to report *quam primum* what outlays, expenses, and Government duties form a proper charge upon said sum of £6808, 1s. 3d., reserving nevertheless to the bankrupt any right to object before the Accountant to the expenses or any part thereof in so far as it is proposed to pay same out of the sum of £6808, 1s. 3d.: Find the petitioner and the said minuters also entitled to the expenses of and incidental to this petition out of the said sum of £6808, 1s. 3d. . . . . as between agent and client. . . . ."

Counsel for the Petitioner — Chree — Horne. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Heritable Creditors (excepting M'Ilwraith's Trustees) — Cullen, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

For Respondents, the Bankrupt, James Somervell, and Others—Party.

Thursday, May 20.

FIRST DIVISION.

[Lord Dundas, Ordinary.

JAMES GILLESPIE & SONS AND ANOTHER *v.* GARDNER.

Agent and Client—Law-Agent—Responsibility to Client—Bargain between Law Agent and Client—Fairness of Bargain—Fairness Called in Question after Lapse of Years.

In 1895 a firm of slaters and plasterers, who had previously done no building, and who possessed no capital, desired to take advantage of the then flourishing condition of the building trade in a certain town, and to buy up certain pieces of ground covered with old buildings, to pull these down and erect new tenements. For this purpose they sought the pecuniary assistance of their law agent. A bargain was entered into in accordance with which the law agent bought for his clients certain property, advanced the whole of the money and took the title in his own name. They then agreed to grant him a ground-annual, on the basis of 25 years' purchase, calculated upon the price so advanced and on certain other prior debts of small amount, and the property was reconveyed to them under burden of the ground-annual. The new tenements were built and occupied, and thereafter the law agent was able to sell the ground-annual for 31 years' purchase. In 1907, and after the firm had been dissolved by the death of one of the partners, the surviving partner raised an action against the law agent for payment of the difference between 25 and 31 years' purchase.

Held that in the circumstances the bargain was a fair one, and that the defender must be assoilzied.

Observations by the Lord President on bargains between law agents and clients.

On 7th February 1907 James Gillespie & Sons, builders, Paisley, and James Gillespie, sole surviving partner thereof, as such partner, as an individual, and as executor of his deceased brother Thomas, who died in 1905, the only other partner of the said firm, raised an action against James Gardner, a writer in Paisley. The pursuers sought to have the defender account for his intromissions as law agent for (1) the said James Gillespie & Sons, (2) the said James Gillespie *qua* partner of the said firm and as an individual and executor foresaid, and (3) the said deceased Thomas Johnston Gillespie *qua* partner of the said firm and as an individual. The accounting went back to 1895.

Accounts were ordered and put in, and objections and answers thereto were lodged.

The pursuers' objection 2 was — "The defender's said account fails to credit the pursuers with the true value of the ground-annuals and feu-duty mentioned in Cond. 4. The true value thereof was, as stated, at least £3822, 19s. 6d., at which price they were sold by the defender, whereas the pursuers have only received credit for £3094, 10s. 3d. The pursuers are accordingly entitled to credit for the sum of £728, 7s. 3d. as from the dates of the creation of the said ground-annuals and feu-duty, with compound interest thereon at the rate of 5 per cent. per annum from said dates."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DUNDAS) (*v.* also opinion of the Lord President), who on 7th July 1908, after a proof, found, *inter alia*, that the transactions between the pursuer James Gillespie and his late brother Thomas J. Gillespie, and the defender, referred to in objection 2, were fairly gone about, and were understood by, and were to the interests of, the Messrs Gillespie, repelled the whole objections, and assoilzied the defender.

Opinion. — ". . . The pursuer's case presents several adverse features. It was not until October 1905 that he raised the principal question now in controversy, which relates to events occurring in the years 1895 to 1897. He and his brother Thomas dissolved their copartnery about 1899, and its affairs were wound up, and their accounts with the defender adjusted, upon a footing inconsistent with the pursuer's present attitude. The brother died in 1902, in full knowledge, so far as appears, of the material facts involved, without having made any complaint or claim of the nature now put forward. His executry estate was wound up by the pursuer as his executor on the footing above indicated. The pursuer is unable to give any satisfactory explanations of his long delay in raising his present contentions. . . . . .

