

a. substantial asset existing at the time of the sequestration which they never discovered, but which they have discovered now, and asking to be allowed to take steps by which they may make good their right to this asset. I think they are entitled to succeed in their petition.

I do not say that cases might not arise in which the Court might exercise their discretion and refuse such a petition, but in the ordinary case creditors have a right to obtain what is asked for here, and I am of opinion that in granting the prayer of the petition we are only doing a formal duty which we cannot refuse to perform. It is said this action on the part of the creditors may hamper or embarrass the bankrupt. We cannot help that. He may very possibly not need to interfere. If he sees fit to interfere, and is unsuccessful, it will be his own fault.

LORD YOUNG—I am of the same opinion. This is not a novel application. There was a case, as we have been told, so recently as 1888, in which the Court proceeded on the ground that there was a legal right in creditors of an undischarged bankrupt—there the bankrupt was discharged, but without having paid any composition—if the bankrupt's trustee had been discharged, to apply for the appointment of a new trustee to enable them to recover freshly discovered assets belonging to the sequestered estate. The course is plain enough here unless there are exceptional grounds for exercising our discretion and refusing the application. Three grounds have been stated. It is said the bankrupt held the property in question really as a trustee for his brother—that does not appear upon any writing, and it is matter of controversy which it is not for us to determine. It is further said that the sum is so small—some £50—that it is not worth litigating about, but that is a matter for the creditors, and if they wish a trustee appointed they have an absolute right to get the appointment made, and the Court have no right to say they would not grant the prayer of the petition. Besides, the asset is said to be of some value. Being ground before villas which it is desired to buy up, it is impossible to say what the value may turn out to be. But lastly, it is alleged that this action on the part of the creditors will interfere with the prosperous career of the bankrupt which has now set in. I do not think it says much for his prosperous career that during the eleven years which have elapsed since his sequestration he has never applied for his discharge, probably because, as his counsel conceded, he saw no prospect of getting it. The fact remains that he is an undischarged bankrupt, and I cannot say my sympathies are with him so as to lead me to refuse such a motion as this.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I agree in the result, but I am not so clear as some of your Lordships seem to be that the Court is here doing a merely ministerial act. I

think the power of the Court is more discretionary than the judgments pronounced imply.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Steel. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Respondent—Orr. Agent—Robert Burnside, S.S.C.

Wednesday, January 14.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

THE LORD ADVOCATE v. THE EARL OF HOME.

*Landlord and Tenant—Long Lease—Valuation of Buildings at End of Lease—Reference—Principle of Valuation.*

A lease for ninety-years provided, *inter alia*—"In regard the present houses on the subjects hereby set are in a most ruinous condition, inasmuch as to be only proper for a quarry, and as the" lessee and his sub-tenants "may during the currency of this lease, erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that at the expiry of this tack the whole houses and buildings then upon the subjects hereby let shall be valued and appraised by two neutral persons, one to be chosen by each party, and in the case of variance between the said persons, by an oversman to be named by them;" the lessor then bound himself to pay to the lessee the half of the valued amount.

A sub-tenant of the lessee erected a military barracks and other buildings in connection therewith, and at the expiry of the lease he sued the lessor for one-half of the value of the whole buildings. The defender averred that the buildings were not useful to him, and were not houses and buildings in the sense of the lease.

The Court directed the arbiters to intimate to what extent, if any, the value of the lands was enhanced by the buildings then on the lands.

By tack dated 25th May and 18th June 1791 Archibald Lord Douglas let for ninety-nine years to William Douglas of Brigton, and his heirs, assignees, and sub-tenants, "the park of Dudhope, with the houses and offices thereof, and particularly the materials of the old house of Dudhope and of the other houses on the subjects hereby let." . . . It was further provided—"In regard the present houses on the subjects hereby set are in a most ruinous condition, inasmuch as to be only proper for a quarry, and as the said William Douglas and his foresaids may, during the currency of this lease, erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that at

the expiry of this tack the whole houses and buildings then upon the subjects hereby let shall be valued and appraised by two neutral persons, one to be chosen by each party, and in case of variance between the said persons, by an oversman to be named by them; and the said Archibald Lord Douglas shall be bound and obliged, as he hereby binds and obliges himself and his foresaids, at the first term of Whitsunday after the expiry of this lease, to content and pay to the said William Douglas and his foresaids the one-half of the sums at which the said houses and buildings shall be so valued and appraised in manner above-mentioned."

