here, because all the evidence, both his own, as well as the other, is against him. Much pains were taken to discolour the evidence of Mr. Braidwood, teacher of languages. They said there were some articles in which he was contradicted. That, I confess, raised a doubt concerning his accuracy in point of memory, but there is no difference between his evidence and the rest, because, when he speaks of the conversation with Mr. Mackenzie, there can be no doubt the conversation must have passed exactly in the way he represents it. The counsel for the pursuers endeavoured to prove that Mr. Mackenzie fixed the hour of five for the sale to begin, with a view to prevent him coming earlier. That is

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overcharged; for the evidence of Braidwood does not go to affect him quite so deeply as that. He says, he inquired of him when it would begin. The judges were perfectly acquainted in point of practice that the sales very seldom begin so early as given out at the bar. That the advertisement was published two days before, but does not point out sufficiently that the sale was to begin with more punctuality than sales usually did. Mr. Mackenzie told him it would begin at five o'clock, but he had better go to the office to inquire there, where he might look over the papers, and form a judgment at what time it was likely to begin. This was a sort of language which it would have been fair enough to hold. But another thing decisive, is his own evidence and that of Mr. Taylor; for when the sale came on, he asked Mr. Taylor if Mr. Braidwood was in the room. That strengthens the evidence of Mr. Braidwood a great deal more than all the circumstances together. He asked whether he was in the room, and, upon finding he was not, he went on as stated in the evidence, with such precipitation, that Mr. Taylor remonstrated with him that he was going on too fast, and desired him to call the macer and prevent him from knocking down the bargain so soon. He said, "You may go round and tell him yourself," which was a very awkward circumstance; for while Mr. Taylor was going round to tell the macer he was acting with precipitation, that lot was knocked down to Mr. Mackenzie, and he chose to take it. His obvious duty was to keep the sale open, and to do for another the very thing he would have done for himself. If he had been selling his own estate, with the expectation of a purchaser's coming, he would have put off, or continued the auction longer. He ought to have done the same thing here that he would have done for himself, and it seems apparent he did not do it.

"My Lords,—It is said you shall not quarrel with the rules of the Court. The rule is, the proceedings are to be read, and a glass was to run for half-an-hour. It is clear that these two lots were sold before five o'clock, and consequently there must have been a precipitancy contrary to that which the universal rule of the Court held out. It is said you shall not quarrel with the rules of the Court. I say so too. If it was in the case of a stranger, he would not be answerable for the Court having proceeded in this manner; but an agent cannot take advantage of the Court not having proceeded regularly. It seems to be extremely clear, that he has made himself liable to all that which I stated at the outset.

"As to the Company having consented, it seems to be a matter of doubt in what manner it was possible for them to proceed in order to obtain justice. It is, therefore, not much to be wondered at, that the York Buildings Company, when they were deprived of the possession of their own estates, were not able to bring the suit forward, in order to elide the homologation such as will bind the parties. I apprehend it will be sufficient to show, that being ap-

prized it was in their power to set aside the sale, they did some act by which they gave an express preference to the sale standing as it does, instead of seeking to have it rescinded; but there is nothing in the cause from the beginning to the end, that will go to that point. It was argued, and I think pretty strongly, that the forms of the proceedings were not such as enables the pursuer to obtain that justice he is seeking, because anything short of that, not being contained in the summons, ought not to be referred to. I do not at all wonder it was not heard of, because nobody could have attended to the progress of the causes, from that country to this, without observing that correctness in general, with respect to any forms of pleadings, does not make a part of their proceedings; but it is thought if the objection had been made below, in order to listen to an objection in point of form, it would be a sufficient answer. If this sale is to be set aside, the circumstance of its being challenged on certain general terms, will not make the application bad or informal, because the pursuer is desirous to have it set aside without specifying the terms upon which justice will oblige him, the defender, to set it aside. It appears to be necessary, that Mr. Mackenzie, having advanced money for the original purchase, and money for improvements, should be reimbursed. It is clear that the lessees, who may have contracted for leases, while the other party suffered his legal title to remain unimpeached, ought not to have their leases challenged, though it might be rather difficult, if this matter was set aside absolutely, to prevent those leases from taking the same consequence. It will be necessary, if the situation of the Company requires it, that the sale should be put up again. If it was to be put up again, it is clear some of these contracts could be preserved no longer. In order, therefore, to preserve all possible claim, it has occurred to me to submit, that the clearest way of doing justice, is that upon which I shall call for the opinion of your Lordships.

