

say what my ultimate opinion in the second might be.

LORD RUTHERFURD CLARK—I confess to feeling a certain amount of sympathy with the pursuer in this case, but of course I cannot proceed on any such feeling, but must content myself with construing the contract which he has made. To my mind he has made a very strict contract indeed—a contract for compensation for erecting a house but upon certain conditions. He is to be paid for the house, which he may build upon his croft, but only if that house is built of stone and lime and is slated. That was the condition, and I think it is perfectly clear upon the evidence that that house does not satisfy that condition. Therefore his claim was not well founded. It is said that there was some evidence to show that the factor upon the estate dispensed with the contract and permitted the erection of a house of a different character on the footing that such a house was to be paid for. I do not think we can look at that evidence. Mere verbal communications cannot alter or vary the written obligation contained in the lease. The factor may have permitted the erection of this house and selected the site, but he was unable to undertake for the landlord that the house should be paid for. With respect to the alleged discharge of the claim in the new lease, I confess I share the doubts—the more than doubts—of Lord Young. Wide as the words of discharge there are, I doubt very much whether they are wide enough to extinguish an individual claim at the instance of one only of the two tenants—a claim which is not common to both.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Pursuer—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender—Darling—Forbes. Agents—W. & J. Cook, W.S.

Friday, March 19.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

KERR (TEENAN'S TRUSTEE) v. TEENAN
AND ANOTHER.

Bankruptcy—Insolvency—Act 1696, c. 5.

On consideration of a verdict of a jury reducing a deed as in contravention of the Act 1696, c. 5—held (*diss.* Lord Young) that in considering whether a deed was struck at by the Act, it was irrelevant to inquire whether the grantor's estate would ultimately be sufficient to pay all his creditors in full if in point of fact he was unable to pay his way, and had been sequestrated within 60 days of the date of granting.

Michael Teenan, farmer, along with his son Robert, carried on business as horsedealers in Dumfries under the firm of Michael Teenan & Son. On 27th March 1883 Michael Teenan was charged, by virtue of an extract registered protest of a bill for £200, to make payment of that sum to

Hugh Crawford, horsedealer, Kilbarchan, the holder of the bill. The charge expired without payment being made on 2d April 1883. On 7th April Crawford presented a petition in the Bill Chamber for sequestration of Teenan's estate, but this petition was dismissed in respect of a minute lodged by the petitioner stating that the bill had been paid. This payment was made by James Teenan, another son of Michael Teenan's, and James Teenan subsequently got an assignation to the bill and debt. On 2d November 1883 Teenan's estates were sequestrated on the petition of Mr Maxwell Witham of Kirconnell, proprietor of one of the farms occupied by him, and on 4th December Thomas Kerr was appointed trustee.

On 11th February 1885, Kerr, as trustee, brought an action against James Teenan, and also against Robert Teenan for his interest, concluding for reduction of (1) a minute to which Michael Teenan was first party, his firm of Michael Teenan & Son second party, and the defender James Teenan third party, and dated 21st February 1883, whereby the firm and partners acknowledged that on 16th February they borrowed £882 from James Teenan with interest at 4 per cent., and the bankrupt agreed to grant a security over his heritable property at Dumfries; and (2) a bond and disposition in security for £882 granted by the bankrupt in James Teenan's favour dated 24th February. The grounds of reduction were (1) weakness and facility; (2) under the first branch of the Act 1621, cap. 13; and (3) under the Act 1696, cap. 5.

The pursuer averred that the bankrupt was insolvent when he granted the deeds, that he was made notour bankrupt by the expiry (on 3d April 1883) of Crawford's charge without payment, and that he had been insolvent ever since.

James Teenan alone defended. He denied the pursuer's averments, and stated that the estates were solvent, and showed a surplus at the time of the alleged notour bankruptcy, and further that the estates if properly realised were still quite sufficient to meet all claims in full.