In 1795 the Secretary of State for War obtained a sub-lease of a part of the lands of Dudhope amounting to about 19 acres or thereby, and including the site of the old Castle of Dudhope and its pertinents, all as described in the principal lease.

The sub-lease was for the remaining years to run of the principal lease from and after 1795, and by it the sub-tenant had assigned to him "the whole clauses and obligations" contained in the principal lease incumbent on the proprietor. During the course of their occupancy the sub-lessee and his successors in office restored and added to the old Castle of Dudhope, and used it as military barracks. They also erected officers' quarters and a hospital. The sub-tenancy expired at Martinmas 1889, and the military authorities removed from the premises.

The Lord Advocate, on behalf of the Secretary of State for War, brought the present action to enforce the obligation contained in the clause of the lease above quoted, and to have the houses and buildings upon the lands valued by two neutral persons.

The pursuer nominated Mr John M'Lachlan, architect, Edinburgh, to act as valuator on his behalf.

The defender refused to make any nomination. He averred that the buildings were not useful to him, and pleaded, *inter alia*, (3) that the houses and buildings now on the grounds in question were not houses and buildings in the sense of the said tack.

By interlocutor of 12th June 1890 the Lord Ordinary (KINCAIRNEY) ordained the defender to nominate a valuator to act along with the valuator nominated by the pursuer to appraise the houses and buildings on the lands as specified in the summons.

"*Opinion.*— . . . There remains the defender's averment and relative plea to the effect that the houses which have been built on the ground are not useful to the defender, and are not of the nature of the buildings referred to in the lease. As to their usefulness to the defender, that may possibly form an element in determining the sum which the defender will have to pay, and I do not think that that averment necessitates an allowance of proof. As to the averment that the houses are not of the kind contemplated by the lease, I have come, although not without hesitation, to the conclusion that there ought not to be

a proof about that either. Considering the generality of the language of the lease, and the fact that it was a lease for ninety-nine years, it was next to impossible to imagine that it was understood that the tenant was to be restricted to any particular kind of houses, and I consider that far more specific averments on this point would be necessary before a defence of this nature could be regarded as relevantly averred. But I think it would not be quite safe at this stage absolutely to repel this plea, and it seems better to pronounce the operative part of the interlocutor before answer on this point."

The defender reclaimed, and on 6th November 1890 their Lordships of the First Division pronounced the following interlocutor:—"Remits to Alexander Beith Macdonald, Master of Works, Glasgow, to examine the houses and buildings on the ground in question, and to report *quam primum* on the character and condition of the same, and how far they are and can be made available for ordinary occupation to the Earl of Home, as proprietor of Dudhope Park, having regard to the circumstances of the neighbourhood, including those of the remainder of Dudhope Park."

On 1st December 1890 the reporter lodged the following report:—" . . . The reporter having carefully considered the terms of the remit, visited Dundee and made an inspection of the houses and buildings in the presence of representatives of the parties to the action, from whom he received plans, sections, and other information for his guidance.

"The Park of Dudhope, which is described in the condescendence as extending originally to 46 acres, is now intersected by Lochee Road, an important thoroughfare of Dundee traversed by a line of tramways.

"The houses and buildings which form the subject of the remit are situated on the north side of Lochee Road, and together with the Barrack Park occupy a space that approximates the area of 19 acres 1 rood and 4 falls Scots measure, sub-let in 1796 by William Douglas of Brigton to the Secretary for War. The portion of Dudhope Park lying to the south of Lochee Road has been subdivided by streets, and is almost entirely covered with buildings occupied as shops, dwellings, and public works of various descriptions, which have been erected without reference to any code of building restrictions. The availability of the houses and buildings referred to in the remit is therefore not complicated by any question of amenity, as it seems to the reporter that their conversion to any manner of use could not be held to deteriorate their present surroundings.