"I submit that the proper method will be to set aside the sale in an equitable point of view, but to do it by compelling a conveyance of the estate, subject to all the terms I have stated. If that should be your Lordships' opinion, I propose to reverse the interlocutor, and that the sale complained of should be set aside."

LORD CHANCELLOR LOUGHBOROUGH.—"My Lords,—I shall submit to your Lordships some observations upon the discussion of this case.

"My Lords,—I must confess, when the case was opened at your Lordships' bar, I felt my mind impressed with several prejudices against the present appeal. The length of time from the sale to the commencement of the present action, had its weight. Another circumstance was, the summons, in the year 1784, was manifestly not proceeded with as any judicial proceeding ought to be; and the enormous length of the arguments stated in the case on the part of the appellants, contributed to raise an idea concurring with the for-

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mal judgment of the Court of Session, and the expression of satisfaction they made as to the character of Mr. Mackenzie, and that this was an unfavourable case, stirred up in the hope of gaining an advantage, which if it existed, ought not to weigh at all in accelerating or forwarding the claim of the appellants, namely, the advantage which resulted from the different value of lands in the year 1784 in Scotland, and the value which land bore at the time of the sale.

"My Lords,—Notwithstanding all these unfavourable impressions, I felt it my duty to examine particularly into the case, and I see the Court of Session pronounced two judgments opposite to one another, and yet, when I came to examine this case upon principles peculiar to this or that law, it does not depend upon the form in which any rights are disposed of, but upon grounds founded on general principle. I thought neither of the judgments at all applied to the justice of this case. The judgments under which the respondent remained in possession, namely, the first and third interlocutors, were clearly founded on an idea, that the respondent in this cause, in the situation in which he stood, was at liberty to make such a bargain as any stranger or indifferent person might have done with respect to the purchase of this estate. The intermediate interlocutor was founded upon an idea, that if any thing had not been reprehensible in his conduct, yet, being common agent to manage the sale of the estates, he was in a situation in point of law, incapable to become a purchaser, and that the purchase it was impossible to maintain as good, he being common agent. It appeared to me, therefore, that the judges of the Court of Session had been led to adopt two extreme grounds. Those who were of opinion against the respondent entertained this opinion, that, let his conduct be ever so correct, the quality of common agent, barred his exercising any right as a purchaser, and that all he contracted for as a purchaser, it was argued at the bar, was a simple nullity, and that it was no good sale. On the other hand, when *that* had been pressed, those who maintained that such restriction did not attach upon a common agent, seemed to have thought there was no middle course, and if he was not disabled absolutely in point of law from purchasing, he must stand in the position of all the rest of mankind, and might purchase as advantageously as he could, provided there was no gross practice or direct fraud. Neither of these opinions are at all in my opinion proved. A person who is an agent for another, undertakes a duty in which there is confidence reposed. He undertakes a duty which he is bound to execute to the utmost advantage of the person who employs him. An agent may be employed by any one or more persons, and such an agent may purchase. Brokers purchase every day, but they can take no advantage by it. The bargain must be perfectly fair and equal, at the best price, because they are placed in a situation in which they are bound, in the first instance, to act against their own advantage, and for the advantage of their employers; and

if they sacrifice that interest and advantage, with a view of profiting and taking the interest of it to themselves, the purchase will be liable to be set aside, the advantage will not come to themselves, and the breach of confidence will not avail them.