"Obj. II. raises the most important point in the case. It does not seem to me to be, properly speaking, an item of accounting; but the matter has been fought out with

immense elaboration, and should be decided. It relates to certain transactions in 1895, 1896, and 1897, between the defender on the one part, and the pursuer and his brother on the other. Where the pursuer and defender differ as to the inception and character of the transactions, I prefer the latter's account, because I regard him as by far the more trustworthy witness. The evidence of Thomas Gillespie is, unfortunately, not available, as it would have been at any time down to his death in 1902. His apparent acquiescence goes so far to support the defender, whose version of what happened seems to me more probable than the pursuer's, and also more in accordance with the subsequent actings of all concerned. Shortly put, I think the substance of the matter is this:—In 1895 the two brothers were desirous of entering into building speculations which they thought would be profitable. They intended to buy land occupied by houses of an inferior class, to pull these down, and replace them with a superior order of buildings. The scheme, of course, required capital; and I think the evidence is that the Gillespies, though far from being penniless persons, were not in a position to raise any very substantial sum from their bankers, or their friends or relations. They asked the defender to finance them. He says, and I believe him, that he was unwilling to do so, such things being out of his line, and the adventure being apparently somewhat hazardous. Ultimately, however, he consented to advance money to buy the land, the title to which he was to take in his own name; and it was agreed that a ground-annual should thereafter be created in his favour, and the land reconveyed to the Gillespies under burden of it. The ground-annual was to be calculated on the basis of yielding 4 per cent. on the amount of the defender's claim, which was to include the price of the ground, cost of redeeming casualties, &c., and certain law expenses. The same *modus operandi* was, with some variations, agreed to in regard to each of four successive adventures during the years I have named. The defender did, in fact, treat the ground-annuals (or, as regards one instance, the feu-duty) as his own property; the half-yearly payments were regularly debited against the brothers; the defender in 1901 sold the whole of the ground-annuals and feu-duty, and in 1904 he bought them back at some loss, and still possesses them. I may say in passing that I see no reason to doubt the truth of Mr Gardner's evidence as to the circumstances under which this sale and repurchase took place; and I discard, so far as contradicting him, the testimony of his former clerk Dunlop. I think Thomas Gillespie must have known quite well that the defender was treating the ground charges as his own property, and he apparently regarded this as in accordance with the bargain. Even the pursuer admits at one part of his evidence (not, perhaps, easy to reconcile with his alleged ignorance of the state of his accounts):—'I knew that Mr Gardner paid the half-yearly ground-annual to himself from the money lying in his own hands. I knew that that was the system all through.' But he says that he did not understand how the ground-annuals had been made up, never having received any written statements of them—such as undoubtedly existed in the defender's books—and understood they truly belonged to him and his brother. His case accordingly is, though it is rather obscurely formulated in Obj. II., that the defender, having entered into these transactions with his clients, and having made a profit, must disgorge it to them. This profit is said to amount to over £700, and is measured by the difference between the value of the ground-annuals at twenty-five years' purchase, as at their creation, and at thirty-one years' purchase, as at their sale by the defender in 1901. Now it is true that the law looks with some jealousy at transactions between agent and client; but they are not null—only reducible. The question of their validity, or the reverse, is always one of circumstances; and the transaction will not be set aside if the agent can show (the burden of proof being upon him) that he gave full and fair value for what he got, that he did not withhold from the client any information he possessed, and did not conceal that he was himself the transacting party. (Begg on Law Agents, p. 253, and cases cited, especially *Edwards*, 1842, 2 Hare's Chan. Rep. 60. See also *M'Pherson's Trustees*, 1877, 5 R. (H.L.) 9). I think the defender does sufficiently discharge the *onus*, and that there is no good ground for impugning the transactions. The evidence establishes to my mind that the price was a fair one,—experienced witnesses like Mr Binnie and Mr Cameron characterise it as 'generous,'—or, in other words, that the return Mr Gardner got for his advances was at a very moderate rate. One must have regard to the whole surrounding circumstances as they stood at the time,—the financial position of the builders, the degree of risk which seemed likely to be run by the defender, and so forth. I think that the transactions, so viewed, were not injurious but beneficial to the interests of the Gillespies; and that they could not, so far as appears, have carried through their speculations on better terms by any other feasible method. Great stress was laid by the pursuer's counsel upon the fact that,—notably in the case of the first of the transactions,—the ground-annual was calculated upon a sum including not only the price of the land and the cost of redeeming casualties, etc., but also various sums, of no great amount, due to the defender by the builders, unconnected with the matter in hand, and the legal expenses incident to carrying the transaction through. The proceeding may have been unusual; but there is not, to my mind, anything illegal or improper in making such a bargain. It saved the Gillespies from paying these debts in cash, as they must otherwise have done. I believe the defender when he says that it was by their wish that the matter took this shape; and I see no reason to doubt that the pursuer, as well as his