"The houses and buildings are situated on an area of ground fenced by stone walls, which enclose a surface of eight and a-quarter acres or thereby, imperial measure, bounded on the west and north by the Barrack Park and Dudhope Street, and on the south principally by Lochee Road, along which it extends for a distance of about 470 yards. The houses and buildings,

however, stand back from Lochee Road at an elevation of from 40 to 50 feet above it, so that they do not possess the ordinary benefit of frontage, but depend for access on the present entrance from Dudhope Street, which is a thoroughfare that ascends from the business quarter of Dundee to a residential district on the summit of the town. It is necessary to direct attention to this circumstance in order to indicate the severance of the houses and buildings from the public works on the farther side of Lochee Road, distant only 100 yards in direct line, but separate at least half-a-mile following the nearest vehicular route.

"The principal buildings are Dudhope Castle, which during the tenancy of the War Department was occupied as soldiers' quarters, and which stands nearly in the centre of the enclosure; the officer's quarters, which are situated about 80 yards to the east of the castle; and the hospital, which stands about 100 yards to the west of the castle at the north-western angle of the ground. There are also separate buildings, formerly occupied as a guard-room, canteen, kitchen, wash-house, stores, straw shed, cellars, latrines, coal yard, &c., as well as two gunpowder magazines, one of which is at present used for storing the ammunition for the time-gun, and the other reserved for the accommodation of local volunteer regiments. The whole of the buildings are built with stone and roofed with slate, and with the exception of the hospital and gunpowder magazines, are in a condition of extreme disrepair. They have been unoccupied for a year, and according to information given to the reporter, the structural decay has proceeded without check for some years previous to their vacation. In their present condition they are not protected from the weather, and cannot be described as available for any ordinary occupation.

"With a view to determining whether the buildings can be made available in the sense of the remit, the reporter begs to indicate that the question depends on the adaptability of what may be described as the three main buildings, viz.:—Dudhope Castle, the officer's quarters, and the hospital. It appears to him that unless these subjects adapt themselves readily to conversion, the other buildings, which are of minor consequence, cannot be regarded as separately available.

"(1) *Dudhope Castle*.—This is a large building containing upwards of 16,000 superficial feet of floorage in the four storeys above the level of the basement. The original fabric is evidently of great age, having undergone extensive alterations in its conversion to a barrack for the accommodation of 180 soldiers, and the building in its present condition is unfit for occupation. The roof is in a state of decay, and the interior structure is insecure—the several floors being supported by transverse beams resting on intermediate upright timbers, and the ceilings have in many instances been lined with sheet-iron to overcome the inconvenience of broken plaster. The ceilings for the most part do not exceed eight

feet in height, and access to the different floors is obtained by narrow stairs which are in a dilapidated condition.

"It is extremely difficult to see how this building can be made available for ordinary occupation. Apart from the isolation of its position, which has already been described, the structure is quite incapable for adaptation for any commercial purpose. The building could not be strengthened to admit the introduction of mechanical power, and it would involve unreasonable outlay to make the large extent of floor space secure enough to meet the requirements of ordinary storage. The only other resource which suggests itself to the reporter is conversion to habitation, but this also is surrounded with difficulty. The present structural arrangements do not satisfy the requirements of the Dundee Police and Improvement Consolidation Act, 1882, in regard to buildings intended or designed to be used for human habitation, and the reporter, after the most careful consideration, is convinced that nothing short of complete reconstruction would suffice to bring the building into conformity with the conditions imposed by that statute.

"(2) *The Officers' Quarters*.—This is a large three-storey building, of a much more practicable description than the last described, but a considerable outlay would be required in renewing the roof and the window frames, as well as in other external and internal repairs, before it could be made weatherproof, and even then it would not be available for ordinary occupation. The only purpose to which it could be readily applied would be habitation, and in order to render it suitable for this purpose the building would require to be sub-divided, which would involve further outlay such as no proprietor would expend on any other than a valuable permanent structure.

"Having regard to the circumstances of the remainder of Dudhope Park, the reporter feels bound to consider the probability that the enclosure within which these buildings stand, as well as the adjoining Barrack Park, will be laid out for feuing, and it does not appear to him reasonable to suggest a large outlay in the adaptation of a building which might prove an obstruction to the development of the rest of the estate.

