

it altogether merits further consideration. I believe it is the fact, and it strengthens my view for further consideration, that upon an appeal being taken to the House of Lords the case was settled upon the footing that the judgment should be held as reversed, and with costs. But the question here regards the title to sue an action of damages upon such facts as are set forth here, and my opinion is that there is no title to sue in this action. We have limited the title to sue in our practice hitherto to legitimate parents and legitimate children, and I think we have no authority to extend it. If it is thought desirable to extend it there must be an appeal to the Legislature. Whether they would think it fitting to deal with Scotland differently from England in the matter it is not for us to determine. In England they thought fit very recently to determine that there should be no such action, and the probability is that that would be their view for Scotland also. These actions are of an anomalous character altogether. I suppose that where children sue for the death of their father they must sue as a body—as a family. It was argued that wherever feelings are wounded there ought to be *solatium* by those who cause that pain or suffering. The law has not recognised that, for it has refused actions at the instance of a brother for the death of a sister, or of a sister for the death of a brother. The brother and sister may have lived together all their days, and there may be as much attachment, love, and interest between as is possible in this world. Still there is no action. It is not according to custom. It has not been allowed. It has never been allowed here, and it was not allowed by the Legislature in England when dealing with the subject. If it were allowed the case of bastards would be very perplexing indeed. I do not know what limit there is to the number of bastards a woman may have. I remember Lord Mackenzie saying upon this bench that there is no limit at all after she has had one. There may be any number of them, and any number of fathers. Well, if she could sue for the death of one of them, any one of them could sue for her death, and if any one of them, then every one of them. There must be a limit, and I think the limit we must take is that which is according to the custom heretofore—that is, the common law and practice in the matter. That has not extended it beyond legitimate parents and their children, and I am therefore of opinion that we ought to sustain the first plea for the defenders, that the pursuer has no title to sue, and to dismiss the action.

The LORD JUSTICE-CLERK and LORD LEE concurred.

LORD RUTHERFURD CLARK was absent when the case was heard.

Counsel for the Pursuer—Young—M'Lennan.
Agent—Thomas Liddle, S.S.C.

Counsel for the Defenders—Comrie Thomson—
Dickson. Agent—W. G. L. Winchester, W.S.

Saturday, March 16.

FIRST DIVISION.

[Sheriff-Substitute of Forfarshire.

M'NAB AND OTHERS v. CLARKE.

Bankruptcy—Cessio—Notour Bankruptcy—Insolvency—Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), secs. 6 and 8.

By the 8th section of this Act it is provided that "any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 . . . or of this Act," may present a petition to the Sheriff of the county in which is his debtor's domicile, praying for decree of *cessio* against the debtor; and "with the petition shall be produced evidence that the debtor is notour bankrupt." By the 6th section it is provided that where imprisonment is rendered incompetent by the Act, "notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by expiry of the days of charge without payment."

In a petition for his debtor's *cessio* a creditor produced a charge expired without payment as evidence of the debtor's notour bankruptcy. A suspension of the charge had been raised, and the note had been refused. It appeared from the circumstances that the creditor might reasonably hope for the ultimate payment of his debt, although the debtor was unable to make present payment thereof. *Held* that there was *prima facie* evidence of the debtor's notour bankruptcy.

By bond and disposition in security, dated 13th and recorded 14th October 1876, David Wilkie Clarke and David Crabb, both residing in Dundee, bound themselves as trustees and individuals, and also conjunctly and severally, and their heirs, executors, and representatives whomsoever, also conjunctly and severally, and without the necessity of discussing them in their order, to repay the sum of £2000 to Jane M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, and to pay interest thereon at the rate of 4½ per cent. till payment, and in security of repayment they further disposed certain lands.

The bond was registered in the Books of Council and Session on 12th January 1888, and on 24th January Clarke was charged to make payment of the sum due thereunder within six days, with interest from the term of Martinmas till payment was made. On 31st January Clarke raised a suspension of the charge, and on 14th March the Lord Ordinary on the Bills refused the note of suspension, and on 26th May the First Division adhered.

The present petition was thereafter presented in the Sheriff Court of Forfarshire at Dundee by the creditors in the above mentioned bond, viz., Jane M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, for the *cessio* of the said David Wilkie Clarke.

