

on the pursuers' instructions alone, and their preparation had neither been sanctioned by the Court nor agreed to between the parties. The item, therefore, must be disallowed—A.S., 15th July 1876, Table of Fees, chap. v., sec. 2; *City of Aberdeen v. School Board of Aberdeen*, 15th November 1897, 5 S.L.T. 182.

Counsel for pursuers were not called on.

LORD PRESIDENT—I am of opinion that this objection must be repelled. In the first place, my recollection is that the photographs were quite useful at the hearing of the case. But I do not rest my judgment upon that. Again and again it has been held in this Court that we are not sitting as taxing-masters, and it would be *permissi exempli* to allow an objection involving a sum of only £9 odd upon a matter about which the Auditor is perfectly able to make up his mind.

LORD KINNEAR—I quite agree. I think this is merely a taxing question to be decided by the Auditor.

LORD JOHNSTON—I agree.

LORD MACKENZIE—I also agree.

The Court repelled the objection.

Counsel for Pursuers—D. P. Fleming.
 Agents—H. B. & F. J. Dewar, W.S.

Counsel for Defender—D. M. Wilson.
 Agents—Patrick & James, S.S.C.

Wednesday, June 12.

OUTER HOUSE.

[Lord Cullen.

REID v. M'GILL.

Right in Security—Lease—Bond and Disposition in Security—Mineral Lease—Lease Granted by Proprietor of Security Subjects Subsequent to Date of Bond Containing Provisions Prejudicial to Bondholder's Rights—Validity of Lease.

A bond and disposition in security was granted by the proprietor of certain lands during the currency of a lease of the minerals. When this lease expired, a new lease was entered into which contained certain unusual provisions unduly favourable to the tenant.

In a question between the bondholder and the mineral tenant as to the validity of the new lease, held (*per* Lord Cullen) that the terms of the lease were such that it could not be regarded as an act of fair and reasonable administration on the part of the proprietor, and that the lease was therefore not binding on the bondholder.

William Reid, 4 Clarendon Terrace, Dundee, raised an action against James M'Gill, Castlecary, Stirlingshire, in which he sought to have it declared that he was absolute proprietor of the whole metals and minerals in and under the lands of

Coneypark and Tomfyne in Stirlingshire, and that the defender had no right, title, or interest in the same as lessee, tenant, occupier, or otherwise.

The defender brought a counter-action against the pursuer, *inter alia*, for declarator that he (M'Gill) was tenant of said metals and minerals, in virtue of a lease entered into between him and the former proprietor of the lands in question.

Proof was allowed and evidence was led before the Lord Ordinary.

The facts proved and the contentions of parties sufficiently appear from the opinion of the Lord Ordinary *infra*.

The following authorities were referred to at the hearing:—Gloag and Irvine, *Rights in Security*, p. 130; Cooke, *Mortgages*, 1904, p. 708; Rankine, *Law of Leases* (2nd ed.), chap. ii; *Abbott v. Mitchell*, May 25, 1870, 8 Macph. 791, 7 S.L.R. 493; *Ritchie v. Scott*, March 10, 1899, 1 F. 728, 36 S.L.R. 540. *On Duration of Leases—Entail* (Scotland) Act 1882 (45 and 46 Vict. cap. 53), sec. 9; *Entail Improvement Act 1770* (10 Geo. III, cap. 51), sec. 1. *On Fair Rent—Valuation of Lands* (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 6.

LORD CULLEN—The principal question which arises for decision in these cases is whether a certain lease of minerals granted by the proprietor of the lands of Coneypark, &c., in the county of Stirling, is valid and effectual in a question with a creditor holding a bond and disposition in security over the property granted and recorded prior to the said lease.

The property of Coneypark, &c., was purchased by John S. Street (the grantor of the bond) in 1898 at the price of £12,000. To meet the price *pro tanto* he borrowed £10,000 on bond and disposition in security from Mr Wm. Reid, the pursuer of the principal action now before me. The coal and most of the other minerals were then under lease to a company called the Kilsyth and Bonnybridge Coal Company, Limited. This lease was dated in 1895, and was terminated by a renunciation granted by the liquidator of the tenant company in 1900.

John S. Street was a speculator possessed of little or no means, and apart from the loan of £10,000 obtained from Mr Reid, seems to have been sustained in his venture by advances made by his brother William B. Street, which ultimately amounted to about £11,000.

After acquiring the property John S. Street associated himself with Mr Andrew M'Gill, who had been a colliery manager, who is the defender in the principal action and pursuer of the other action of declarator and reduction. Mr M'Gill had practical experience as a colliery manager, but he, like John S. Street, his employer, was a man of no means. He was employed by John S. Street under the writing dated 22nd December 1898, in terms of which he was to be paid £250 per annum for taking full management of the brickwork and colliery on the property.