"(3) *The Hospital*.—This is a large building whose dimensions are somewhat similar to the officers' quarters. There is not much defect in its present condition, but the structural arrangement is very special and not available for ordinary occupation. The cost of converting this building to habitation would be serious, and in view of the probability that its position would embarrass the feuing arrangements of the adjoining lands, the expediency of converting it is extremely doubtful.

"None of the other buildings are in themselves available for ordinary occupation, neither are they in the opinion of the reporter capable of adaptation. The gunpowder magazines are not suitable adjuncts of a feuing estate, and the other buildings can only be regarded as obstructions.

“In view of the whole matter remitted to him, the reporter, after the most careful consideration of the question in all its aspects, has arrived at the conclusion that the houses and buildings are not available for ordinary occupation to the Earl of Home as proprietor of Dudhope Park, and that having regard to the circumstances of the neighbourhood, including those of the remainder of Dudhope Park, they cannot be made available for his ordinary occupation.

“Without presuming to express an opinion as to whether the enclosure walls form any part of the remit to him, the reporter begs to indicate that they appear to him to be essential to the protection of the property at the present time. The retaining wall at the entrance gate, especially, forms an indispensable adjunct. The walls generally are in fairly good condition, although they require pointing and splicing, and in some parts, of limited extent, rebuilding.”

Argued for the defender—The reasonable construction of this clause was that the only buildings which were to be valued at the termination of the lease were such as were *ejusdem generis* with those on the lands at the commencement of the tack. The only buildings which the defender could fairly be called upon to pay for were agricultural subjects and such as would enhance the value of his estate. The value to the defender of the buildings now on the lands was *nil*, and therefore there was nothing for a valuator to value. If, however, it was necessary to go through the form of a valuation, then the Court should beforehand determine the principle upon which the valuation should proceed.—*Frier v. Earl of Haddington*, November 22, 1871, 10 Macph. 118.

Argued for the respondent—The clause in the lease was explicit in its terms and did not need construction. There were buildings on the land at the termination of the tack, and the pursuer was entitled under his lease to have them valued, and one-half the estimated value paid over to him.

At advising—

LORD PRESIDENT—The only difficulty in construing this old tack of 1791 is the impossibility, one may call it, I think, of placing ourselves exactly in the position in which the parties stood when they entered into that contract. But there are some things that are express or very clearly implied in the clause of the tack which guide us at least so far. The subject conveyed in the tack is the “Park of Dudhope, with the houses and offices thereof, and particularly the materials of the old House of Dudhope and of the other houses on the subjects hereby let.” That seems to imply, if it stood alone, that it is rather the materials of the houses than the houses themselves that were then upon the ground. But this is made a great deal more clear in a subsequent clause of the tack, which says—“In regard the present houses on the subjects hereby set are in a most ruinous condition, insomuch as to be only proper

for a quarry”—showing that the houses at the time, if they had any value at all, were valuable only as materials that might be used in the construction of other houses. That is one point that comes out very clearly. And another appears to me to be this, that it was contemplated—and indeed could not but be contemplated—that other houses might be erected on the land during the currency of the tack, and accordingly the parties express themselves thus—“As the said William Douglas and his foresaids may, during the currency of this lease, erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that at the expiry of this tack the whole houses and buildings then upon the subjects hereby let shall be valued and appraised.” That shows again that the houses which the parties foresaw might be upon the lands of the tack at the expiry might be either houses substantially in the same dilapidated condition as those which were at the beginning, or they might be houses of a different description, or at all events there might be other houses in a very different condition from those that were on the lands at the commencement of the tack.

These things being clear, I think the rest of the tack can be very easily construed. The conclusion is that the whole houses and buildings upon the subjects at the expiry shall be valued and appraised by two neutral persons, one to be chosen by each party, and in case of variance between these parties, by an oversman to be named by them; and then there is a conclusion for payment of the amount. Now, the suggestion which I have already made leads me to this further inference—that it is quite possible that at the expiry of the tack there may be no houses of any value on the land at all—that is to say, the subject may be at the expiry of the tack very much in the same condition as it was at its commencement—and in that case there would be nothing to value, or at least the value would be *nil*. It appears to me therefore that all of that must be kept open in any reference that is to be made to the persons who are to be appointed to value and appraise, and I think in that respect probably the interlocutor of the Lord Ordinary is a little defective, because I think the only value which the lessee is entitled to get from the lessor at the expiry of the tack is the advantage which the lands gained by the existence of buildings upon the lands at the expiry of the tack, or in other words, what the lessor has got to pay is any enhanced value of the lands by reason of there being existing buildings on the lands at the expiry of the lease.