brother, saw and approved the document which is taken from the defender's state book. Nor do I attach any importance to the facts, on which the pursuer's counsel seemed to base indefinite but sinister suspicions, that a couple of pages appears to be missing from that book; or that the 'State' in reference to one of the four transactions is apparently booked out of chronological order. I need not labour this matter further. I think these transactions were honestly and fairly gone about; that the pursuer and his late brother knew about and understood them —that they did, in fact, benefit by them; and that the transactions are not assailable on any legal ground. The objection will therefore be repelled. I should add, that even if my opinion had been different I should have thought the pursuer's claim was met by the offer contained in the answer to this objection. . . ."

The pursuers reclaimed, and argued—The defender had obtained the ordinary law agent's remuneration in respect of the various conveyances arising through the purchase and sale of the properties and the constitution of the ground-annuals, and he was not entitled in addition to make a profit out of transactions which he must be presumed to have advised. In any case from his position as law agent the *onus* lay on the defender to show that the transactions were not only made without concealment, but also that the bargains were in themselves fair, *i.e.*, such as if the lender had been a third party, the law agent would have been justified in advising. Reference was made to *M'Pherson's Trustees* v. *Watt*, December 3, 1877, 5 R. (H.L.) 9, Lord Chancellor Cairns at p. 16, Lord O'Hagan at p. 17, 15 S.L.R. 208; *Clelland* v. *Morrison*, November 9, 1878, 6 R. 156, Lord Justice-Clerk Moncreiff at 167, Lord Young at p. 172, 16 S.L.R. 90; *Anstruther* v. *Wilkie*, January 31, 1856, 18 D. 405; *Tyrrell* v. *Bank of London and Others*, 1862, 10 H.L. (Clark) 26, Lord Chancellor Westbury at p. 44; *O'Brien* v. *Lewis*, 1863, 32 L.J. Ch. 569.

Argued for the defender (respondent)—There was here no gift, and no concealment. Had the transaction been with a third party, and had the defender been consulted about it, he would have acted quite properly in advising it. There was no concealment of any sort, and the transaction was eminently a fair one looking to the risk run before any buildings were erected, and should not be regarded *ex post facto*. Had the pursuers become bankrupt, and the buildings never been erected, there would have been a loss. The pursuers had shown no method by which, prior to the erection of the buildings they could have obtained the money more advantageously. Reference was made to Lord M'Laren's opinion in *Anderson* v. *Turner*, April 17, 1884, reported in a footnote to *Logan's Trustees* v. *Reid*, 12 R. 1094, at p. 1097, 22 S.L.R. 744, at p. 745.

LORD PRESIDENT—This is an action of count and reckoning brought by a builder in Paisley, and also brought by him in the capacity of executor of his deceased brother, who was a partner of the firm of builders to which both brothers belonged, against Mr Gardner, writer, Paisley, who for many years acted as their legal adviser. The action goes back for a period of more than ten years. The accounts of the defender, who had money transactions with the pursuer, were put in, and objections were then lodged to the accounts in ordinary form. Proof was led, and the Lord Ordinary disposed of those objections, practically refusing the whole of them, and assoilzieing the defender from the conclusions of the action, he having of course offered a payment of the sum brought out by the accounts as lodged. The present reclaiming note has been brought, but before your Lordships the discussion has been limited practically to one matter with a slight allusion to another matter which I will afterwards mention. That one matter has to do with certain building transactions which happened as long ago as 1895. In 1895 the pursuer and his deceased brother seem to have been plasterers and slaters in a small way with a good-going business — men who were respectable tradesmen and no more. That is to say, they had never been builders, and as a matter of fact they were possessed of no capital. In 1895 the building trade was on one of the waves to which the building trade is notably subject, and the wave was in the ascendant at that time, and the building trade was in a flourishing condition in Paisley. Thus it entered into the minds of these two men that they might take advantage of this favourable condition of the building trade, and they conceived a scheme, namely, to buy up pieces of property in Paisley covered with old buildings, to pull down those old buildings and to erect tenements of a newer class, and afterwards to re-sell at a profit. Well, that was a scheme which in a flourishing time might well succeed, provided always that the selection of the sites was made judiciously, and that the properties were judiciously bought. But, naturally enough, the first difficulty was that they had no capital, and a scheme of that sort requires capital, notably for the initial expense of acquiring the property on which a new building is to be made. Accordingly, the two men approached the defender, who was their law agent, and asked him for assistance. The end of it was that he consented—he says somewhat against his will, but I do not think that much matters—to advance the money necessary for the building speculation. Now, as a matter of fact, there were four different speculations which have here been the subject of inquiry. The first one may be taken as a type of all the others. I shall not omit to notice an argument which has been pressed upon us which would seek to make a difference between the transactions. Well, the first transaction, which is to be taken as a type of the others, was carried out in this way—the defender bought the property for the pursuers, advanced the whole of the price, and took the title