"My Lords,—In considering the situation of a common agent, which was the situation in which Mr. Mackenzie stood, I am led to consider what peculiar advantages he had. It had been argued at the bar, that Mr. Mackenzie's conduct in preparing the estates to be put up judicially, was perfectly regular, and according to the course and practice of similar proceedings, namely, judicial sales; but I am apt to think otherwise. The judges have talked of his reputation in the office, and have expressed themselves with regard to his conduct. What is the conclusion? It is, that he acted as common agent, by following the course of the Court, by pursuing the methods that had been practised, not deviating from the rule of conduct that all other persons would have observed. If, in consequence of that, a loss had arisen, they could not have charged him with negligence, because he had done that which the Court pointed out to be regular in the Court. I cannot help observing on the practice which has prevailed, with respect to judicial sales in the Court of Session, for it is manifest that a strict account of the value of these estates is not got in this case. If an estate is let upon the old rents, all the world know the old rents of the estate are not equal to the actual value of the estate. I do not say the rule of the Court, in not allowing anything but what is proved to be paid, is a bad rule for fixing the rental; but if you do not set out at fixing the periods at which the rents were fixed, especially when advantage may be got upon the possession, it is clear you leave a great deal of the value behind; and therefore I cannot help saying, if it is the general practice to take no account of the value, it is a very loose practice, and must be attended with great disadvantage to estates disposed of at a judicial sale. How could it then apply? It by no means follows from thence, that there is no proof to be given of what the land in the neighbourhood does yield. It is in itself matter of proof for the Court to inquire into. What can the Court do? The Court will do this,—it is a measure by which the Court will go on to tell the world the rent of the estate is more than is actually paid by the tenant. At any rate, *that* matter should enter into the inquiry of the Court, and they should examine the constituent parts that compose its value. That was not done in this instance, and there are several others which I do not go through. What is the consequence to Mr. Mackenzie, he being the common agent? When the estate came to be put up to auction with such a rental, and such an upset price, Mr. Mackenzie knew the actual leases that existed, he knew their circumstances, which were but matters of speculation with other persons, but of all those he had an insight. To give your Lordships but one instance, I will mention the estate yielding £800 per an. that he bought. The estate had been in

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the possession of sub-tenants from the beginning of the century. The rent paid was the only rent stated to be paid by the rental. The leases were all expired. Mr. Mackenzie took grassums according to the rate of one year's purchase, for fifteen or sixteen years' lease, and half a year for seven or eight. What is the consequence of this? Mr. Mackenzie knew perfectly well the actual rent was £800. That the tenants, in fact, paid more, having paid a fine. A fine of one year for fifteen years, is exactly equal to 11 per cent. upon the rent. What was the case of Mr. Mackenzie? He takes it at a good value upon twenty-five years' purchase, upon the rental of £800. But to that you must add £99 more. The consequence of that is, that as for one part of the rent of the estate, Mr. Mackenzie has paid no value at all; and then in their argument they say:—"This is a fair purchase, for I have done what the Court of Session adjudged. I have paid a fair price upon twenty-five years' purchase of £800 per annum." On the other hand they say:—"You have taken an advantage arising from your knowledge of the subject. You have put money into your pocket by the sale; and you have not paid the price, which, by the tenor of your contract, you ought to have paid." I think Mr. Mackenzie is bound by duty, and that he could not take that advantage. The Court of Session has considered that he might act as any indifferent person. If he had been any man not engaged in that capacity, and had seen the estate put up, nothing could have been imputed to him. He had a right to avail himself of his judgment and understanding. He, bidding at a public sale, might have got the estate on the best terms he could; but it is not so with respect to Mr Mackenzie. With respect to the conducting of the sale upon Mr. Taylor's own account, there was hurry and precipitation on the part of Mr. Mackenzie, who should have kept open the sale. It would have been very well if he had been acting for himself, but being in his situation, and knowing there were bidders to come in, he would only have done his duty if he had stopped the sale. If an application had been made to the Judge, it would have been stopped, but it was not stopped, Mr. Mackenzie being the bidder, and present in the Court himself. Mr. Taylor tells you he was so concerned, he could not sleep all night; for he could see all things had not been rightly done. A common purchaser may snap and take advantage, and if it is not checked at the time, he shall have the advantage of his activity. With respect to Mr. Mackenzie, it is not possible for him to take that which no law would take from a sharp common purchaser. He is the agent, a man of business, paid for transacting his duty, and, we are to suppose, paid adequate to the performance of it; and it is totally impossible, according to every principle of general policy, and every ground of equity, to permit any advantage to be taken, though he was not the artificer of it, though he did not contrive it for himself, yet he is not to avail himself of that good fortune—it is his duty to

