

we hold these to be the same, or whether the reference is to new regulations of a kind which the company could make of itself, and which did not require the sanction of the Board of Trade, because in any case they have a general dispensing power by giving written authority to whomsoever they please to use the pier, and that power is only controlled by the prior right of persons wanting to use the ferry—a right which I should imagine nowadays has become of very secondary importance. I therefore concur with your Lordships in the opinion that the interlocutor should be recalled and decree given interdicting the respondent from the use of the pier.

LORD SHAND was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the reasons of suspension, and interdicted the respondent in terms of the prayer of the note.

Counsel for the Complainers—Comrie Thomson—C. S. Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Respondents—V. Campbell—F. T. Cooper. Agents—Wylie & Robertson, W.S.

Wednesday, June 25.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

KYD (GORRIE'S TRUSTEE) v. GORRIE.

Bankrupt—Lease—Adequate Consideration—Act 1696, cap. 5.

A father, in the knowledge that he was insolvent, granted a lease of a shop to his son at a yearly rent of £7. It was proved that the fair rent was £12. In terms of the lease the son had expended about £12 in repairs, and it was admitted that he had no claim against his father for repayment of this sum. *Held* that the lease fell to be reduced under the Act 1621, cap. 18.

In September 1888 the affairs of John Gorrie, potato merchant, Perth, became embarrassed, and he endeavoured to arrange a private settlement with his creditors. He failed however to effect this, and upon 15th January 1890 he presented a petition for sequestration to the Sheriff of the county at Perth, and sequestration was awarded on the same day.

Upon 17th November 1888 he wrote the following letter to James Dunbar, writer, Glasgow—"Since I saw you on Wednesday, things are going farther against than I expected. I have been in difficulties for this last two months and have been negotiating with my creditors for a settlement private, and fully expected it till a few days ago, and now I am afraid I will be forced into sequestration. My reason for wanting a lease for my son of his shop was that my business could be carried on in his name.

Can you make a lease that will be good in those circumstances, say for five years instead of three, and send it on at once. I will get it signed here. Your attention to this will oblige."

The lease, which was for five years, was accordingly prepared and executed, and thereunder the son, William James Gorrie, entered upon the occupation of a shop, 23 Princes Street, Perth, where he carried on the trade of a cycle agent. The yearly rent was £7, and William James Gorrie was taken bound to repair and keep up the premises.

George Kyd, auctioneer, Perth, was appointed trustee upon Gorrie's sequestrated estate, and he sold the subjects in Princes Street by public roup for £100. The buyers were not aware then of the existence of the lease. W. J. Gorrie refused to leave the premises upon being served with the usual warning by the burgh officer. The magistrates declined to grant a summary warrant of ejection on the ground that the lease was *ex facie* regular, and the purchaser refused to pay the price until he got possession, and threatened an action of damages against the trustee.

Kyd brought an action of reduction of the lease against William James Gorrie. He averred—"The said pretended lease under reduction was so granted by the said John Gorrie when he was insolvent in favour of the defender, his son, a conjunct and confident person with the said John Gorrie, gratuitously and without any consideration, in fraud and to the prejudice of the said John Gorrie's creditors. The said lease is thus null and void under the Act 1621, cap. 18, and also at common law. The rent stipulated for under the said pretended lease is considerably below the true annual value of the subjects thereby pretended to be let; and if the said pretended lease was granted in security of a prior debt or obligation, it is reducible under the Act 1696, cap. 5, and the 'Bankruptcy (Scotland) Act, 1856,' section 110, or one or other of the said Acts."

The defender averred—" (2) In November 1887, the said John Gorrie let the said shop to the defender for five years from Martinmas 1887 in consideration of the yearly rent of £7, and of the defender's painting and flooring the said shop at his own expense, and the said John Gorrie at the same time agreed to execute a formal lease in the defender's favour. (3) The defender entered into possession of the said shop about 20th November 1887. Because of its unfinished state, he could only use it for lumber and keeping poultry until February 1888. He then had it painted and floored at his own expense, the cost being £12, 11s. or thereby. The said possession was under the said agreement of lease, and the said expenditure was made by the defender only on the faith of that agreement."

The pursuer pleaded—" (1) The lease libelled is null and reducible under the Act 1621, cap. 18, in respect that it was a gratuitous alienation granted by the said John Gorrie when insolvent to a person conjunct and confident with him, without true, just,

and necessary cause, and to the prejudice of prior creditors represented by the pursuer. (2) *Separatim*, the said pretended lease is also null and reducible at common law, in respect that it was granted by the said John Gorrie when he was insolvent, fraudulently to defeat and disappoint the rights of his just and lawful creditors. (3) If the defender was a creditor of the said John Gorrie for a prior debt, the said pretended lease is null and reducible under the Act 1696, cap. 5, and 1856, section 110, or one or other of them, in respect that it was a preferable security granted within sixty days of the sequestration of the said John Gorrie."

