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THE GOVERNOR and COMPANY of UNDERTAKERS for Raising Thames Water in York-Buildings, . . . } *Appellants;*

ALEXANDER MACKENZIE, W.S., . . *Respondent.*

YORK BUILDINGS CO. *v.* MACKENZIE.

House of Lords, 14th June 1797.

REDUCTION OF SALE OF ESTATE—INTEREST UPON RENTS—DEDUCTIONS FOR IMPROVEMENTS—EXPENSES—DAMAGES—MALA FIDE POSSESSOR.—In the question of adjusting accounts between the appellants and respondent, under the judgment of the House of Lords, the respondent, before reconveying the estate of Seton, was held entitled to claim, 1. Expenses of making up his titles. 2. The expense of planting shrubbery and trees. 3. Expense of building the mansion-house, and the house and office at Port-Seton, as items expended beneficially for the estate. But held that Mr. Mackenzie was not liable in the expenses of the reduction incurred to the appellants in the circumstances of this case —the Court below having exonered him of all fraud in the transaction, and decided in his favour as to costs of the proof.

This was a resume of the case between the appellants and respondent, (reported, *ante* p. 378).

After the judgment in the House of Lords, the respondent appealed, by petition to the Court of Session, to have the judgment applied, and produced, along with the judgment, a state of all the accounts he conceived to be necessary for adjusting the balance. In the accounts so exhibited, the respondent, besides the purchase money and interest, charged the appellants with the following articles:—

1. The expense of completing his titles to the estate of Seton.
2. The expense of boring and sinking for coal.
3. The expense of building a house and offices at Port-Seton.
4. The expense of erecting a mansion-house on the estate, and offices; and,
5. The expense of improving and dressing a part of the grounds contiguous to the mansion-house, and planting trees and shrubs.

And as the judgment of the House of Lords directed interest to be computed on the rents and profits which the respondent had received, he stated, in his said petition, that

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the stipulated terms for payment of the rents were such, that the last, and a large portion of each year's rent, was payable only at Lammas, (*i.e.* 2d of August), of the following year; that is, of the rent of the year 1779, the last part was payable at Lammas 1780, and so forth. The respondent suggested to the Court that each year's rent should be held to have been on hand at Martinmas (11th November) of the subsequent year, and that five per cent. interest should be charged on both sides of the account.

The respondent farther submitted to the Court, that he was entitled to a commission as factor-fee for receiving the rents which he was thus going to account for, in the same way that the appellants' steward would have done.

14th and 18th Nov. 1795. The Court pronounced this interlocutor:—"Find that "Mr. M'Kenzie must be liable to account for the rents at the "term of Martinmas following the terms of payment re- "spectively, and repelled the objection to the same: Sus- "tain the objection of the appellants to Mr. M'Kenzie's "charging factor-fee for levying the rents and managing the "estate: Find Mr. M'Kenzie entitled to charge the expense "of making up his titles to the estate, and repel the objection "thereto; and ordain Mr. M'Kenzie to give in *quam pri-* "*mum*, a minute or condescendence, with respect to the "4th, 5th, 6th, and 7th articles objected to by the Company, "and therein to state what he offers to prove concerning "them."

12th and 18th Dec. 1795. The appellants reclaimed against this interlocutor, in so far as it allowed the expense of making titles, but the Court adhered.

The respondent having given in his condescendence, and considering which and answers, the Court pronounced this interlocutor: "Nominate and appoint George Steele, over-

Dec. 12, 1795. "seer of the late Sir Archibald Hope's coal-works, to exa- "mine the boring and sinking for coal in the lands and "estate of Seton, made by Mr. Mackenzie, with the depth "and lie of the metals, and whether or not it had been pro- "perly executed, and for the benefit of the estate, and to "report upon oath, with power to the said George Steele to "take such information as may enable him to form his opi- "nion. And with respect to the mansion-house of Seton and "the shrubbery, before answer, allow a proof to both par- "ties of the value thereof, and how far they are to be con- "sidered permanent benefits to the estate: And also of the "house at Port-Seton."

The respondent presented another petition, stating that, although, by the terms of the judgment of the House of Lords, he was entitled to retain possession of the estate till the accounts between the parties should be settled, at which period he was directed to divest himself, yet as he had no wish to retain possession, and was ready to divest himself thereof, provided his preferable claim to the rents, as well as to the property, in satisfaction of his claims, was reserved; and therefore praying the Court to sequestrate the estate of Seton, and appoint a judicial factor.

Whereupon the Court pronounced an interlocutor, appointing Mr. Archibald Swinton, W. S., judicial factor upon the estate of Seton. Dec. 19, 1795.