in his own name. He then arranged with the pursuers, because that was the bargain, that they, who were the true proprietors, should grant him a ground-annual for the ground calculated at four per cent. (or otherwise twenty-five years' purchase) upon the price which he advanced. In other words, he was to be repaid his money, not by means of a capital sum, but by means of a fixed annual charge calculated at four per cent. on the price. That was done. The ground-annual was given, not for the exact sum calculated, but for a slightly larger sum, because the builders being at that time indebted in certain moneys, not to a very large amount, to the defender, asked him to include that sum in the calculation of the ground-annual, thereby attaining this object, that instead of having to cripple their somewhat slender resources by paying up what they owed, they were enabled to convert that also into a ground-annual, and thus not to have to find any money, but to keep all the money which was available for the daily calls in the process of putting up the houses. Now the speculation as a matter of fact proved a successful one. The houses were built, and the natural result of the houses being built and occupied was that the ground-annual which had been granted became better secured. With the prices as they ruled at that time there came a day when it was possible to sell the ground-annual at thirty-one years' purchase, and the defender did so. It is quite true that afterwards he came for other reasons to buy it back again, but I do not think that that affects the question. Now taking the first transaction, which, as I say, is a sample of the others in the action as originally raised, the pursuer averred and sought to prove that the defender in all this matter was a mere trustee, that the true arrangement was that he should hold the ground-annual, not for himself at all, but as a mere security for the money advanced, having to account to the pursuer for any sum realised over and above the sum actually advanced and interest. Upon that matter it is only necessary to say that the Lord Ordinary came to the conclusion that the pursuer had entirely failed. He held, first of all, that he believed the defender and not the pursuer. Secondly, he held that the whole evidence of the books and what had been entered from time to time about the payments made were of a character negative of the pursuer's contention. The learned counsel for the pursuer, very sensibly, I think, felt that that part of the case was so hopeless that they did not argue the case upon that assumption before your Lordships at all, but they put the case thus: They said—"We are entitled to treat the defender as a trustee, not because there was any such arrangement, but because, owing to a well-known rule of law, a law agent when in a fiduciary capacity towards his client cannot take advantage of any bargain which he makes with his client. If he makes a bargain with his client at all, the *onus* is upon him to show that the bargain is one which a third party would have recommended." Then they say again that they can show that this bargain was a bad one, an improvident bargain, and one that another agent would not have recommended; and that being so, they are entitled to recover, whether as from a trustee or in name of damages I think does not matter, the extra profit that the law agent made by getting the ground-annual at twenty-five years' purchase and selling at thirty-one. Now I am very far from wishing to throw any doubt, even if I could, upon the long series of authorities that we have in the books about the position of a law agent towards his client. I say "if I could," because I cannot, because a number of those authorities are cases in the House of Lords which are absolutely binding, and of which the case of *Macpherson* v. *Watt* (5 R. (H.L.) p. 9) may be taken as one. I do not think it necessary to examine the authorities, because I do not think there is really any doubt as to the law. The only doubt, as Lord Cairns put it, is as to the application of the law to particular facts. I wish, however, to say this in order to make things clear, that I think counsel for the pursuer confused—perhaps I should not say confused, because I am not going to pay them such a bad compliment, but I think the drift of their argument was to confuse — two perfectly different things. The case of a law agent not being able to extort from his client as remuneration anything over and above his ordinary professional fees, whether that remuneration is given merely as a gift or as covenanted for, is one thing—and there is no doubt that it does not arise on the facts here at all. The other case is quite different, that where you have the law agent and the client entering into contracts about things which have nothing to do with his remuneration as a law agent, yet in respect of the fiduciary position and in respect of what the law considers the superior position of the law agent in the matter of knowledge over his client, that bargain will not be supported unless the law agent can show that the bargain was fair and entered into without concealment of any kind. Concealment will vitiate even if there is no unfairness. The case of *Macpherson* v. *Watt* is a very good instance of that. But where there is no concealment there is no absolute nullity in a bargain made between law agent and client. If the law agent can show that it was fair, then the bargain will be supported.