The case was sent for jury trial, *inter alia*, on the following issue—“(3) Whether the said minute of agreement and said bond and disposition in security, or either of them, were granted by the said Michael Teenan within 60 days of his notour bankruptcy, in contravention of the Statute 1696, c. 5, and in fraud of the rights of the pursuer as representing the lawful creditors of the said Michael Teenan?”

The case was tried on the 8th and 9th July 1885 before Lord M'Laren and a jury. The jury returned a verdict for the pursuer on the third issue, and for the defender on the other issues. The defender obtained a rule on the pursuer to show cause why a new trial should not be granted.

The evidence showed that on 24th February 1883 there was a deficiency on Teenan's estates of £824, 17s. 10d. if certain claims by Hugh Crawford, already mentioned, were allowed; if these claims were rejected there would be a surplus of over £1000, the claims amounting to £1882, 1s. The pursuer, as trustee, had not adjudicated on these claims, and there was very little evidence regarding them. The vouchers were bills drawn by Crawford and accepted by Teenan's firm, and other bills endorsed by

Teenan or his firm to Crawford, who retired them. The bills appeared to have been drawn in connection with the farm of Laigh Grange, in which Teenan and Crawford were both interested—having become cautioners for the tenant, and having owing to his embarrassed circumstances undertaken the management of the farm. Mr C. J. Romanes, C.A., Edinburgh, a witness for the defender, deponed with reference to these bills, "I, as a trustee, would not admit such bills without proof of value."

The pursuer argued—The question here was whether Teenan was insolvent in 1883. On 27th March Teenan had been charged on Crawford's bill, and that charge had expired; Teenan was thereby by the law of Scotland a notour bankrupt—*Monkhouse v. Mackinnon*, 8 R. 454, Lord President's opinion, 456; Bell's Com. ii., 159. The deeds had been executed within sixty days of the expiry of the charge, and therefore fell under the Act 1696, c. 5. The verdict was in accordance with the evidence, and the law laid down by Lord M'Laren in his charge to the jury. [LORD M'LAREN—I told the jury that in judging of the question of insolvency it was not necessary for them to weigh the amount of the assets against the liabilities of the debtor, to see if he could ultimately pay his creditors twenty shillings in the pound, but that if he was unable to meet his engagements as they arose from day to day, then he was insolvent].

The defenders argued—Teenan was not insolvent when he granted those deeds; his estate was able to pay all the claims upon it. The evidence showed that when Crawford's claim, which was a bad one, though not yet adjudicated upon by the trustee, was withdrawn, the estate would yield a surplus. If a debtor was able to pay all his creditors in full he could not be said to be insolvent.

At advising—

LORD M'LAREN—There is in my opinion no sufficient reason for granting a new trial on the only issue on which the jury found for the pursuer. The verdict of the jury on that issue is in accordance with the weight of the evidence, such as it is, for there is not much of it. And in considering that verdict I cannot leave out of account the evidence adduced as to the state of mind of Mr Teenan, and his habits, and that owing to those habits, and the state of mind engendered by them, his once flourishing business had declined, and his properties had become heavily burdened. His condition also was such that his family had had to take the management of his affairs into their own hands, and gave him such small sums as he required for his personal wants. According to his bankers, his business with them was transferred to his son, who continued him as their customer for some time. They ultimately closed his account with some difficulty, though without loss.

Teenan was therefore without either cash or credit at the time in question. These matters were in my opinion for the consideration of the jury in connection with the other evidence on the question of insolvency. And looking to the history of the business, and to the fact that a bill for £200, on which the firm were obligants, lay dishonoured, the jury were I think quite justified in inferring insolvency, notwithstanding

the attempt made to show that if all Teenan's heritable property had been realised there would have been an apparent surplus. That surplus was to my mind at the time in question problematical.