The report in regard to the expense of sinking for coal, and the value of the mansion-house, &c. the Court pronounced this interlocutor: "Repel the charge made by Mr. "Mackenzie for the expense of boring and sinking the coal, "but sustain the claim made for the expense laid out in in- "closing and making plantations, and a shrubbery adjacent "to the mansion-house; also for the money laid out "in building the house at Port-Seton, and the mansion- "house of Seton and offices: Find him entitled to the full "amount of these outlays, and remitted to Mr. Bremner "accountant to adjust the accounts betwixt the parties upon "the data of this interlocutor." 11th and 15th June 1796.

The accountant having reported that there was due to the respondent as at Martinmas 1796, the sum of £26,017. 4s. $10\frac{4}{12}$d.

Objections having been given in to this report, a further sum of £47. 7s. 4d. was added to the sum due to the respondent. Petitions having been presented by both parties, that from the respondent craving the Court to hold the estate to be irredeemable unless the appellants paid the sum found due to him on a precise day; but the Court adhered, of these dates. Dec. 17, 1796. 14th and 15th Dec. 1796.

Against these interlocutors the present appeal was brought to the House of Lords; 1st. Against the mode fixed by the Court of calculating the interest of the rents received. 2d. Against the respondent's claim for the expense of making up his titles. 3d. Against the expense of making the shrubberies and the building of two houses, in respect that these were not laid out for permanent benefit and improvement of the estate. 4th. As to the appellants' claim for damages on account of the different leases granted by the defender

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on the estate. 5th. Against sequestrating the estate of Seton and appointing a judicial factor; and, 6th. As to the expenses in the Court below.

Pleaded for the Appellants.—1. In regard to the interest on the rents, this ought to have been calculated from the dates on which these rents were received, and not from an arbitrary period fixed by the Court long after the term of payment. 2. The charge for completing the titles was a bad charge, and ought not to be allowed, the more especially as your Lordships, in the former case, had ordered the estates to be reconveyed without any reservation or deduction of this kind. 3. and 4. These charges for the houses built, and shrubberies, &c. are not accurate; and your Lordships' judgment only allowed such deductions as are actually *laid* "*out for the permanent improvement of the said estate,*" which these buildings in any sense cannot be considered to be. 5. The sequestration of the estate and rents was totally in direct contradiction to your Lordships' judgment, which ordered the estate of Seton to be reconveyed to the appellants. Besides, the estate was not bankrupt, and there was no necessity for this step. 6. and 7. In regard to the damages for the leases and the expenses of process, and the whole deductions for buildings and planting, &c. the original transaction being unfair, Mr. Mackenzie was not entitled to claim these. Your Lordships found that he was *in pessima fide* in taking the advantage he did, and so therefore cannot be held in law to such redress.

Pleaded by the Respondent.—1. The interest of the rents was properly calculated, and upon a principle to give the appellants the utmost advantage, and to avoid complexity and confusion, which would have resulted from calculating it in any other way. 2. The charge for completing the respondent's titles was usefully expended, and *in rem versam* of the appellants. 3. The expenses of the buildings and other improvements was decided by your Lordships in the previous appeal, which the appellants are not entitled to question. 4. It was quite competent and proper, in the circumstances, to sequestrate the estate, seeing that Mr. Mackenzie had refused to act, and resigned his office of common agent. 5. In regard to the costs, there was good ground, or at least a *probabilis causa litigandi* in defending the reduction. The respondent had two judgments of the Court in his favour, and the last interlocutor expressly found him entitled to the expenses of the proof led, though

not to any other expense. He ought therefore not to be held liable in costs. In regard to the damages for the losses, the same judgment below found him exempt from the charge of fraud. Your Lordships also did not impute fraud, or hold that the acquisition was void *ab initio*, otherwise the maxim *resoluto jure dantis resolvitur jus accipientis* would have applied. Therefore, as every contract made *bona fide* with him, as proprietor of the estate, is declared to stand, upon the same principle every contract he made with others respecting the estates *bona fide*, and in the usual manner, must stand good; and there having been a *probabilis causa litigandi*, he ought therefore not to be found liable in damages. And in respect to the whole objections, the long possession, together with the *bona fides* of the respondent, ought to be held a sufficient answer, and ought also to entitle him to pray, as he did, that unless the appellants paid the balance found due to him by a certain day, the estate ought to be held irredeemably in his possession.

LORD CHANCELLOR LOUGHBOROUGH said:—

"My Lords,

"I do not at present rise for the purpose of moving your Lordships to reverse the interlocutors appealed from in the present case.

"In the original question which came before this House, between the same parties, many different opinions might have been formed; the interlocutors of the Court had varied, and it was a matter of delicacy, and deserving of much consideration. The habits of the Court, in cases of a similar nature, the competency of a common agent to purchase, the situation of Mr. Mackenzie, and the conduct of the York Buildings Co., taken altogether, involved a nice case, and one of considerable difficulty.

"The judgment of this House upon it is amply stated; it is distinct, and careful of the interests of either party. I declared my opinion at the time, that it would put a stop to future litigation on the subject; but I have been a false prophet, as the large bundle of printed papers in the subsequent litigation now before me sufficiently testifies.