The defender pleaded—" (3) The lease in question having been entered into for a true, just, and necessary cause, and in pursuance of a prior obligation to grant the same, it is not liable to challenge."

The Act 1621, cap. 18, provides—"For remeéd whereof the said Lords will decree and decerne all alienations, dispositions, assignations, and translations whatsoever, made by the debtor of any of his lands, teindes, reversions, actions, debtes, or goods whatsoever, to any conjunct or confident person, without true, just, and necessarie causes, and without a just price really paid the same being done after the contracting of lawful debts from true creditors: To have beene from the beginning and to be in all times coming null and of none avail, force, or effect, at the instance of the true and just creditor by way of action, exception, or reply, without further declarator."

The Act 1696, cap. 5—"Declares all and whatsoever voluntary dispositions, assignations, or other deeds, which shall be found to be made and granted directly or indirectly by the foresaid dyvor or bankrupt, either at or after his becoming bankrupt or in the space of sixty days of before in favours of his creditors either for his satisfaction or further security in preference to other creditors, to be void and null."

After a proof, the result of which is fully stated in the Lord Ordinary's note, he pronounced this judgment upon 28th January 1890—"Finds that it has not been proved that the lease sought to be reduced has been granted without true, just, or necessary cause, or without a just price really paid: Therefore assolizies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, &c."

Opinion.—This is an action of reduction brought by the trustee on the sequestrated estate of John Gorrie, coal merchant, Perth, of a lease in favour of his son William Gorrie, the defender. The action is based on the Act 1621, c. 18, and on fraud at common law. There is a subsidiary or alternative plea founded on the Act 1696, c. 5.

"For some time before October 1888 the bankrupt was, and knew that he was, insolvent. He had consulted Mr Macleish, writer in Perth, about his affairs, and on 1st November Mr Macleish had sent him a petition for sequestration for his signature. He declined to sign it at that time, but on 14th January 1889 he instructed Mr Mac-

leish to present a petition for sequestration, which was accordingly awarded on that day.

"Between these dates, and on 17th November 1888, the bankrupt instructed Mr Dunbar, a writer in Glasgow, to prepare a lease in favour of his son in a letter, the terms of which are certainly calculated to arouse suspicion. He writes—"I am afraid I will be forced into sequestration. My reason for wanting a lease for my son of his shop was that my business could be carried on in his name. Can you make a lease that will be good in these circumstances, say for five years instead of three, and send it."

"The lease was prepared by Mr Dunbar on these instructions, and the testing clause bears that it was signed on 20th November 1888. The lease is for five years from Martinmas 1887, and the rent is £7. The lease had therefore nearly four years to run at the date of the sequestration. If it be sustained the defender will possess the shop until Martinmas 1893 for £28, which will be payable primarily to the trustee, or if the property be sold, it will be sold under burden of that lease.

"There is some conflict of evidence, or rather difference of opinion, about the fair rent of the shop. But I think that the result is that £7 is below a reasonable rent, and that at the date of the lease it might have been fairly expected to let at £10 or £12. If the rent mentioned in the lease had been £10 there would have been nothing to be said on the score of the rent.

"It is not unfair to say that £3 or £4 a-year for four years—that is to say, from £12 to £16—represents the loss to the estate occasioned by this lease. The trustee would not have been benefited to that amount, because it appears that the property was burdened beyond its value. This fact no doubt does not destroy the interest of the trustee, but minimises it. At all events, the pursuer's case cannot be put higher than this, that the defender managed to abstract from the estate about £16, and that no more than that can be recovered by this action.

"Now, if that be so, it seems at first sight a very unreasonable thing to incur the expense of an action of reduction in the Court of Session for such an inconsiderable sum. The most complete success could not possibly increase the dividend to the creditors. Besides, it was in the power of the trustee to raise an action of removing in the Sheriff Court, and to state his objections to the lease by way of exception in virtue of the 10th section of the Bankruptcy Act 1856, and the 9th section of the Bankruptcy Act 1857.

"I can hardly think that I am wrong in conjecturing that this action would not have been brought but for the circumstance that the property has been sold by the trustee, with consent of the heritable creditors, without mention of this lease, and that the purchaser has on that ground refused to pay the price.