It therefore appears to me that before making any remit to valuers or appraisers it would be desirable to define what is the duty of those parties, or what is the valuation or appraisements which they are to make under this clause of the contract, and that will be done probably most fittingly by a finding to the effect that the neutral persons who are to appraise and value are to take into account only the enhanced

value of the lands by reason of the existence of the houses at the expiry of the tack, and of course the extent of the enhancement of the land will depend entirely on the value of the houses built on the land at that part. What I should therefore propose to your Lordships is that we should make a finding to that effect, and *quoad ultra* adhere to the Lord Ordinary's interlocutor.

It might have been perhaps more conducive to despatch if the Lord Ordinary had made an appointment upon each party to appoint a valuator, but as I suppose the pursuer, the lessee, is anxious to get on, we may take it for granted that he would not interpose any delay in the way of constituting this valuing tribunal if he gets decree against the lessor to appoint a man on his side.

LORD ADAM—I concur with your Lordship. What the predecessor of the respondent undertook to do was to agree that the whole houses and buildings then upon the subjects thereby let—"then" being at the expiry of the tack—should be valued and appraised by two neutral persons, and then he binds and obliges himself to content and pay one-half of the sum at which the houses and buildings should be so valued. That is quite clear. But I agree with your Lordship that the expression "whole houses and buildings" on the subjects let must be subject to some construction. It was suggested in the course of the discussion, for example, that supposing a monument had been built on the subject, a building of that character could not possibly be within the contemplation of parties to this tack as being the houses or buildings of that kind which the defender was bound to pay for. I think that would be so, and I think, as your Lordship has put it, that the true test is—houses or buildings of that class or character which go to increase and enhance the value of the subjects there. I think that is really what the parties intended by the clause, and therefore I agree with your Lordship that we should have a finding to that effect, and then do as the Lord Ordinary has done as regards the appointment of valuers.

LORD M'LAREN—I am of the same opinion as your Lordships, and have very little to add. I understand it to be the wish of both parties that the Court should construe this contract so far as it stands in need of construction. The question is, what is the legal effect of the clause under which Lord Douglas, the predecessor of the defender, agreed that the buildings to be erected upon his land should be valued at the expiration of the term of ninety-nine years, and that the proprietor should then pay one-half of the appraised value. Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication, or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest

a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition. In the remit which the parties are to make, I apprehend it will be the duty of the neutral persons to ascertain the value in this sense, and the only way in which the exchangeable value of the buildings can be found is by taking the difference of the price of the land with the buildings upon it and the price of the land if these buildings had never been put up or are supposed to be non-existent. Now, if that test be applied, all the difficulties which have been suggested arising out of the character of the buildings disappear, because if buildings have been put on the land which are of no use to anyone but the tenant who erected them, they do not represent any exchangeable value, and nothing would be allowed for them. These buildings are of a peculiar character, for they were put up for the purposes of a military station. The report we have obtained rather indicates that they have no commercial value, or very little indeed, because the cost of adapting them to civil purposes would be disproportionate to any benefit which could be obtained from them. That, however, is a matter for the valuers. I agree with your Lordships that all we have to do at present is to make a finding and to appoint the defender to name a neutral person to act as a valuer, reserving the disposal of the second conclusion in case it should be necessary for the parties to come here to obtain decree for payment.

LORD KINNEAR concurred.

The Court pronounced this judgment—

"Adhere to the interlocutor of the Lord Ordinary: Refuse the reclaiming-note: And further find that the neutral persons to be appointed in terms of the lease are to ascertain to what extent, if any, the value of the lands of Dudhope Park is enhanced by the existing buildings now on the land, reserving the question of expenses, and remit to the Lord Ordinary to dispose of the expenses incurred in the Inner House as part of the expenses of the case."

Counsel for the Pursuer—C. N. Johnston.  
Agent—Donald Beith, W.S.

Counsel for the Defender—Murray.  
Agent—R. Strathern, W.S.