The property included clay suitable for

the making of bricks, and after purchasing it John S. Street erected buildings and put down plant for brickmaking purposes at an outlay which is varying estimated at £3000 to £6000. The money appears to have been borrowed by him from his brother W. B. Street.

John S. Street having so expended a large amount in setting up a brickwork, proceeded to work it, but without success. In 1903 matters came to a standstill. The brickwork was a failure, and there was no money available to work the coal. In 1903 an attempt was made to float a company to take up the property along with a business at Inverkeithing carried on by John S. Street's brothers.

A prospectus was issued, but the enterprise proved entirely unsuccessful. In 1904 the project was mooted of constituting a lease of the minerals in the person of Mr M'Gill. M'Gill had no money, and could not himself work the minerals. But as the previous efforts to sell had failed, it seems to have been considered a good move to invest M'Gill with a lease. M'Gill does not seem to have been able to command any financial backing, and I do not profess to understand clearly all that the parties had in view in handing over the mineral rights under a lease (for fifty years) to a tenant who could not work them, and who had no tangible prospect of obtaining money through a company or otherwise to procure them worked. The possibility or probability of M'Gill being unable to turn the lease to any account must have been obvious to the parties, but the proof does not disclose what arrangement, if any, was made as to the function of the lease in that event. It was granted as an instrument to be used for the purpose of exploiting the minerals one way or another, and one idea which I think the parties entertained was that the existence of a lease on easy and favourable terms might be attractive enough to bring about the formation of a tenant company.

What followed on the lease was (1) that M'Gill did nothing either in floating a company to take over the lease or in the way of working the minerals himself; (2) that John S. Street, with the co-operation of his brothers W. B. Street and Thomas Street, endeavoured unsuccessfully to sell the property in London and elsewhere; (3) that in connection with these endeavours M'Gill on the 31st January 1905 granted an assignation of the lease to W. B. Street, who obtained also a disposition of the property from John S. Street, *ex facie* absolute, but really in security of his advances; (4) that W. B. Street executed a renunciation of the lease on 24th September 1907; (5) that in June 1906 John S. Street was sequestered; and (6) that in 1910 the bondholder, Mr William Reid, foreclosed in virtue of the Act 57 and 58 Vict. cap. 44. Having thus foreclosed under his bond, Mr Reid now raises the question whether the foresaid lease granted by John S. Street to M'Gill is a valid and effectual right in a question with him as a

heritable creditor who did not consent to it.

In the principal action Mr Reid founds on the assignation of the lease by Mr M'Gill to W. B. Street and the renunciation by the latter as having extinguished the lease. To meet this contention M'Gill raised the second action, in which he seeks to have it declared that the assignation, although *ex facie* absolute, was truly granted in trust, and that W. B. Street, the assignee in trust, acted *ultra vires* in renouncing it. The case made by M'Gill is that in course of the endeavour to sell the property he was asked to assign his lease to W. B. Street, who was also to obtain an *ex facie* absolute disposition of the property from his brother John, so that W. B. Street might thus have a more free hand in negotiating for a sale—that is to say, might be in a position to sell the property free of the lease; and that he, M'Gill, ultimately agreed to grant and did grant the assignation for this purpose, but on the footing that, failing a sale, he was not to be held as having parted with the lease. It is somewhat remarkable that M'Gill should have made no stipulation as to what he was to get out of the proceeds of a sale should one be effected. The reason for this, as indicated in the evidence, perhaps was that it was highly speculative on what terms a sale could be effected, if at all, and that M'Gill at that time trusted the Streets to deal fairly with him in the event of their succeeding in selling. It is, I think, less difficult to believe that M'Gill should have acted on this footing than to believe that he should have agreed gratuitously to strip himself of the lease altogether. And had he agreed to take the latter course it would have been more natural that he should have renounced the lease rather than have assigned it.