"There is some obscurity about that matter, but the trustee's ignorance of the

lease seems to have arisen from the failure of the bankrupt to enter this lease in his state of affairs, or to allude to it in his examination, or to mention it to the trustee. On the other hand, it does not appear that the trustee directly questioned either the bankrupt or the defender on the subject, although he saw that the defender's name was on the signboard of the shop.

"It appears that at the sale of the property Mr Macleish stated publicly that there was no lease, and he depones that he believes the defender must have heard him. The defender's evidence is quite at variance with that of Mr Macleish, but where they differ I have no difficulty in preferring the evidence of Mr Macleish. At the same time I cannot hold it clearly proved that the defender heard the statement made that there was no lease, and without going into details on the point which really does properly bear on this case, there do not seem to me sufficient grounds for blaming the defender for the belief of the trustee that there was no lease.

"I have no means of judging of the validity of the purchaser's objection to complete the contract of sale. But in truth this difficulty as to the sale of the property has no real bearing on this case, and is not alluded to on the record. It came out almost incidentally in the course of the proof; and the case must be considered just as if no attempt to sell the property had been made. The attempted sale may, and no doubt does account for this reduction being brought, but cannot affect the judgment to be pronounced.

"The pursuer's case, therefore, is left on the bare facts that this lease was granted by the bankrupt to his son, when he was insolvent and on the eve of bankruptcy, for a rent of £7, when £10, or possibly £12, might have been obtained.

"If the rent had been adequate, I think the lease would have been unchallengeable, although granted by an insolvent to his son on the eve of bankruptcy. It could not be said to have been granted without a true, just, and necessary cause. But, on the other hand, a lease granted by an insolvent to his son at a grossly inadequate rent would, I apprehend, undoubtedly be subject to reduction. Counsel for the defender contended that a lease cannot be reduced under the Act 1621, c. 18, because it cannot be comprehended under the deeds specified in the Act. As at present advised, I do not concur in that argument; but it is not in my view necessary to decide the point, because whether the statute applied or not, such a deed would in such circumstances be reducible at common law.

"In the present case, slight as the advantage may be to the defender, and still smaller the loss to the trust-estate, I should, although not without difficulty, have held the pursuer entitled to succeed in consequence merely of the difference between the rent in the lease and the rent which might have been obtained if the lease could not be supported on any other ground.

"But the defender has stated a somewhat special defence, which, although not very

satisfactory in itself, nor very satisfactorily proved either, appears to me sufficient in the special circumstances of this case to meet the pursuer's action.

"The evidence of the bankrupt and of his son did not impress me favourably, and I place on it a very limited reliance. I do not think it necessary to examine it in detail. But I think that, making all allowances, the following facts may be taken as proved.

"The shop occupied by the defender was constructed by the bankrupt in 1887 out of a court or entry which formed part of the bankrupt's property and adjoined his shop. It was made by connecting two side walls already existing, and was therefore erected at a comparatively small cost. It was built for the use of the defender, and with the intention that he should occupy it as tenant. It was let to him verbally, at or about Martinmas 1887, at the rent of £7, which, although a low rent for the shop, was a very fair return for the money expended in making it. All this was done before there is proof of the bankrupt's insolvency. Two sums of £3, 10s. were paid by the defender to his father at Whitsunday and Martinmas 1887 as rent for the shop. It was not fully completed when the defender entered into possession, and he spent somewhere about £10 or £12 in completing it. It does not appear that this was an advance or loan by the defender to the bankrupt, or could have been claimed by the defender as a debt. It has been deponed that the bankrupt agreed verbally to give the defender a lease for five years, but no such lease was executed at that time, and the bankrupt was not under an obligation which could have been enforced to grant the written lease now sought to be reduced. But it may happen that a deed is protected against reduction under the statute, although the bankrupt could not have been compelled to grant it, if it be supported by a fair, onerous, and adequate consideration,—Bell's Comm., 7th ed., ii., 177; and it appears to me that in this case the bankrupt was entitled in granting a lease to his son to take into consideration what had previously occurred, and the expenditure on the property, inconsiderable as it was, to which his son had been put. If the defender had expended £100 on the house, it would surely have been fair to grant a lease to him on easier terms than if there had been no such expenditure. Such a lease could not have been justly called gratuitous. But the propriety of taking into account a previous expenditure cannot depend on its amount.

"If, then, the bankrupt was entitled to take the expenditure into account at all, and was entitled to modify the rent in consequence, can it be said that the modification allowed was excessive, or was too great to such an extent as to open the deed to challenge under the Act 1621, c. 18, or as a fraud at common law.