With regard to the explanation of the existence of the bill, and of its remaining unpaid, viz., that Teenan along with Crawford was cautioner for Richmond, the tenant of the farm of Laigh Grange, and that Richmond had fallen into embarrassed circumstances; that Teenan and Crawford had arranged to carry on the farm for their own extrication, and that the bill was drawn by one cautioner on the other, to raise money by way of accommodation to meet obligations connected with the farm—I must say that nothing was adduced to show that that explanation was untrue. But at the same time it did not appear to me that there was anything in this explanation to distinguish this bill from any other obligations, except that they were not admitted by the defender to be due, and it was for the jury to consider whether the defender was able to meet his engagements, or was in the commercial sense insolvent, as being a person who was obliged to stop payment, and have his affairs put under the management of a third person. If that is the right view of insolvency under the Bankruptcy Acts, it appeared to me that there was evidence to go to the jury, and on that ground I think the verdict ought to stand.

LORD YOUNG—I have had great doubts about this matter, but I am unwilling to disturb the verdict of the jury, although I cannot say that my doubts have been removed. This matter came before us, and was put before the jury on three issues. The subject-matter of these issues, to put it shortly, was, whether a certain agreement dated 21st February 1883, and a bond and disposition in security dated 24th February 1883, granted by the father Michael Teenan to his son James Teenan junior, was or was not good? These deeds were assailed under the first issue, on the ground of the imbecility of mind of the father—that is, whether the son, taking advantage of the weakness and facility of his father's mind, obtained these deeds from him to his own leison, and that of the pursuer as representing his lawful creditors? That issue was negatived by the jury.

The second ground on which reduction of these deeds was asked from the jury was that they had been granted by Michael Teenan to a conjunct and confident person without any true, just, and necessary cause, in contravention of the Statute 1621, cap. 21, and that issue was also negatived. Almost all the evidence that was led was led in regard to these two issues, and related to the alleged mental incapacity of the father, and that these deeds had been granted by him without any just or necessary cause. From the way in which the jury dealt with the case I must assume that the father was in a fit state to know what he was doing when he granted these deeds, and that they had been granted for a just and necessary cause.

The only other ground on which reduction of these two deeds was asked for is presented in the third issue, which is framed thus—"Whether said minute of agreement and said bond and disposition in security, or either of them, were granted by the said Michael Teenan within sixty

days of his notour bankruptcy, in contravention of the Statute 1696, c. 5, and in fraud of the rights of the pursuer as representing the lawful creditors of the said Michael Teenan?" That is, that this was a case of real fraud, and that a notour bankrupt had defrauded his creditors by alienating to his son property which really belonged to them. The very minimum of attention seems to have been given in leading evidence in support of this issue. The import of what evidence was given is, that at the time of his bankruptcy, or 60 days before it, he was solvent or not according as the bills granted to Crawford were good for the amount contained in them or were not good for that amount. The deficiency on 24th February 1883 was £824, 17s. 10d., and Crawford's claim, which has not yet been subject to decision by the trustee in the sequestrated estate, amounts to £1882, 1s. Now, this claim of Crawford's is one of rather a suspicious character. It is indeed of such a character that the trustee has refused to make up his scheme of division of the estate as holding them a *prima facie* evidence of debt, and the only witness who gave evidence as a skilled witness on the defender's side, Mr Romanes, C.A., Edinburgh, said, "I as a trustee would not admit such bills without proof of value."

Now, if that claim by Crawford for £1882 is not a good claim, and need not be paid, then so far from being bankrupt the father Michael Teenan had a surplus of about £1000.

The jury, however, found practically that he was insolvent, and this verdict is complained against now on the ground that it is against the weight of the evidence. The first bill granted to Crawford for £200 was not paid by this horse-dealer, but it was paid shortly afterwards, and I cannot hold that on the ground of the non-payment of that bill alone that Teenan was insolvent. I can quite account from the condition in which he seems to have been for his leaving that bill unpaid and afterwards leaving it for his son to take up. I cannot in that state of matters, and with such a very small amount of evidence as seems to have been led on that point, only two pages of the print, say that I think that the matter has been satisfactorily tried on the third issue, or that on the evidence before the jury they could find that Michael Teenan was insolvent when he granted these deeds.