The assignation was granted in January 1905. At the same time W. B. Street obtained an *ex facie* absolute disposition of the property from John S. Street. Thereafter W. B. Street made prolonged efforts to effect a sale of the property but without success. In June 1906 John S. Street was sequestered. W. B. Street took up the position of claiming to be owner of the property under his *ex facie* absolute conveyance. He was still apparently in hopes that he might sell it, but he was harassed by the bondholders, and in September 1907 he was induced to sign a renunciation of the lease with the view of obtaining some degree of respite. M'Gill was not consulted regarding the renunciation. Efforts were subsequently made to obtain a renunciation from him, but he refused to grant one. [*His Lordship, after consideration of the evidence, granted decree of declarator as concluded for in M'Gill's action.*]

I turn now to consider the question raised in the original action regarding the efficacy of the lease in a question with Mr Reid, the bondholder. The argument submitted to me on this matter does not raise the general question as to the powers of a

proprietor who has granted a heritable bond to excavate and carry away valuable minerals forming part of the *corpus* of the security subjects—either by his direct act or through a tenant—without the consent of the bondholder, whose security is thereby affected. The footing on which Mr Reid's case has been presented by his counsel is that, inasmuch as the minerals were being wrought under lease at the time when the bond was granted, he was bound to contemplate a continuance of the workings as a feature of the ordinary administration of the property; and that when the then current lease came to an end, as it did in 1900, John S. Street, the proprietor, could competently have granted a new lease effective against the bondholder provided the lease was in such terms as to represent a fair and reasonable act of administration not unfairly trenching on the bondholder's security. Mr Reid maintains, however, that the lease granted to M'Gill does not represent such fair and reasonable administration, and that it is materially prejudicial to his security so as to be not binding in a question with him.

I have already explained the circumstances attending the granting of the lease. The terms of it did not form the subject of any real negotiation or bargaining between the parties. It was roughly drafted, without the intervention of a law agent, by Thomas S. Street, and after being approved by M'Gill was put into the hands of Mr Robert Stewart, solicitor, Edinburgh, in order that he might give a more formal expression to its clauses and have it engrossed and executed. Mr Stewart was not asked to advise as to the stipulations of the lease, but, as he observed the absence of any provision for a fixed rent, he added a clause which I shall make reference to hereafter.

It is obvious enough, I think, that in the adjusting of the lease the idea of making it one which would be fair and reasonable from the point of view of a bondholder was not in the minds of the parties. What they desired, I think, to achieve was the making of a lease which would prove attractive in connection with efforts to be made to float some kind of company to take up the working of the minerals. And while the motives which actuated the parties and the conditions under which the lease was engineered may be said to have no direct and immediate bearing on the question at issue, viz., whether the lease on its own merits represented a fair and reasonable exercise of the powers of the proprietor effective in a question with a bondholder, they at least prepare one's mind for the possibility of finding that the terms of the lease were otherwise conceived.

The challenge of the lease made by Mr Reid does not rest on any one feature of it as in itself conclusive, but on a combination of various features which it presents. I shall now consider those which were advanced as being the most important.

The first is the absence of any exclusion of assignees or any control on the part of

the landlord of the tenant's power of assignation. This is, I think, unusual.

The next is the duration of the lease, which is fifty years. A term of fifty years or longer is by no means unknown in mineral leases, but I think that it is exceptional. Some guidance is, I think, to be found in the legislation dealing with the subject. The Entail Acts, the Trust Acts, the Heritable Securities Act of 1894, and the Lands Valuation Act of 1854, all reflect the view that the maximum limit in ordinary circumstances is thirty-one years. This is by no means conclusive; but it points to a lease for fifty years as being one of exceptional duration. This topic connects itself with the next one, which is the stipulation for royalties. I am not prepared to go further in regard to the amounts of the royalties, viewed as at the date of the lease, than to say that they were on the side of being indulgent to the tenant. But there is no provision of a sliding scale. A sliding scale is a thing which forms a provident and proper feature of a lease of exceptional duration, so that in the event of any material rise in the price of coal the landlord may fairly share with the tenant the benefit of the rise.

In the next place, the lease does not stipulate for any fixed rent for the minerals. A stipulation for fixed rent is an almost invariable feature of a lease of minerals, and the function of the stipulation, in the interest of the landlord, is so obvious that I do not consider it necessary to enlarge upon it. As this lease was sketched out originally it was a complete blank on the subject. Mr Robert Stewart was struck with the fact, and, although not asked to advise the parties, he added to the lease a clause binding the tenant "to make all practicable exertions for working, putting out, and disposing of the minerals hereby let." This is a very vague obligation. I have not been able to find that it is a usual clause in mineral leases, and it certainly appears to me to be a very ineffective substitute for what is the usual stipulation of a fixed rent. The lease stipulates for a fixed rent of £50 for the brickworks, on which at least £3000 had been expended, and £50 for twenty miners' cottages, which rents were apparently adopted from the valuation roll, and seem to be, on the evidence, unduly low.