"I am unable to hold so. I think that in considering whether a deed is challengeable under the Act or as a fraud the difference between the consideration received by the bankrupt and an adequate consideration must be something considerable, or at

all events tangible, and not absolutely insignificant, as in the present case, if the proved expenditure be taken into account—£4, or something like that, would in that case be the amount of the advantage to the defender.

“I hold that it is proved that the defender spent £10 or £12 on this house; that the bankrupt was entitled to take that expenditure into account in fixing the rent in the lease; and that when it is taken into account there is no such inadequacy in the rent as makes the lease reducible.

“The lease was granted within sixty days of bankruptcy, but that is not in fact of any relevancy in considering the application of the Act 1621, c. 18. But if the expenditure by the defender which is founded on in justification of the lease could be regarded as a prior loan by him to the bankrupt the lease might possibly have been challengeable under the Act 1696, c. 5. But I think that there is no proof that the money spent by the defender was advanced as a loan at all, or raised the relation of debtor and creditor between the defender and the bankrupt, and on that account I think the Act 1696, c. 5, does not apply.

“While I feel that the conduct of the bankrupt has been in many respects reprehensible and calculated to arouse grave suspicion, I doubt whether the defender has been equally to blame, and think, on the whole, that he has proved sufficient onerosity to escape the reach of the statute, and that he is therefore entitled to absolve.”

The pursuer reclaimed, and argued—There was here a distinct violation of the Act 1621, cap. 18. The bankrupt knew that he was insolvent at the time of granting the lease of his shop. He granted it to his son, who was a conjunct and confident person within the meaning of the Act, and he granted it for an inadequate rent. The evidence showed that the rent was not a fair one as some of the witnesses said that £12 or even £14 would have been a proper sum for such a shop. The letter of 17th November to his agent by the bankrupt showed that he wished to get the better of his creditors. The lease was also reducible under the Act 1696, cap. 5, as it was granted in further security of a prior debt.

The respondent argued—This lease was not reducible under the Act 1621, cap. 18. The lease was granted to the son of the bankrupt in terms of an agreement between the parties that the son was to expend £12 upon the premises so as to put them in proper order. This was not a prior debt, as there was no legal obligation upon the younger Gorrie to spend the money, but that he actually did the Lord Ordinary had found proved. In view of that fact the rent must be held to be quite an adequate one. The fair rent the Lord Ordinary had stated at £10, the actual rent paid was £7, but if the £12 spent on improving the premises was spread over the five years during which the lease was to run that would bring the rent up to the sum which the Lord Ordinary thought just. In the second place, the

trustee had no interest in pursuing this action as no advantage could accrue to the estate.

At advising—

LORD JUSTICE-CLERK—In this case the Lord Ordinary has found, although according to his Lordship's note the evidence brought forward in support of the defender's plea is not satisfactory, that this lease may be allowed to stand. Upon a full consideration of the whole case I have come to the conclusion that it cannot. It is a very trifling and paltry case in itself, but it deals with an important legal principle, and it is not desirable that the fixed law on this point should be unsettled by any decision of this Court from which it might appear that any transaction of this kind could be sustained if it was shown that it was entered into not only in good faith by the persons interested, or that was for the benefit of the creditors to uphold it.

The facts are very simple. Mr Gorrie, in the knowledge that he was insolvent and on the eve of bankruptcy, proposed to his agent by the letter of 11th November 1888 to get a lease of these premises made out in favour of his son, so that the business could be carried on in his name—“Can you make a lease that will be good in those circumstances, say for five years instead of three, and send it on at once.” Now, the question whether a good lease could not have been made then is just the question we are trying, and the answer depends on the considerations whether it was granted in the ordinary course of business, and whether an adequate consideration was given for the lease of the premises.

The subject here is a very small one, and the difference between the rent actually paid and the amount which should be taken as the adequate consideration for the use of the house is a very few pounds a-year. But the witnesses for the pursuer say—and I see no reason to doubt their testimony—that the rent of the subject, instead of being £7, should be at least £10, some of the witnesses going as high as £12 or £14. If that is true—and the inclination of my mind is to believe in its truth—the pursuer's case is proved conclusively unless the inadequacy be got rid of in some way and made up.

