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 granter 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

office and on the street, sometimes alone and sometimes with defender. . . . (Q) May I take it that negotiations were suspended from time to time, but that they were never broken off?—(A) I never can say they were broken off. They were afterwards brought to a point by the letter of October; we decided to sell the plant at the best price obtainable. We were not very minding about selling it before that. (Q) I suppose if it had not been for pursuer you would never have had anything to do with defender?—(A) I could not say if we would ever have met Mr Glass otherwise or not. It was pursuer who introduced him to us."

Several telegrams from the defender to the pursuer were produced, directing the latter to do certain work for the defender with regard to the purchase of the machinery, and the evidence otherwise showed that throughout the negotiations the pursuer had acted as the representative of the defender, and had taken a good deal of trouble in promoting the transaction. The pursuer failed to establish that it had been arranged that he should receive a commission of £250.

On 26th December 1889 the Sheriff-Substitute (BALFOUR) decerned against the defender as libelled.

"*Note.*— . . . Under these circumstances it is difficult to see how the defender can shake himself clear of his liability for commission to the pursuer. He seems to hold himself morally liable for it, and I think he is legally liable as well. It is always difficult for a man who has been introduced by a third party to another man, and where business ensues after that introduction at a longer or shorter period, to shake himself clear of liability for commission to the third party. There are three recent cases on the subject, viz.—*Moss* v. *Cunliffe and Dunlop*, 2 R. 657; *Mansell* v. *Clements*, 9 L.R., C.P. 139; and *Walker, Donald, & Co.* v. *Birrell & Co.*, 11 R. 369. I will only specially refer to the first case, as it negatived the claim for commission, and the other two cases allowed the claim in circumstances which are not at variance with the present case. The case of *Moss* was decided upon the ground (first) that the party who ultimately gave an order for a steamer was not identical with the party to whom the builder was introduced, and (second) that the original negotiations had been for a small steamer and the ultimate contract was for a large steamer.

"We are dealing with no such distinctions here. The parties remained the same, and the subject-matter remained the same, and the transaction was closed, as the result of an introduction given some years before, but the negotiations between the parties had never really been closed, and about the time when the contract was closed we find the three parties—seller, purchaser, and broker—in communication with one another, and the broker receiving instructions regarding the purchase from the purchaser.

"I have therefore given decree for the sum sued for, which is a reduction on the amount which the pursuer says the defender agreed to pay."

The defender having appealed, the Sheriff on 26th March 1890 adhered.

"*Note.*—It is unnecessary to consider what might have been the rights of parties if after the failure of negotiations in 1883 the fresh negotiations which ended in the transaction of October 1888 had been continued without any intervention in the meantime on the part of the pursuer. It appears from the proof that there was a renewal of negotiations in the early part of 1888, and although they were not successful at the time, as Mr Kerr says, they were never broken off, and in the course of them the pursuer's offices were again employed. . . .

"If then there was a concluded contract, the fact that it was abandoned on account of the defenders being unable to raise the money did not affect the pursuer's claim to commission. That he had a valid claim to commission, if there was a concluded contract, must be taken to have been the case. He has acted previously in a similar way for the defender, and has been remunerated by payments, not apparently of a fixed kind, but varying with the circumstances of each transaction. The sum he claims in the present case is reasonable, and I think that he is entitled to it."

The defender appealed to the Court of Session, and argued—There was no proof of the arrangement asserted by the pursuer, but on the contrary the evidence showed that the defender had only promised the pursuer commission if the contract turned out profitable.

The pursuer argued—The only defence to the pursuer's claim was the improbable assertion that the pursuer's remuneration was made conditional on the transaction being a profitable one. The *onus* lay on the defender to prove this improbable agreement, and it had not been discharged. The pursuer had introduced the defender to the refining company, had taken trouble in promoting the negotiations, and a contract had been completed between them, he was therefore entitled to the remuneration sued for—*Petrie* v. *Earl of Airlie*, November 21, 1834, 13 Sh. 68.

At advising—

LORD PRESIDENT—This is an action brought in the Sheriff Court of Lanarkshire under the Debts Recovery Act, and unfortunately it is the privilege of parties in such actions to make no statements on record, and so there are none made in this case. I say "unfortunately" because we have no distinct averments as to the ground of the pursuer's claim for commission, and we are left to gather it entirely from the proof, and of course we must do so as best we can. But I cannot help thinking that the bringing up of appeals without any statements on record is very inconvenient.

