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 M'Naught, S.S.C.

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*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 liferent, 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 Lilias 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 survivance, 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 allenarly. (*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 liferent, 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

whomsoever" occurring therein, meant Mrs Berrie's heirs and assignees as at the date of the distribution of the estate, and not as at the date of her death. They consequently offered to pay inventory-duty and legacy-duty on one succession according to the rule applicable to brothers and sisters. The Crown, however, demanded inventory-duty on three successions according to the rates applicable to intestate succession, with interest, under 44 Vict. c. 12, sec. 27 ; 55 Geo. III. c. 184 ; and 23 and 24 Vict. c. 80, sec. 5, on the footing that in consequence of the death of the only child of the marriage before majority, the purposes of the marriage-contract in regard to the fee had failed ; that in so far as it was moveable it fell, subject to her husband's liferent, to Mrs Berrie Henderson's heirs *in mobilibus;* that her heir *in mobilibus* at the date of her death was her daughter; that on the daughter's death the estate fell to her heir *in mobilibus*, namely, her father ; and that on his death it fell to his brother as his heir *in mobilibus.*

This demand having been refused by Mrs Berrie Henderson's brothers and sisters or their representatives, the Lord Advocate brought an action of declarator against them. It was admitted by the parties that Mr Berrie Henderson was a domiciled Scotsman at the date of his death.

On the 24th February 1886 the Lord Ordinary (FRASER) pronounced the following interlocutor:—"Assoilzies the defenders from the conclusions of the summons, reserving to the pursuer action for the duties on the footing that no estate of fee vested in the child Lilias, or in the husband Peter Berrie Henderson, and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—The Lord Ordinary is of opinion that this case is governed by the decision in the case of *Haldane's Trustees* v. *Murphy, &c.*, December 15, 1881, 9 R. 269. It is true that the deed which is here to be construed is not a will but a marriage contract. But that circumstance tends all the more to lead to the conclusion sanctioned by the case of *Haldane.*

"The provision in the contract is that in the event of there being no child of the marriage, or of all the children predeceasing the period of vesting, then the trustees shall, after the expiration of the husband's liferent, make over the fee of the wife's estate to such persons as she might appoint, 'and failing such writing, to her heirs and assignees whomsoever.' Now the period of vesting of the estate in the children was on their arrival at twenty-one years or marriage. The only child of the marriage died a few days after birth, and therefore nothing vested in that child as under the contract. The wife did not make a writing appointing her estate to go to anyone, and the question then comes to be, who are the heirs and assignees that are entitled to take in the event which happened. The parties construed these words to mean the heirs and assignees at the time when the distribution or conveyance of the estate was to be made, and not the heirs and assignees as at the death of the wife. On this footing the wife's money has been distributed among her own brothers and sisters, and this suit has been raised ten years after the distribution has been made in order to have effect given to a different distribution. The mother died on 17th June 1875, having given birth to a child on the 9th June. That child died on the 22d of June, five days after its mother, and then the husband and father died on the 13th of July. The Crown's case is that the heir of the wife was the infant daughter, and that a right to the wife's personal estate carried by the contract vested in that daughter, and the daughter having died, then her heir was her father, and he having died intestate, the estate goes to his heirs and not to the heirs of the wife.

"Independently of the authority of the case of *Haldane*, the Lord Ordinary would hold this construction to be contrary to the intention of parties as disclosed by the provisions of the contract. It is very plain that the object of the contract was to secure the wife's property to her own relations after making the usual provision of a liferent on behalf of her husband. If there were children of the marriage then the fee was to go to them, but if there were none it was to go, after the liferent to the husband was ended, to the persons who would then be the wife's heirs.

"The whole question here is as to the amount of duty claimable. The defenders have offered and still offer to pay inventory-duty on the personal estate, and also legacy-duty on the estate according to the rate applicable to brothers and sisters, but this has been refused by the Crown, and a demand made for inventory-duty on three successions, according to the rates applicable to intestate succession. The Lord Ordinary is of opinion that this demand cannot be granted, and that the offer of the defenders is all that they are bound by law to make."

Counsel for the Pursuer—J. Campbell Lorimer. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Defenders — R. V. Campbell. Agents—W. & J. Burness, W.S.

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# LANDS VALUATION COURT.

*Friday, March* 12.

## NICOLSON AND OTHERS *v.* ASSESSOR FOR PORT-GLASGOW.

*Valuation Cases—Sale by Tenant who was also* pro indiviso *Proprietrix—Goodwill of a Public-House.*

N and L were *pro indiviso* proprietors of a tenement, part of which was let as a public-house to L's husband at an annual rent of £19, 10s.; on his death L purchased the business from his trustees; on her death her trustees sold the business and tenant's fittings, goodwill, &c., to M for £1000; L's trustees and the other *pro indiviso* proprietor, N, then granted a lease to M for seven years at the annual rent of £40. *Held* that the transaction was a sale between tenant and tenant, that there was no consideration other than the rent, and therefore that £40, the amount of the rent, was to be taken as the annual value.

Mrs Mary Conway or Nicolson and Mrs Jane Conway or Lawson were the *pro indiviso* proprietors of a tenement in Shore Street, Port-Glasgow.