The pursuers, after setting forth the fact of the charge having been made, and the proceedings in the suspension, averred, *inter alia*, as follows—"Since the term of Whitsunday (15th

May) 1888 the half-year's interest due on the said sum of £2000 at that term has been paid or accounted for to the pursuers, and sundry sums have also been received by them of sundry dates, all subsequent to the last-mentioned term, to account of said sum of £2000, amounting *in cumulo* to £92, 5s. 8d., being £13, 2s. 4d. of net proceeds of goods which belonged to said defender sold under pouding, and £79, 3s. 4d. of balance of rents, after deducting fire insurance premium, interest, and other outgoings. The said principal sum of £2000, with interest thereon at the rate of £4, 10s. per centum per annum from the said term of Whitsunday, is still due, under deduction of the said sum of £92, 5s. 8d. and interest corresponding thereto, as from the said term, all as more fully set forth in copy state of debt herewith produced and referred to, showing the debt at the date of the presentation hereof to be £1944, 8s. 10d., including therein interest to said date, and £1, 13s. 1d. of expenses. The days of charge have expired, and the debt has not been paid or satisfied to a greater extent than that above mentioned. Said extract bond and disposition in security, and the execution of said charge thereon, are herewith produced and referred to. Upon the 4th day of October 1888 notice of the pursuer's intention to present this petition was duly given to the defender in terms of the Act of Sederunt of the Lords of Council and Session, of date the 22nd day of December 1882, and section first thereof, entitled Act of Sederunt aent Processes of Cessio. A certificate of the posting of the said notice to the defender, and the Post Office official receipt therefor, are herewith produced. The defender is insolvent, and unable to pay his debts."

The pursuers pleaded—“(1) The defender is, in the circumstances stated, notour bankrupt within the meaning of the Debtors (Scotland) Act 1880, and the Bankruptcy and Cessio (Scotland) Act 1881 amending the same. (2) The pursuers, being creditors of the defender, are, in respect of his notour bankruptcy, entitled to obtain decree as craved.”

Section 6 of the Debtors (Scotland) Act 1880 provides that “in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79).” Section 8 of the same Act provides as follows—“Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), or of this Act, may present a petition to the sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decreed to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate for such behoof, and such process shall be taken and

deemed to be a process of *cessio*. In the petition there shall be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence, so far as known to the petitioner, and with the petition shall be produced evidence that the debtor is notour bankrupt.”

In anticipation of the presentation of the petition a *caveat* had been lodged and the parties were heard before the Sheriff-Substitute (SMITH).

On 21st November the Sheriff-Substitute having made avizandum found “that the pursuers' averments and relative documentary evidence do not sufficiently warrant the granting of the petition; in respect, and *separatim* . . . that the inference deducible from the documents does not amount to *prima facie* evidence of insolvency, therefore dismisses the petition.”

“*Note*.—The respondent and David Crabb are debtors under bond to the pursuers, and are bound conjunctly and severally, and as individuals, to pay to the pursuers the sums of £1600 and £400, and for these two sums, amounting to £2000, they have granted heritable security with the usual power of sale over three separate properties in Dundee. The pursuers have taken no steps to exercise their power of sale. They have charged the respondent and his co-obligant, be he co-partner or joint-adventurer, or whatever kind of colleague he may be, and without waiting to see whether the charge would be obeyed by this respondent or not, two days after its date they made intimation that they were to institute processes of *cessio*. The days of charge have, however, eventually expired, and payment has not been made. The petitioners aver that the respondent and his co-obligant are insolvent, but they tender no evidence of insolvency except the expired charge, and they plead that the expired charge by itself constitutes both *prima facie* evidence of insolvency and notour bankruptcy according to the 6th section of the Debtors (Scotland) Act 1880. They maintain that under said section and the 8th they are entitled to have the first order in a process of *cessio* pronounced against the respondent in each of the two processes. . . .

“There is no evidence of insolvency except the expired charge, and I am not disposed to hold that every expired charge for every debt, however small, is proof of notour bankruptcy against any debtor, however rich, more especially when the creditor has a power of sale, be it under a bond or a pouding, and shrinks at the same time from taking payment of his own debt in the readiest way, and also in proving his averment of insolvency if that averment be really true. But I am satisfied in this case the petitioners' own state of debt contains *prima facie* evidence of solvency. This state shews that within the last six months, or rather five months, the rents of the property exceeded the interest and outlays by £80, and that in that time the petitioners' debt had been reduced from £2000 to £1907. Therefore it seems to me that the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt, and about the regular and timely payment of interest, that there is no *prima facie* evidence of insolvency, and that there is *prima facie* evidence that the process is attempted for some other and less justifiable object than the mere payment of debt.”