As I read the evidence the defender is a person who is in the way of buying old material, and is anxious accordingly to be put in the way of such transactions, and is indebted to anyone who puts him in the way of such transactions, which is precisely what the pursuer did here.

In dealing with the evidence I prefer very

much to take the statement of Kerr, the managing clerk of the sugar refinery, and a perfectly unbiassed person. He says—"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 office and on the street, sometimes alone and sometimes with defender." And then part of his examination to this effect—"(Q) May I take it that negotiations were suspended from time to time, but that they were never broken off?—(A) I never can say they were broken off. They were afterwards brought to a point by the letter of October; we decided to sell the plant at the best price obtainable. We were not very minding about selling it before that. (Q) I suppose if it had not been for pursuer you would never have had anything to do with defender?—(A) I could not say if we would ever have met Mr Glass otherwise or not. It was pursuer who introduced him to us." The evidence otherwise, particularly the writings, show very clearly that throughout the negotiations the pursuer acted as the representative of the defender, and took a good deal of trouble in promoting the transaction. There are a variety of telegrams from the defender to the pursuer as to matters which could only be done by the pursuer as for the defender, and appear to have been so done. The precise facts summed up amount to this. The pursuer introduced the defender to the Glebe Sugar Refining Company; he did all he could to promote the transaction between the parties, and spent a considerable time in the discharge of this duty.

The question in these circumstances is whether the pursuer is entitled to commission? The only difficulty in the matter is that the pursuer is not a professional broker. If he had been, the remuneration payable to him would have depended very much upon the custom of trade. But he is not in that position, though he was acting as a broker, that is, performing the functions of a broker. Now, if he was placed in the same position as a broker I am not prepared to say that because he is not by trade a broker he has no right to charge a commission, particularly as he is in the habit of acting in that capacity, and had previously so acted for the defender.

If that be so the only point left is the rate of his remuneration. The price agreed upon for the old material by the letter of 6th October 1888 was £7250. The commission claimed is £50, which is under one per cent. on the purchase money, and I do not think that it is possible to say that that is an unreasonable amount, and therefore I am of opinion that we should adhere to the Sheriff-Substitute's decision.

LORD ADAM—I agree that the forms of process uder the Debts Recovery Act make it very difficult to get at the true case of parties, and that the present case is an example of this fact. As I remember the matter, parties are prohibited by the Act from making statements on record, and the pleas are noted by the Sheriff, and all the Sheriff has noted in the present action is—"The defender denies that he is due the commission sued for or any commission;" and that is because the action is laid on the special conditions which it is alleged were stipulated for by the pursuer and agreed to by the defender. The summons again is for payment of commission as arranged, and therefore, as I read the action, the claim is for payment of special commission as contracted for.

Now, I do not think the particular arrangement is proved, and if we were not entitled to inquire further we should have, I think, to decide for the defender. But then the question arises whether the pursuer is entitled to a sum as *quantum meruit*, and taking the view that he is so entitled I concur with your Lordship.

The difficulty I have felt in the case is that the pursuer is not a recognised broker. If he had been we should have known what rules were to be applied, and among other rules there would have been this, that if the contract was completed between purchaser and seller it would be no matter to the broker whether or not the purchaser could pay the price. The difficulty is whether we can apply these rules to the relations between the parties here. All that we know is that the pursuer was in the habit of giving information to the defender, who is a purchaser of old iron and such materials. What in these circumstances are the rules which we should apply? The defender says that he agreed only to pay commission if the transaction turned out profitable. The difficulty in giving effect to that view is that it is not a probable contract, and is not to be presumed that a party would agree to do work for nothing, and in the absence of clear proof it is difficult to arrive at that result. On the other hand, it is a known principle that if one man uses another for the purpose and with the effect of doing business the ordinary rule is that the person employed is entitled to some remuneration. In the case of the professional broker the amount is fixed by usage of trade or otherwise. We have no usage to guide us here, and the question being whether £50 is too large a remuneration for the services to the defender I have come to the conclusion that it is not.

LORD M'LAREN concurred.

LORD SHAND was absent.

The Court adhered.

Counsel for the Pursuer and Respondent

—G. W. Burnet—Macaulay Smith. Agents —Emslie & Guthrie, S.S.C.