The only way in which the defender proposes to make up the inadequacy is by the statement that he laid out a sum of money upon the premises about a year ago, and which he admits he cannot legally claim from his father. I cannot look upon that expenditure as a sufficient consideration entitling the bankrupt to grant a lease of these premises to his son at an inadequate rent for a period of five years. If the defender had any claim against his father for the money he had so expended he could claim on his father's estate as a creditor, but it is admitted that he could not make any such claim. The conclusion I have come to on the whole is that the Lord Ordinary's interlocutor cannot be allowed to stand.

It is very unfortunate that this very

trifling case should not have been brought in the Sheriff Court. I think we should find neither party entitled to expenses.

LORD YOUNG—No doubt this is a distressing case in several ways. My impression when I first read the papers was that the Lord Ordinary had come to an erroneous conclusion, and my impression has been confirmed by the debate to-day.

I think it a very strong thing for any man to do, when he knows he is insolvent and on the verge of bankruptcy, to grant a lease of any premises which must finally go to the benefit of his creditors, even for an adequate consideration, and very little, I think, would be necessary to reduce it. Otherwise the greatest possible injury might be done to creditors. If the owner of an agricultural estate in these circumstances was to grant the lease of a farm to his son for a term of years, if the lease could not be reduced the creditors might suffer a greater loss than the rent of the farm by having to pay him to go out. I do not think that a lease could be honestly granted or accepted in the knowledge that the grantor was insolvent and on the eve of bankruptcy.

But we have the special case before us to deal with. The monetary value of the case is so slight that the question is, whether the sum of £7 or of £10 is a fair rent to pay for the premises, the right to which is in dispute? I think £7 was not a fair rent, and in coming to that conclusion I can take no account of the sum which the son is alleged to have expended upon this subject at a prior date. He was not a creditor for the amount, and his father could not have recognised that the son had any legal claim against him for it. If that be so, and in a question with the trustee, he could not take credit for it as a debt due to him.

This lease, which was granted by the bankrupt father on the eve of his bankruptcy, was granted to the prejudice of his creditors, and was intended to be to their prejudice, and cannot stand. I confess I have no sympathy with either of the parties, because neither of them seem to have tried to avoid this litigation by making a reasonable offer or to have had any proper communications upon the matter. I therefore agree that there should be no expenses to either party.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I agree. I am of opinion that this case was struck at by the Act 1621, cap. 18.

The Court recalled the Lord Ordinary's interlocutor, and found for the pursuer in terms of the conclusions of the summons, without expenses to either party.

Counsel for the Reclaimer—Chisholm.
Agent—David Milne, S.S.C.

Counsel for the Respondent—M'Kechnie.
Agents—Carmichael & Millar, W.S.

Thursday, July 3.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KENNEDY v. GLASS.

Agent and Principal—Commission—Quantum Meruit.

Held that a person who was not by profession a broker, but who had acted as such in bringing about a contract, was entitled on the completion of the contract to a remuneration *quantum meruit*, from the person who had taken advantage of his services.

This was an action under the Debts Recovery (Scotland) Act 1867, raised in the Sheriff Court of Lanarkshire by Thomas Kennedy, architect in Greenock, against Peter Glass, 19 Armour Street, Glasgow, for payment of £50. The statement of account annexed to the summons was as follows—"To commission, as arranged, on the price of old machinery and buildings bought from the Glebe Sugar Refining Company, Greenock, by the defender through the agency and introduction of the complainer, £250—restricted to £50."

The following plea was noted for the defender—"The defender denies that he is due the pursuer the commission sued for or any commission."

Proof was allowed from which the following facts appeared—The defender was a dealer in old material and old machinery. The pursuer was an architect by profession, but was in the habit of occasionally doing business on commission. On several occasions he had introduced the defender to persons who had old material for sale, and been paid a commission. In 1883 he introduced the defender to Mr Kerr, managing partner of the Glebe Sugar Refining Company, who had a large amount of old machinery for sale, and negotiations were entered into for the sale of the machinery to the defender. It was not, however, till the year 1888 that any agreement was entered into between the defender and the company, but in October of that year the defender entered into a contract to buy the machinery at the price of £7250. This contract the defender subsequently failed to carry out.

Mr Kerr deponed—"I cannot tell when the subject as to a sale was first discussed between pursuer and myself. It was over a course of years. He said he thought he could introduce me to a person who might buy it. He introduced me to defender. Negotiations were going on for three or four years, but they were completed by a letter which I received, dated 16th October 1888. In dealing with defender I dealt with him entirely as a principal in the transaction. (Q.) And was it through pursuer's intervention that this sale took place?—(A) Well it was pursuer who introduced defender to me, (Q) Was pursuer in frequent communication with you during the period you have referred to?—(A) Yes; I saw him on several occasions both in the