prevent it—he is bound to do it—he is paid to make the most advantage of the sale for the benefit of his employers.

"My Lords,—With respect to the acquiescence which has been stated, and which was so much relied upon, I think, if it is fairly stated, it comes to nothing; for it would be a violation of justice to call it so in the circumstances of the case. You cannot impute any laches upon the part of the appellants. Mr. Mackenzie is stated and admitted to be the agent for the York Buildings Company, and for the creditors also; he sold the estate for both; therefore, as long as he continued the agent, as long as the management of the affairs were in his hands, and their funds passing through his hands, and as long as his accounts as agent were unsettled, the Company was not in a situation to call him to an account. If a gentlemen has a transaction between an agent or steward, and finding himself deceived, continues to employ him for years, then he is not at liberty to call him to an account for his former conduct, but if he dismisses him after coming to a knowledge of his conduct, he may do it. If he is dismissed, and then lies by and suffers time to elapse, then the time will begin to run against him from that period; but never can during the time he was an agent, and the management continued in him. The appellants could not call the respondent to an account. He was not an agent of the election of the York Buildings Company. He was an agent put upon them by the nomination of the Court of Session, and while he continued their agent, no delay can be imputed to them.

"My Lords,—Upon these grounds, therefore, I am of opinion that the appellants have established their claim. I am greatly obliged to the noble and learned Lord who has digested this case. It would not have been well to have sent this case down again with general directions to proceed on it. The resolutions drawn up are perfectly accurate, and so very distinct and exact, though it is a bold thing to say there will be no farther litigation in consequence of the suit; it has been very much investigated; and I am not without hope it has been of service, as the whole matter will be determined by the present appeal.

It is ordered and adjudged that the interlocutors complained of in the appeal be reversed: And it is hereby declared, that the decreet of sale, and the charter under the great seal, proceeding on the said decree of sale in favour of the defender, with the instrument of sasine in his favour following thereon, ought to be set aside and voided, to such extent and degree, and in manner hereafter provided, and the defender ought to refund to the pursuer all the rents and profits which he hath received out of the estate in question, and an

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adequate consideration for the enjoyment of such part 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 thereof, and also for the permanent improvement of the same, with the interest thereof, to be computed from the time when the same were advanced, and paid according to such rates 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, the expenses incurred by the pursuer in recovering the same being first deducted. And it is further ordered, that an account 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 he hath actually laid out for the benefit and improvement of the said estates, and that interest be computed at the above-mentioned rate, upon the said several sums, from the lands, when the same were actually disbursed, and that one of the said accounts be set against the other, and such rests 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 accounts, if nothing be due to the defender, or upon payment of what shall be so found due, that the defender do re-convey 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 said Court shall think fit to direct; and it is also further ordered, that the cause be remitted back to the Court of Session, and that the said Court do give all necessary and proper directions for carrying this judgment into execution.

For Appellants, *R. Dundas, Jas. Mansfield, R. M'Intosh.*
For Respondents, *Sir J. Scott, Robert Blair, W. Grant, W. Miller, W. Adam.*