"There are a number of different points taken up by the appellants in the present appeal. But there is an exception taken to a rule adopted by the Court, in their interlocutor of 14th November 1795, with regard to charging interest for the rents received by Mr. Mackenzie at the term of Martinmas following the terms of payment of the same. But as to this point the interlocutor was fully acquiesced in by the appellants, they specifically reclaimed against another part of that interlocutor, but not against *that* now in question. It is

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true, the rule adopted by the Court with regard to the terms of Martinmas was taken up arbitrarily, and was not according to the terms of the judgment of this House. It is a fact well known, however, that, in that part of the country, the rent of the year 1796 is not payable till 1797, the year after; and the rent even then payable at four different terms. I am afraid, too, that in Scotland as well as perhaps in this country, the rent is not always paid when it becomes payable. To have gone with accuracy into every term's rent would have been extremely difficult. The Court therefore arbitrarily go into one term. As this was different from the directions of the judgment of this House, if it had not been acquiesced in by the parties, I should have found some difficulty in departing from that judgment.

" Afterwards, the matter went to an accountant, on the footing of this interlocutor, with a long account of Dr. and Cr. And accordingly the accountant made up his report, without previous objection by the appellants. In a court of equity in this country, in the Court of Chancery, if an account was referred to a Master to be made up in a certain form, the mode of accounting must be objected to before the account is made up, and cannot be done afterwards.

" 2d. The appellants make an objection to a sum of £79, claimed by the respondent for making up his title to the estate. A considerable part of that expense will not be needed again. Whoever makes up a title in future, it will not be necessary to take it up by decree of the Court. But a complete answer to this objection is, that at the time of Mr. Mackenzie's purchasing, there was no objection taken to him, and he was under a necessity of making up a title. Perhaps by application to the Court he might have removed tenants, but there were many other things to be done. In the then condition of the estate, it was very inconveniently divided; part of it lay in runridge and in links, part of it was possessed by rentallers, who have a sort of permanent interest. He must have made up titles to new model these parts of the estate; and he could not otherwise have settled with those possessors. The first step was to make up a legal title, and, in so doing, he acted for the advantage of the estate. That expense was particularly beneficial.

" 3d. The appellants take exception to the sums allowed to Mr. Mackenzie for building the mansion-house and the house at Seton, and for making the plantations on the estate. It would be singular indeed if these were to be deemed no permanent improvement. It is not according to the fancy of the owner or of the builder, that the improvement upon the estate is to be estimated; but it cannot be said, that these are no improvements. The only question is the *quantum*. The questions put to the witnesses on this subject seem to have been uncommonly idle, (here his Lordship read some of those put to the surveyor.) If it had been referred to a jury, the

proper question would have been, whether or not the buildings were proper for the estate?

"Before Mr. Mackenzie thought of building, he had been undoubted proprietor of the estate for several years, and which he thought his own. The surveyors also estimate the value of the erection to be more than what was paid for them. But whether the house would weigh more in the sale of the estate than the expense of the erection; Or, if it was sold separately, what price it would bring, are mere matter of speculation. If the house was proper for the estate, no other mode could be taken than what the Court has adopted in the present case.

"In judicial sales in Scotland, it is always the practice to put a specific value on a mansion-house. In a case lately before your Lordships, a house was valued (Culross Abbey) at so much per square yard, *or* so much per cubic foot.

Vide Ante Earl of Dundonald *v.* Bushby and others, p.528.

"The other articles in the present appeal are consequential upon the dispute.

"The appellants claim their costs in the former action of reduction: but that cause was twice determined in the Court below in Mr. Mackenzie's favour; and when the Court were against him in one interlocutor they still decided in his favour as to costs. It was extravagant to suppose they were going to give costs against a party whose claims they had twice sustained.

"They claim damages on account of the leases let by the respondent, but their demand upon this point is totally wild and groundless. These leases are let for a prodigious rent, and very much for the advantage of the Company. When the appellant entered into the possession the yearly rent amounted to , and when he left it, the rent had increased to upwards of £1300.

"The Company also appeal against an interlocutor pronounced by the Court, refusing a petition of Mr. Mackenzie *in hoc statu*, which prayed to have his claims paid against a certain day, or that the estate should otherwise be adjuged to belong to him. It does not appear to me that the Company had any reason to appeal from this interlocutor, whatever reason Mr. Mackenzie might have. They, however, have thought proper to add this to the other items of their appeal.

"To conclude, there appears to have been so much perverse litigation in this business, that it will be a proper example to affirm the interlocutors with some costs against the Company. If the appeal had been singly with regard to the erections and improvements, I would have given no costs; that was a fair point for litigation: I therefore do not think proper to go to the full extent of your powers on this occasion; but I shall move that the interlocutors be affirmed with £100 costs."

Accordingly, it was

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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.*

THE GOVERNOR & COMPANY of Undertakers for Raising the Thames Water in York Buildings, - - - } *Appellants;*

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, - - } *Respondents.*

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