The petitioners appealed, and argued—The process of *cessio* at the instance of a creditor was introduced by the Debtors Act 1880. By that Act imprisonment for debt was abolished save in certain specified instances and it was necessary to have “notour bankruptcy” constituted in some other way. Section 6 of the Act showed how that was to be done. Insolvency was presumed when the other requisites occurred—Bell’s Comm. 5th ed. 317, 7th ed. 334; *Knowles v. Balgarnie*, February 1, 1865, 3 Macph. 457. In the present case there had been an inhibition and a poiding of the ground, both of which processes had been resisted by the defender—*Clarke v. M'Nab*, March 10, 1888, 15 R. 569; *Clarke v. M'Nab*, May 26, 1888, 15 R. 670. These proceedings gave some evidence of continued insolvency. Having got an expired charge, an inhibition and poiding of the ground, it was difficult to see what more could be got to constitute “notour bankruptcy”—*Black v. Watson*, November 29, 1881, 9 R. 167; *Teenen’s Trustee v. Teenen*, March 19, 1886, 13 R. 833.

The respondent argued—The inference deducible from the documents did not amount to *prima facie* evidence of insolvency, and insolvency had to be established as a requisite of notour bankruptcy. A mere expired charge was not sufficient. Insolvency had to be established. The practice under the old law afforded no ground for the proposition now maintained which was that the absence of an offer to pay the debt coupled with an expired charge constituted notour bankruptcy. Here there was no *prima facie* evidence of insolvency as the rents more than met the interest on the bond. The question to be decided involved the further question whether it was possible to get *cessio* and then sequestration as following thereon, when on the evidence of insolvency presented sequestration could not have been obtained—44 and 45 Vict. cap. 22, sec. 11.

At advising—

LORD ADAM—The appellants in this case are creditors of the respondent and David Crabb, under a bond and disposition in security dated 13th October 1876, for £2000. The respondent and Crabb bound themselves to pay jointly and severally, and in security of repayment they conveyed certain subjects in security. On the 24th January 1888 they were charged by the appellants under the bond to make payment, and the charge, which expired six days later on 31st January, was then brought under suspension, and the note was refused on 26th May 1888. On 4th October the appellants intimated, in terms of the Act of Sederunt of September 1882, their intention to apply for *cessio* against the respondent. They applied and the respondent lodged a *caveat*, with the result that both parties appeared before the Sheriff, and he pronounced the interlocutor of 21st November 1888. By that interlocutor he “finds that the pursuers’ averments and relative documentary evidence do not sufficiently warrant the granting of the petition,” and he states as a reason for arriving at that conclusion “that the inference deducible from the documents does not amount to *prima facie* evidence of insolvency,” and this we took time to consider. I am, however, of opinion that it is illfounded. It depends on the construction of

the Act 43 and 44 Vict. cap. 34, sec. 8, which says—“Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856, . . . or of this Act, may present a petition to the Sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decreed to execute a disposition *omnium bonorum*,” and so on. What the meaning of “notour bankruptcy” is, is discovered by going to section 6, which says—“In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or, when a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made.” “Notour bankruptcy” is therefore constituted by “insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment.” We have next to look at the 9th section of the Act, which points out what the Sheriff has to do when the petition for *cessio* is presented to him. His duty is this—“The Sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette*, intimating that such petition has been presented, and requiring all the creditors to appear in Court on a certain day, being not less than 30 days,” and so forth.

We have here undoubtedly one element going to constitute notour bankruptcy, namely, a duly executed charge followed by expiry of the days of charge without payment. The only question is, whether or not there is *prima facie* evidence of insolvency, and that is the question with which the Sheriff-Substitute has dealt.

We must, I think, first ascertain what is the meaning of insolvency in the sense of the Act. It means, I think, present inability to pay a debt. If a man, when a demand has been made upon him, cannot pay, he is *prima facie* insolvent. It is no answer to say that if he were given time to realise he might meet the obligation. Now, if that is the meaning of insolvency, it appears to me that the fact that there has been a charge for payment, and that the time allowed for payment has expired is equal to *prima facie* evidence of insolvency, and I confess I do not see how you could have better evidence. No doubt it might be said in some cases that the debt has not been paid because not due. But the charge has been here brought under suspension, and the note was refused, and we have thus an assurance that the respondent has no good ground for objecting to pay the debt. I cannot accept therefore the grounds which the Sheriff-Substitute gives in his note, on which he thinks there is no *prima facie* evidence of insolvency. These are stated thus at the end of his note—“But I am satisfied in this case the petitioners’ own state of debt contains *prima facie* evidence of solvency. This state shows that within the last six months, or rather five months, the rents of the property exceeded the interest and outlays by £80, and that in that time the petitioners’ debt had been reduced from

