

1797.

Ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

For the Appellants, *R. Dundas, J. Mansfield, John Clerk.*

For the Respondent, *Sir John Scott, Wm. Tait.*

YORK BUILD-  
INGS CO.  
v.  
BREMNER, &c.

<p>THE GOVERNOR &amp; COMPANY of Undertakers for Raising the Thames Water in York Buildings, - - -</p>	}	<i>Appellants;</i>
<p>JAMES BREMNER, Writer to the Signet in Edinburgh, Common Agent in the sale of the York Buildings Company, JAMES FORBES, the Heirs of the Rev. Dr. Fordyce, and THOMAS PLASKETT, - - -</p>	}	<i>Respondents.</i>

House of Lords, 19th June 1797.

This was a petition and complaint for the removal of a common agent, in the following circumstances, and also against the judicial sale ordered by the Court, of the estates of Seton.

The York Buildings Company's estates became the subject of a ranking and sale; and afterwards an act of parliament was passed for selling off the estates, and otherwise winding up the concern. This act gave power, without waiting the conclusion of the ranking of the creditors, to sell the whole lands belonging to the Company in Scotland, at the suit and application of any party having interest, empowering the Court of Session to give decree of sale in favour of the purchasers, in the same manner, and under the same laws and regulations respecting the sale of bankrupt estates.

It was alleged by the appellants, that in consequence of these sales, a fund arose which greatly exceeded their debts; but, in consequence of the irregularity and mismanagement of the common agents on the estates, this fund, which, after paying their creditors in full, would have left a reversion of £10,000 for them to receive, had been entirely wasted and consumed.

It was further stated, that Mr. Mackenzie had been at first appointed common agent; but, upon his purchase of part of the estates of the Company, and the proceedings

consequent thereon, to reduce the sale, he resigned his office of common agent, and Mr. Scott, W. S. was thereupon appointed in his place.

It was further stated, that by the judgment in the House of Lords in the case with Mr. Mackenzie, the sale to him was not only set aside, but it was also ordered, that Mr. Mackenzie, on receiving payment of what was due to him for his reimbursements, was to reconvey the estates *to the Company*, subject to the several claims of the creditors still remaining unpaid. But in place of giving effect to this judgment of the House of Lords, the Court of Session, in the remit made to them, ordered the estate to be sold under a bankruptcy. In particular, on petition of Mr. Mackenzie, stating that he would no longer continue the management of the estate, and praying the Court to sequester the same and appoint a factor, Mr. Bremner appeared, and adopted this petition, and also separately petitioned the Court to sequester.

The Court, of this date, sequestered the estates of Seton accordingly, and continued Mr. Archibald Swinton, W. S. factor on the sequestered estates of Seton.

The Court thereafter “found it proven that the present rental of the whole lands, teinds, and other subjects under sale, amounts to £1326. 12s. 2 $\frac{4}{12}$ d. Sterling, deducting £10. 7s. 11 $\frac{4}{12}$ d. of public burdens, which falls to be deducted from the said rental. Find that the value thereof, and of the house at Port-Seton, according to the several rents mentioned, on the said first view would extend to the sum of £37,963. 13s. 10d. Find that the common debtors are bankrupt, and their creditors in possession of their estates: Find it proven, that on the supposition that the leases, (excepting Thorntree Mains), expire in a short time, the said lands might yield a gross rental of £1876. 6s. 4d. &c.; and ordain the lands to be exposed by public roup, in one lot, at the upset price of £47,000, on the day of next to come.” On reclaiming petition the Court adhered.

It was farther stated, that on the resignation of Mr. Mackenzie as common agent, the Court, sensible of the right the appellants had, did, on petition presented to them, recognise the Company’s right and interest in the management of the estates of Seton, and had pronounced this interlocutor: “In respect of the particular circumstances of this case, found that the creditors have no right to name the common agent, but that the right is in the Company, and

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Feb. 13, 1796.

July 6, 1796.