There are two observations which I think have a good deal to do with the practical application of the law as regards the facts of each particular case, and they are these —first, that in judging the fairness of a bargain you must put yourself as best you can into the position of the parties at the time; you must not judge with the wisdom of after events. The other is, that where there is complaint there is, and always must be, a great deal of difference between the position where one party at once tries to repudiate a bargain which the other party is trying to maintain, and the position where years go by and one party tries

to rip up the bargain, not to prevent something taking place, but to disturb the result arrived at by its completion. Indeed, if the equitable jurisdiction of the Court is invoked, there is always a great deal of feeling against stale claims, and that is very much accentuated in this case by the fact that one of the parties who would have shed much light on what happened is dead. None of those considerations that I have just handled amount to anything like an absolute rule of law or lead directly to any conclusion, but they are of great weight in pointing the way in which evidence should be examined. There is another general observation, namely, that in considering a bargain between a law agent and his client one would be very much affected, one way or the other, by the fact of whether the bargain was induced by the law agent or sought by the client. Now, having made these general observations, I come to the particular facts of the case. I have come to the conclusion, I must say without the slightest difficulty, that the bargain that was made here was, as the Lord Ordinary says, perfectly fair. What is said against it is that it is a foolish thing to part with your ground-annual, that is to say, to sell your ground-annual at a time when the ground is still unbuilt on, because you will not get nearly the same number of years' purchase for it as you would get when the buildings are completed. Well, that is perfectly true, but then the point here was, How were the pursuers to get the money which would enable the ground to be built on? There was some general evidence to the effect that the Paisley building trade in 1895 was a sort of Golconda—that you only had to stoop to pick up money anywhere you liked. That evidence is exceedingly peculiar, but the hard logic of facts, of which we have a great deal of experience in this Court, enables us to know that a small tradesman with a very moderate bank balance going up and down, and with absolutely no security to give at all, would not get an overdraft of more than from £50 to £100 from the bank, and these people had no security to give. It is not a sufficient answer to say, supposing you had been content with the absolute disposition and waited until the building had gone up, you would have been all safe. That is being wise after the event. Supposing the buildings had not gone up? We have lived through the experience of many building crises, and indeed this case, which shows that everything went right with the building trade, was really rather an exception to the general class of cases which have come into this Court in which another tale has been told. Again, the value of ground-annuals has not been actually proved, but I suppose I may take it to be a matter of judicial knowledge that there have been fluctuations of opinion and dread of political action which have knocked about the prices of ground-annuals to an extent of a great deal more than six years' purchase, which is here said to be the difference between an unconscionable bargain and a fair one. Accordingly I come to precisely the same conclusion as the Lord Ordinary when he said—"One must have regard to the whole surrounding circumstances as they were at the time, the financial position of the builders, the degree of risk which seemed likely to be run by the defender, and so forth. I think that the transactions so viewed were not injurious but beneficial to the interests of the Gillespies, and that they could not, so far as appears, have carried through their speculations on better terms by any other feasible method." That only leaves two other small matters to be dealt with. It is said that there is a difference between the first transaction and the second, because the adventure had been so far successful. I cannot say that that observation impresses me at all. It is forgotten that they still wanted all the money that was available for the carrying on of their speculations, and accordingly I do not think, if they were satisfied, as they seem to have been, with the bargain by which they got the money the first time, that it was strange that they should be perfectly satisfied to have another bargain of the same sort. Last of all there was a small point raised about interest. Now the point that was raised in regard to that by the learned counsel was a point for which there was absolutely no record, and it is out of the question, although amendments of record are allowable to bring out the true nature of the case, to remit the whole thing to the Lord Ordinary at this stage in order to have one small point of interest raised, which ought to have been raised if it was going to be when the case was before the Lord Ordinary. On the whole matter, I think the Lord Ordinary's judgment is right, and that we should refuse this reclaiming note.

LORD KINNEAR—I am entirely of the same opinion, and have nothing to add.

LORD GUTHRIE—I concur.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered to the interlocutor of Lord Dundas, dated 7th July 1908, refused the reclaiming note, and decerned.

Counsel for the Pursuers and Reclaimers —Macrobert. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defender and Respondent — M'Clure, K.C. — M. P. Fraser. Agents—Carment, Wedderburn, & Watson, W.S.