£2000 to £1907. Therefore it seems to me that the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt, and about the regular and termly payment of interest, that there is no *prima facie* evidence of insolvency, and that there is *prima facie* evidence that the process is attempted for some other and less justifiable object than the mere payment of debt." It is quite clear what the error of the Sheriff-Substitute has been. He thinks there is no *prima facie* evidence of insolvency, "because the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt." It is not a question of "ultimate" payment. The question is whether the respondent is able to make present payment of the debt. In all the circumstances I think there is ample evidence of insolvency; and if there is *prima facie* evidence of insolvency concurring with the production of an expired charge, there is *prima facie* evidence of notour bankruptcy, and the Sheriff-Substitute should have proceeded to grant decree of *cessio*.

LORD LEE—My opinion is that the Sheriff-Substitute has gone too fast in throwing out this petition. The case, as was explained to us, was before us on a *caveat*, and the only question, therefore, was whether the petition should be entertained and proceeded with in terms of the statute.

The only point for consideration is, whether there was *prima facie* evidence of notour bankruptcy sufficient to entitle the petitioner to a warrant in terms of the 8th section of the Act. I think that the statute requires the Sheriff to consider this point, and that he is not bound to accept as in all cases sufficient and conclusive the fact that a charge for payment has expired. To constitute notour bankruptcy the statute requires that insolvency shall concur with the expired charge. But in the case of an undisputed debt, neither paid nor offered to be paid, I think that an expired charge is sufficient to raise a presumption of insolvency, and therefore affords *prima facie* evidence of notour bankruptcy.

The provisions of the second and third subsection of clause 9, as to the procedure which is to follow, appears to me sufficient to enable the Sheriff to afford the bankrupt an opportunity at a later stage of showing that the petition ought to be refused.

The LORD PRESIDENT concurred.

LORD MURE and LORD SHAND absent.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor appealed from, and before remitting to the Sheriff find the appellants entitled to expenses in this Court, allow an account thereof to be given in, and remit the same to the Auditor to tax and report to the Sheriff: Further, remit the cause to the Sheriff to proceed therewith in terms of law, with power to decern for the taxed amount of the expenses hereby found due."

Counsel for the Appellants—Gloag—Graham Murray. Agents—Watt & Anderson, S.S.C.

Counsel for the Respondent—D. F. Mackintosh—Salvesen. Agent—J. Smith Clark, S.S.C.

Friday, March 19.

SECOND DIVISION.

SCOTT v. SCOTTISH ACCIDENT INSURANCE COMPANY (LIMITED).

Policy of Insurance—Construction—Liability Defined by Notice on Policy—Ambiguity to be Interpreted "contra proferentem."

A man effected a policy of insurance with an accident company, which provided that "if the insured shall sustain any bodily injury . . . which shall occasion permanent partial disablement (as defined on the back hereof) then the company shall be liable to pay to him the sum of £200." On the back of the policy there was the following:—"Notice.— . . . Permanent partial disablement implied the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight."

Held that the notice was ambiguous in its terms, and must be read in the most favourable way for the insured, and that consequently he was entitled to recover the sum of £200 for permanent partial disablement from hernia if he had otherwise complied with the conditions of the policy.

On 3rd February 1885 John Scott, timber merchant, Finnieston Sawmills, Glasgow, effected a policy of insurance with the Scottish Accident Insurance Company (Limited), having its registered office at No. 115 George Street, Edinburgh.

The policy contained the following clause—"If the insured shall sustain any bodily injury caused as aforesaid (viz., by violent accidental means) which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay to him the sum of £200 within one calendar month, after satisfactory proof of such disablement shall have been furnished to the directors, and if such injury does not entitle the insured to the compensation for permanent total or permanent partial disablement, as above provided, but shall independently of all other causes immediately and totally disable and prevent him from attending to business of any kind, then compensation shall be paid to him at the rate of £3 per week for the period of such continuous total disablement as shall immediately follow the said accident and injury, or at the rate of 15s. so long as he shall be thereby rendered partially unable to attend to business. But the period during which compensation for total or partial temporary disablement, or both, is to be paid, shall not for any single accident exceed twenty-six consecutive weeks from the date thereof." And on the back of the policy the following definition was given:—"Notice.—Permanent total disablement implies the loss of both hands or of both feet, or the loss of a hand and a foot. Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight." The said policy also contains a provision in the following terms:—"Provided always that this policy shall not extend to, nor cover the death or injury of the insured . . . arising from natural disease, or weakness, or exhaustion consequent upon disease or any surgical operation