LORD CRAIGHILL—I think that in this case no new trial should be allowed, because it has not been shown that the verdict of the jury was against the weight of the evidence given at the trial, and because it was proved that the bankrupt Michael Teenan was insolvent when he granted the agreement of 21st February, and the bond and disposition in security of 23d February. It appears to me that the evidence does not show that even when all his affairs were cleared up there would have been a surplus, and that clearing up might not take place till some years after he had been charged on this bill, which he did not meet at maturity. But his affairs are not now cleared up, and certainly at this time there is no surplus of assets on his estate. Some of the witnesses examined have come to one conclusion and some to another, but it is at least uncertain whether the estate will pay twenty shillings in the pound to those who hold unsecured debts as well as to

those creditors whose debts are secured. Whether or not, as a matter of law, Michael Teenan at the time he granted these deeds was insolvent there seems no doubt that he is so now. We have this fact proved that Teenan was charged upon a bill, and that the charge expired without the bill being paid. That was quite enough for the jury to proceed upon. I think that here there was no want of evidence, and none of the arguments adduced at the bar has convinced me that the weight of that evidence was against the verdict given by the jury. I do not disagree with Lord Young as to the proof of fraud adduced at the trial, but I have very little sympathy with any party who does not pay a bill which he owes even when charged on it, and then makes over his property to his son. It does not look well. I think that on the evidence the jury were entitled to return the verdict they did, and that no new trial should be granted.

LORD RUTHERFURD CLARK—I confess I was not quite sure that the verdict in this case was right, but I have come to be of opinion that no new trial should be granted. The only part of the case with which we are now concerned is the third issue submitted to the jury. The only question on which that issue turned is whether or not at the time the agreement of February 21st and the bond and disposition in security of February 23d were granted the bankrupt was insolvent. That again turns on the question, whether at the time that he was charged in Crawford's bill he was insolvent? That is the only question of fact and in it there is very little evidence. I was rather surprised at the very slender amount of evidence that was brought forward on that point, but on the point of law I agree with the law as laid down by Lord M'Laren at the trial. If parties cannot meet their obligations then they are insolvent. The only obligation that Teenan did not meet, so far as we know, was the bill granted in favour of Crawford, and he did not meet it either because he did not believe it was due or because he had not the money to pay it with. But it is plain he was in a very imppecunious condition, and unable at that time to meet his obligations so that in the words of Professor Bell, he was insolvent. If there was a fair body of evidence to show that Teenan was insolvent we cannot set aside the verdict.

We were told when we heard this case before that if Crawford's claim of £1882 was struck out that there would be no deficiency of assets to meet the bankrupt's liabilities, and that there might even be a surplus, so that every creditor would get 20s in the pound, but we cannot adjudicate upon the validity of Crawford's claim in this case. It appears to me that the trustee should have adjudicated upon this claim of Crawford's, because as I read the statute the trustee ought to adjudicate upon all claims sent in to rank on the bankrupt's estate within a certain time. If that matter had been adjudicated on by the trustee we would have known by this time whether Crawford's claim was well founded or not, and whether there really was a surplus on the estate or not, for if the claim was bad all interest of the creditors to have these deeds reduced came to an end. We must take the case as it is presented to us in the Judge's notes of evidence, and although I have not come to that conclusion

without difficulty, I think that there should not be a new trial.

LORD JUSTICE-CLERK—I concur. Where a motion is made for a new trial to be granted, and the ground of that application is that the verdict returned by the jury in the trial was given against the weight of evidence, I cannot recall a case where the Court have disagreed with the opinion of the Lord Ordinary who tried the case as to whether there should or should not be a new trial. I think the Lord Ordinary was entirely right in the law that he laid down in his charge to the jury as governing this case. To say that a man is insolvent means that he cannot pay his way; and that was the case presented here to the jury. The jury have given their verdict upon the whole matter, and I am not disposed to change it. I think that the rule here ought to be discharged.

The Court discharged the rule and refused a new trial.