Nov. 26, —

5th and 11th March 1789.

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 The appellants thereafter having recommended Mr. Scott,  
 YORK BUILD- W. S. the Court, upon the 11th March 1789, nominated and  
 INGS CO. appointed him to be common agent. But the above inter-  
 v. locutor of 5th March, finding the right in the Company to  
 BREMNER, &c. name the common agent, was afterwards corrected when, on  
 the resignation of Mr. Scott in 1791, the Company named  
 Mr. Bremner as Mr. Scott's successor. By an interlocutor  
 of March 1792, the Court, recurring back to the above inter-  
 locutor, and stating it to have been worded in mistake, held  
 Mar. 9, 1792. that the appointment of the common agent in this case was  
 in the Court, and that Mr. Bremner derived his appointment  
 from the Court alone. The appellants further stated, that  
 this latter judgment was erroneous—that there was no  
 pending ranking and sale—that by the ranking and sale that  
 formerly was in pendance, their estates had been sold at im-  
 mense undervalues, and that as the House of Lords had au-  
 thorized these estates of Seton to be conveyed to them,  
 they had an interest to prevent such proceedings again, and  
 therefore that judicial sale ordered by the Court was incom-  
 petent.

The petition and complaint, besides alleging these irre-  
 regularities, alleged further irregularities against Mr. Bremner,  
 the present common agent, in so far as the estate was se-  
 riously injured, and the funds wasted, by his proceedings.  
 In particular, it was alleged that Mr. Bremner had given in  
 states of the claims to the Court, magnifying greatly the  
 amount of the debts against the estate beyond the real  
 amount, so as to give an appearance of bankruptcy, and  
 praying to have him removed from the office of common  
 agent, and to appoint another, to be named by the peti-  
 tioners. It farther prayed the Court to delay the sale of  
 the Seton estates advertised by Mr. Bremner.

Dec. 2, 1796. Pending the discussion, the Court adjourned the sale in  
 Dec 15, — the meantime. In the course of this discussion the appel-  
 lants contended, 1st. That the act 17th of his Majesty above  
 mentioned does not, under the circumstances of the case,  
 authorize the Court to proceed in the sale of Seton. 2d.  
 That there was no proper or regular process of ranking and  
 sale in dependence, in which it is competent *hoc statu* to  
 insist in the sale of Seton; and, 3d. That Mr. Bremner  
 ought, in the circumstances, to be removed from his office.  
 Mr. Bremner gave in replies, along with three other credi-  
 tors who concurred with him, contending for the contrary  
 of these propositions.

Thereupon the Court pronounced this interlocutor:—  
 “ Remit to this week’s Ordinary on the Bills to adjourn the  
 “ roup and sale of the first and second lots of the lands and  
 “ barony of Seton, till Thursday the 16th day of February  
 “ next, and appoint the same to proceed on that day:  
 “ Find the charges exhibited against the common agent  
 “ groundless and injurious; therefore find the York Build-  
 “ ings Company liable in the expenses of this part of the  
 “ litigation; and appoint an account thereof to be given  
 “ into Court; and refuse the desire of the petition, replies,  
 “ and minute, *quoad ultra*.”

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Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—That the whole proceedings in the ranking and sale following the judgment of the House of Lords in the case with M’Kenzie were irregular and incompetent, because the House of Lords having set aside the sale in the manner expressed in the judgment, and having thereby ordered and adjudged that Mr. Mackenzie do, on receiving payment of what was due to him, *reconvey* he estates of Seton to the appellants, the *York Buildings Company*, subject to the demands of their creditors then unpaid; and having also remitted the cause back to the Court of Session, that the said Court might “ *give all necessary and proper directions for carrying the judgment into execution;*” the meaning of the said judgment and remit by the House of Lords was so express as totally to exclude all construction and interpretation. But by the proceedings adopted under the remit above set forth, the Court of Session have now made it impracticable for Mr. Mackenzie to grant the conveyance directed to be executed by him, and have also thrown insuperable difficulties in the way of settling with him his embursements, which is the condition only upon which he is ordered to reconvey the estate. This has been brought about by the Court of Session ordering the estates to be sold by a form of process unknown in the law of Scotland, and by which the purchaser cannot have a good title, although he may attain possession of the estate, and hold the price at the same time. The consequence of which necessarily is, to involve the appellants in an useless and expensive litigation, by which the reversion of the price is swallowed up, or the right to such reversion lost altogether.