The next matter to which the pursuer calls attention is a very peculiar clause in the lease, running as follows—"And whereas the second party [the tenant] has acquired in virtue of this lease from the first party the whole plant, fittings, buildings, and erections at or in connection with the various mines and pits on the said land, and the said mines and pits themselves as well as the plant and buildings in connection with the brickwork, it is hereby declared and agreed that the said plant, fittings, buildings, and erections, and the said mines and pits, shall be deemed and held to have been erected and the said mines and pits sunk and equipped with machinery and plant by the second party, and to fall under the same provisions of

this lease as if the said buildings, plant, and machinery had been erected by him after the date hereof in virtue of the powers herein contained." This provision refers forward to another clause in the lease, which runs as follows—"And further declaring that at the termination of this lease the first party shall have right, if he think proper, to purchase the whole or any part of the buildings, plant, or other apparatus belonging to the second party at a valuation to be made by two men of skill mutually chosen, or by an arbiter appointed by the Sheriff of Stirlingshire for the time being. In the event of the first party not electing to purchase any or all of the said buildings, plant, or apparatus, then the second party shall be allowed a period of six months beyond the termination of the lease to remove same within three months thereafter," &c. Now I do not think I am concerned to inquire or speculate as to how the lease came to be framed in such terms. The fact is, that for one reason or another the lease is so conceived as to invest the tenant with a large amount of buildings, fittings, &c., as by way of tenant's fixtures, removable by him if not paid for by the landlord, for which he paid no price or gave any consideration apart from the royalties exigible on the output of minerals.

The next matter founded on is a clause which gives the tenant right to work minerals of other lands from pits made in the first party's lands, and to use any tramways or railways made by himself above or below ground for the conveyance of such other minerals. No wayleave or payment of any kind is stipulated for in respect of this right. Such a right is, of course, not uncommonly given in mineral leases, but it is quite out of ordinary course to give it gratuitously. No doubt the tenant's obligations, generally, might in a particular case be such as to be adequate to cover the granting of the right without any specific payment in respect of it. But that cannot be said here.

The next matter is a clause relating to surface damage, which binds the tenant to pay to the landlord "for the rights of himself and his tenants the farm rental per acre for any land damaged or required beyond that already taken up." It is objected, and I think justifiably, that the amount of the farm rental does not represent reasonable compensation in respect of such damage.

The last matter specially founded on is a clause which gives the tenant right to use whatever sand or freestone he may find in the workings, or rather the bounds of the lease, for his own use in connection with the erection of dwelling-houses or other buildings on the estate, and that without paying any lordship therefor. The previous lease gave right to the tenants to take sand and freestone, but that from places to be pointed out by the landlord, and the taking was to be only "for the use of the colliery." Both of these limitations are omitted from the present lease with the result of giving the tenant right to take sand and freestone wherever he pleases,

and to any extent, and for the purpose of putting up buildings or erections of any kind, whether connected with the colliery or not. He might thus obtain without payment sand and freestone for erecting, say, rows of miners' houses to be let to miners working at adjoining collieries.

Such being the features of the lease to which exception is specially taken, the question for determination is whether, viewing them all together, they do not take from the lease the character of being a fair exercise of the ordinary power of administration which, *ex hypothesi*, the proprietor retained notwithstanding his having disposed the lands in security to the bondholder. The parties are agreed on the character of the test to be applied. In my opinion the lease, having regard to these various features in it, does not answer to the description of fair ordinary administration, but is one which unfairly trenches on the bondholder's security. The provisions of the lease, as I have already remarked, were not conceived with any actual regard to the conservation of the bondholder's interest, but mainly, I think, with the object of making it a favourable and attractive one from the point of view of outsiders who might be solicited in one mode or another to take up the tenant's interest under it. And it appears to me that the result has been to make a lease which it would be an injustice to the bondholder to support against him. On the assumption of this view being right, it is agreed that the conclusions of the summons at Mr Reid's instance formulate suitably, in the circumstances, the remedy to which he is entitled. I shall accordingly grant decree in his favour in terms of these conclusions.

Counsel for the Pursuer—Wilson, K.C.—Wilton. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender—M'Lennan K.C.—Lippe. Agents—Wishart & Sander-son, W.S.

Wednesday, July 10.

OUTER HOUSE.

[Lord Cullen.

THOMSON v. THOMSON.

Process—Divorce—Adultery—Intimation of Action to Person with whom Adultery Alleged—Act of Sederunt, 17th July 1908, sec. 1.

The Act of Sederunt of 17th July 1908 enacts—Sec. 1.—"In every action of divorce on the ground of adultery in which appearance has not been entered, and in which the person with whom the defender is stated to have committed adultery has not been cited as a co-defender, the Lord Ordinary before whom the action depends shall, before fixing a diet of proof, unless cause be shown to the contrary, appoint intima-