Counsel for Pursuer—R. Johnstone—J. Reid.
Agent—John Macpherson, W.S.

Counsel for Defender—Comrie Thomson—
Shaw. Agent—Thomas McNaught, S.S.C.

Wednesday, February 24.

OUTER HOUSE.

[Lord Fraser.]

THE LORD ADVOCATE v. LAMOND AND OTHERS.

Succession—Vesting.

L. and H. were married on 1st September 1874. By antenuptial contract L. had conveyed her whole estate to trustees, directing them that in the event of there being no child of the marriage, or no child surviving the period of vesting, which was to take place on arrival at twenty-one years or on marriage, they should, on the expiration of the husband's life, make over the fee to such persons as she might appoint, "and failing such writing to her heirs and assignees whomsoever." She died on 17th June 1875 survived by the only child of the marriage, who died on 22d June, a few days after its birth, and by her husband, who died on 13th July of the same year. She had not executed any writing of appointment. *Held*, in a question with the Crown as to succession-duty, that the destination by L. in favour of "her heirs and assignees whomsoever," was a destination in favour of a class to be ascertained at the time when the distribution fell to be made, and not at the date of her death.

Peter Berrie Henderson, shipbroker, Austin Friars, London, and Lilius Dalglish Lamond were married on 1st September 1874. By antenuptial contract of marriage, dated 31st August 1874, Mrs Henderson conveyed in favour of trustees her whole estate, to be held and applied as follows:—(*First*) Payment of expenses, advancing insurance premiums on husband's life

(if necessary), &c. (*Second*) The said trustees shall allow the second party, during the subsistence of the intended marriage, and after the dissolution thereof, in the event of her survival, and there being a child or children of said marriage, the use and enjoyment of the said means and estate, or make over to her the interest or proceeds thereof for her alimentary use alienably. (*Third*) In the event of the second party surviving the first party, and in case there shall be no child or children then surviving of the said intended marriage, or in case of all the said children dying, the said trustees shall make over the said means and estate to the second party absolutely. . . . (*Lastly*) Upon the death of the survivor of the first and second parties the trustees shall make over the fee of the said means and estate to the child or children of the said intended marriage in such shares and proportions, if more than one, and subject to such limitations and conditions as the second party may appoint by any writing under her hand, and failing such writing equally among them if more than one; declaring that unless otherwise provided by such writing the said child or children shall not have a vested interest in the said means and estate, nor shall the same be payable until they respectively attain the age of twenty-one years or be married, whichever of these events shall first happen; and also declaring that in the event of the first party predeceasing the said child or children before they attain the period of vesting, the said trustees may apply the income of their or any of their shares for the benefit of the child or children prospectively entitled to such shares, and also if they see fit, may advance to or expend for the benefit of them or any of them such part of the capital of the shares provided to them as they may think proper, notwithstanding the same shall not have vested; and also declaring that in the event of any of the said children predeceasing the period of vesting without leaving lawful issue, such deceased's share shall accrue and belong to his or her brothers and sisters, and the lawful issue of any brothers and sisters who may have predeceased the period of vesting leaving such issue, equally among them *per stirpes*, and in the event of there being no child or children of the said intended marriage, or of all the children thereof predeceasing the period of vesting, then the said trustees shall, after the expiration of the first party's life, make over the fee of the said means and estate to such person or persons as the second party may appoint by any writing under her hand (which writing should not require her husband's consent), and failing such writing to her heirs and assignees whomsoever."

On 9th June 1875 a child was born. On 19th June 1875 Mrs Henderson died without having executed any writing of appointment. On 22d June 1875 the child died, and on 13th July 1875 Mr Berrie Henderson died intestate without issue.

The moveable and personal estate belonging to Mrs Berrie Henderson, and conveyed by her to her marriage-contract trustees, was realised and divided among her four brothers and three sisters, who survived her, in pursuance of a family arrangement based upon the footing that the true construction of the marriage-contract was that the words "to her heirs and assignees