It was further incompetent for the Court of Session to pro-

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ceed in selling these estates as they did under the act 1777, because this act was long since at an end, and of no force; by the selling of these estates of Seton to Mr. Mackenzie, and with the price paying all the remaining creditors of the Company their debts, the purposes of the act were at an end, and the Company had only to receive the reversion, the present creditors, or pretended creditors, Messrs. Fordyce and Plaskett, having no claim whatever on the Company. The act of Parliament was passed to facilitate the payment of the creditors. So soon, therefore, as these were all discharged, the act necessarily fell to the ground, and was at end; and, therefore, the estate of Seton, when sold the second time, cannot be considered as sold under the act of Parliament. But even supposing it was still subsisting, the act of Parliament does not authorise the Lords of Session to sell the Company's estates except at the suit of "*persons having interest.*" But as there are no persons having a legal interest, and as the present pretended creditors have none, there was no authority whatever for the sale. Besides, the title was in Mr. Mackenzie, and not in the York Buildings Company, and therefore it was not at the moment a competent subject for a *judicial sale* as the property of the York Buildings Company.

Then, as to the common agent, Mr. Bremner was never legally appointed common agent in the ranking and sale. A common agent is a person elected by the majority of the creditors, and approved of by the Court, according to the known forms provided therein. Here, at the time, there were no creditors to elect. He was therefore originally named by the appellants, and received by the Court, and consequently to be viewed as their agent, whom they are entitled to dismiss, as well as to appoint. The old process of ranking and sale was also at an end, so that there was nothing which entitled the Court to resort to the proceeding followed forth by the common agent. But supposing his appointment to be valid, yet still the common agent has so conducted himself in these proceedings as to call for his dismissal, because it is the duty of a common agent to attend chiefly to the interest of the common debtor, to preserve the fund, and to take care that all objections be stated to every claim of debt that is not duly supported. He is more imperatively bound to this, because the common debtor being made bankrupt, is presumed in law to have no funds, and therefore is prevented from attending to his own interest. But in place of

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this, the common agent has done every thing in his power to injure the appellants' right. His object all along was to perpetuate the proceedings, and with this view to magnify a list of the debts, without discriminating, as was his duty, whether these were good or valid debts, or were such as were totally unsupported and objectionable. Mr. Bremner ought therefore to be removed; and, in the circumstances, where it is apparent that there will be a reversion, the obvious and usual course is to allow the common debtors access to the estate, so that they may avail themselves of that fund, and attend to their interest in regard to unfounded claims wished to be ranked upon it.

*Pleaded for the Respondents.*—In regard to the competency of the sale, the act obtained by the York Buildings Company for expediting the sale of their estates, proceeds on the narrative, that the said Company's estates have long since been insolvent, and that "the lands and estates of the said Company, which have been long neglected and uncultivated, while remaining in the hands of an insolvent company, will, by being transferred to purchasers, be improved to the benefit of the public."