Counsel for the Defender and Appellant—A. S. D. Thomson. Agent—William Officer, S.S.C.

Friday, July 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TENNENT *v.* TENNENT.

Proof — Presumption — Pater est quem nuptiæ demonstrant.

A husband and wife having agreed to separate, lived apart, but within such a distance as rendered access not impossible. *Held* that the presumption of law in favour of the legitimacy of a child begotten and born during the separation may be rebutted not only by evidence to show that the husband had not intercourse with the wife, but also by evidence of their conduct, such as that the wife had been guilty of adultery at a period corresponding to the conception of the child, that she concealed the birth of the child from her husband, registered it as the son of her paramour, and for years represented it to be illegitimate; that the husband when made aware of the birth of the child repudiated paternity, and was thereafter estranged from his wife in a way in which he had not been before; and that the wife's paramour acknowledged liability for the child's maintenance.

Question, whether affidavits emitted in the course of other judicial proceedings by persons since deceased were admissible as secondary evidence of the deponents in a question of legitimacy.

Opinion (*per* Lord Fraser) that such affidavits were admissible.

Opinion (*per* Lord M'Laren) that such affidavits were not admissible as secondary evidence of the deponents even in a case of pedigree, where they bore internal evidence of having been drawn by a solicitor and merely sworn to by the deponent.

This action was raised by George Dreadnot Tennent against Mrs Hamilton Dunbar Tennent, "designing herself of Pool, in the county of Lanark." The pursuer sought to have it declared that he was the only lawful and legitimate son of the deceased Major James Tennent of Pool, and Mrs Louisa Brown or Tennent, his wife, and that as such he was entitled to all the rights and privileges of children born in lawful wedlock, as regards inheritance, succession, or otherwise, and particularly that he was entitled to succeed to the whole heritable estate which belonged to his said father.

The defender denied that the pursuer was the son of Major Tennent of Pool.

The result of the proof is given very fully in the opinions of the Lord Ordinary (Fraser) and Lord M'Laren.

In the course of the proof the pursuer objected to the following documentary and parole evidence being received—(1) Affidavits emitted by Mrs Tennent, and other parties since deceased, in the course of proceedings before the Court of Probate and the Court of Chancery in England with regard to the administration and distribution of the estate of Major Tennent, who had died intestate; (2) certificate of registration of the pursuer's birth by Mrs Tennent, in which Mr Petherick was stated to be the father; (3) evidence of statements having been made by the mother of the pursuer that he was not a son of her husband.

In repelling these objections the Lord Ordinary delivered the following opinion:—"The first and most important objection is as to the admissibility of two documents, viz.—a certificate of the registration of the birth of the pursuer, and the affidavit of Mrs Tennent, of date 22nd June 1865.

"The certificate of birth bears that the registration was made upon information of Mrs Tennent, and it states that the father was Thomas George Petherick. It is proved that Mrs Tennent did register the birth and did sign the register. With regard to the affidavit, this was emitted in a Chancery suit for the purpose of distributing Major Tennent's estate, he having died intestate. It was instituted at the instance of William Turquand, accountant, London, who had been appointed by the Probate Court administrator. In this suit (in which Mrs Tennent was the defendant) she was examined on affidavit. It came out in the course of the proceedings that she had been delivered of a boy, who was stated to be illegitimate. In consequence of such statement the chief clerk directed advertisements to be inserted in the *Gazette* and other newspapers, calling upon all the next-of-kin who had claims upon the estate to come in and assert them. No appearance was made for the pursuer. The only next-of-kin who did appear was the daughter Julia, and the estate was ultimately ordered to be distributed, one-third to the widow Mrs Tennant, and two-thirds to Julia as the only next-of-kin. In this suit Mrs Tennent, being examined upon affidavit, swears—'And I further say that the only child born of the marriage between the said James Tennent and myself was a daughter, who was born on the 1st day of June 1841, and who was christened Louisa Ann Julia, and who is still living and unmarried.' If the statement in the certificate of registration and this statement in the affidavit are to be believed, then the pursuer of this action is illegitimate. But the first question raised is as to the admissibility of these statements. This objection is founded upon a rule which seems to be quite settled in English law, and which is thus stated by Sir James Stephen in his Treatise upon Evidence (p. 111)—'Neither the mother nor the husband is a competent witness as to the fact of their having or not having had