And further, "that the Judges of the said Court of Session shall, and are hereby directed to proceed to the sale of the said estates, and in the ranking and classing of the creditors, and dividing the price in the same manner and form as is laid down in the several laws and regulations of the Court respecting the sale of bankrupt estates." While this act remained unrepealed, the duty of the Court of Session under it was clear and obvious; and so long as a single creditor remained in the field, the Court was bound to proceed with the sales of the estates, and division of the price, until the whole lands were sold, and the whole fund divided. The application, therefore, made by the common agent in January 1796, in pursuance of the statute, was perfectly regular and competent. Even at common law, and by the general statutes respecting sales of bankrupt estates, a sale of part of the lands being reduced, the lands fall back into the situation in which they were before, and may and must be sold judicially under the original process of sale, at the requisition of any creditor or creditors remaining unpaid; and the terms of the judgment of the House of Lords show that it was the intention that the rights of creditors should be secure; and the Company themselves were at first approvers of the sale. In reference to the removal of the

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common agent, it is sufficient to say that he is responsible for his faithfully discharging his duty. He comes in place of the bankrupts. He acts, having both *their* interest and the interest of the creditors to attend to. But in such case the law will not allow of the interference of the common debtor. It may be true, where the common debtor can show some reasonable prospect of reversion, his interference in the appointment of the common agent may be allowed. But, in order to entitle them to this right, they would have to show that they are not bankrupt, and above all, to prove some specific charge against the common agent, in order to entitle him to be removed. Nothing of this kind has been done; the assertions as to his raising up the amount of debts, so as to give an appearance of bankruptcy, being unfounded; and the Court have justly held, that as he derived his appointment alone from it, he was responsible to the Court alone.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said,

“MY LORDS,

“It appears to me that the interlocutor of the Court of Session, of March 1792, which is not appealed from, is a complete answer to the whole of the argument used for the appellants in this question. If that interlocutor be to stand, the whole subsequent proceedings held in consequence of it must stand likewise. I have a great respect for the opinion of several persons whose names are signed to the appellants' case, and who must have recommended the appeal as advisable; but, upon the ground of that interlocutor, I am of opinion it must go for nothing. There has been, however, so much abuse bestowed upon the Court of Session on the part of the appellants, that I think it calls for some particular notice from your Lordships.

“If there be any real reversion to be expected by the York Buildings Company, I am astonished to see so much powder and shot thrown away in their affairs. In all the steps taken, preparatory to the sale of Seton, the Company assisted Mr. Bremner with their advice; the upset price was proposed by them through the medium of Mr. Bremner, and they were not to interfere farther in that measure. But their conduct since has been totally altered; they have appealed from all the interlocutors of the Court of Session within the time limited for appeals by the order of this House, and that by the lump, and, in several instances, without *gravamine* on their part.

“It is gravely stated in their case, that the former judgment of this House, in their appeal with Mackenzie, has been so unhappily conceived, that it cannot be carried into effect consistently with the

law of Scotland; and we are told, that it is the opinion of great names, that under that judgment no title can be made to a purchaser. I shall very much lament to find that the Court of Session cannot carry it into effect. But we must not have private opinions set up in opposition to that judgment.

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“ Upon these considerations, I shall move that the interlocutor in this case be affirmed, with £100 costs.”

It was accordingly

Ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

For Appellant, *Sir John Scott, R. Dundas, J. Mansfield,*  
*John Clerk.*

For Respondents, *J. Anstruther, Mat. Ross, D. Monypenny.*

The GOVERNOR AND COMPANY OF UNDERTAKERS for raising the Thames Water in York Buildings, . . . . . } *Appellants;*

JAMES BREMNER, Writer in Edinburgh, *Respondent.*

House of Lords, 19th June 1797.

EXPENSES—RANKING AND SALE—The common agent having applied to the Court for a warrant for £1000 out of the York Buildings Co.’s funds, to defray the expenses incurred, and to be incurred, in the preceding causes, pending the appeal of the judgments therein, the Court granted warrant accordingly, and, on appeal, this order of the Court was affirmed.

In the course of the proceedings which issued in the two preceding appeals, it has been seen that Mr. Bremner, the respondent, was appointed common agent in the ranking and sale, in room of Mr. Scott, who resigned.

The respondent, as common agent, gave in a petition, praying the Court to issue an order, to pay out of the funds of the estate the sum of £1000. on account of costs incurred in the Court of Session, and to be incurred in discussing the preceding appeal.

The answer made by the appellants was, That they had appealed against the interlocutors of the Court in these