in process, that the money was raised. The debt —principal, interest, and charges—with a sum of £14 due to Mr Romanes which was also to be provided for, amounted to £157, 5s. 9d.; of this £100 was raised by assignation of the bond to that extent to Miss Davidson; this is proved by the assignation; and the balance was provided out of the contents of a deposit-receipt for £68, 17s. 10d. granted to the pursuer by the Lauder branch of the Bank of Scotland, which was brought by Jane Laidlaw to Mr Romanes that the contents so far as necessary might be used in paying the balance of her debt. This receipt has been recovered. It is endorsed by her, and following her by Mr Romanes, her sister's agent, which shows that the contents of the receipt passed into his hands. All that was needed, however, was £57, 5s. 9d. and for the balance of £12, 3s. 7d. a deposit-receipt from the same agency, dated 11th November 1876, in favour of the pursuer, was sent through her sister to the pursuer by Mr Romanes. This deposit-receipt has also been recovered, and is endorsed by the pursuer and by her sister, the contents apparently passing into the hands of Jane. Now all these things were communicated at the time by letter from Mr Romanes to his client. The letter has not been recovered, but a copy taken from Mr Romanes' letter-book is in process, and it is perfectly certain that the letter itself not only was sent by Mr Romanes, but was received by Jane Laidlaw, for, as Mr Romanes writes, there was sent in the letter the deposit-receipt for £12, 3s. 7d. the contents of which were afterwards uplifted by Jane after the receipt had been endorsed by her and by the pursuer. The possession of this deposit-receipt sent in this letter proves with absolute certainty that the letter in which it was sent must have been received. Such is the evidence laid before the Court, and nothing could be more clearly established than the fact that £57, 5s. 9d. of the pursuer's money was used by Jane Laidlaw's agent, with her knowledge, in providing *pro tanto* for payment of her debt. It is said by the defenders, *non constat* that this money was a loan—it might have been a donation, or in payment of a debt—but neither the one nor the other of these things is to be presumed, and there is not a particle of evidence by which either can be supported. On the whole matter, therefore, I am of opinion that decree for £57, 5s. 9d. ought now to be pronounced.

Lord Rutherfurd Clark—I am of the same opinion. It is proved beyond the possibility of doubt that £57, 5s. 9d. of the pursuer's money was applied in payment of the debt which was undoubtedly due by her sister Jane. That fact itself establishes the debt that the pursuer now seeks to recover, unless it can be shown that the sum sued for was the subject of donation to her sister. That of course could not have been presumed, but besides any such idea is displaced by the evidence which we have in the case. It is plain that the money was given in loan, and was not given by way of donation, for the agent by whom the transaction was carried out records it by contemporaneous writing that the sum was given in loan, and the fact is communicated by him to his client immediately after the transaction was carried through. I confess I never saw a clearer case.

Lord Young was absent.

The Court recalled the Lord Ordinary's interlocutor and gave decree for the sum sued for.

Counsel for Reclaimer — Rhind. Agent—Thomas Dalgleish, S.S.C.

Counsel for Respondent—MacWatt. Agents—Mack & Grant, S.S.C.

Friday, March 19.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

SKINNER *v.* LORD SALTOUN.

Lease—Crofter—Obligation to Erect Buildings—Construction of.

The tenant of a croft of ten acres under a nineteen years' lease bound himself in the lease, *inter alia*, to erect a house on the croft for which he was to receive payment at the end of his lease "if built of stone and lime and slated." He built a house on the croft, which was not of stone and lime, but of stone and clay, and was not slated, but was partly tiled and partly thatched. *Held* that he had not so fulfilled his obligation as to entitle him to receive payment for the house at the end of the lease.

Lease—Renunciation of Claims by Two Tenants, One of whom was Previous Tenant.

The lease of a small croft in favour of two tenants contained this clause—"Further, the tenants hereby renounce and give up all claims in respect of houses and dykes on the said croft, and bind themselves and their foresaids, at their own expenses, to maintain and uphold the same in good repair during the currency of this lease, and at its expiry to leave the same to the proprietor or incoming tenant." Of the two tenants one had been sole tenant under the former lease. *Question*, Whether this clause imported a renunciation by this tenant of claims arising to him under the former lease, or whether the claims renounced must be claims in which both tenants were creditors?

Lease—Verbal Alteration.

The tenant of a small croft under a nineteen years' lease became bound in the lease to erect a house on the croft, for which he was to receive payment "if built of stone and lime and slated." The house erected was of stone and clay, and was partly tiled and partly thatched. *Opinion* (per Lord Rutherfurd Clark) that it was incompetent to prove a verbal agreement by the landlord's factor that the tenant should receive payment even for this house.

By missive dated in 1858 David Skinner offered for a nineteen years' lease of a croft of ten acres on Mormond, part of Lord Saltoun's estate, in, *inter alia*, the following terms:—First, Skinner was to enclose and improve the said croft according to certain specified conditions; Second, he was to possess it rent free for the first three years, he was to pay 2s. per acre for the fourth year, and

2s. per acre additional for each succeeding year until it reached 10s. per acre, at which rent it was to remain for the rest of the lease; and Fourth, he bound himself "to build a house on said croft within the first three years of the lease, and that agreeably to a plan and in such a situation as shall be approved of by you, for which I am to receive payment at the end of my lease according to the regulations, if built of stone and lime, and slated." This offer was accepted by Lord Saltoun's factor on his behalf, and Skinner entered into possession.

On the termination of the lease in 1877 Skinner made no claim on Lord Saltoun for the value of the house which he had erected in fulfilment of article 4 of the missive offer, but continued in possession of the croft under a new lease, whereby Lord Saltoun let the croft to Skinner and one of his sons for the space of one year from and after Whitsunday 1877, and thereafter yearly until any term of Whitsunday previous to which they should have given to or have received from Lord Saltoun, or those acting for him, twelve months' notice in writing. That lease contained this provision—"Further, the tenants hereby renounce and give up all claims in respect of houses and dykes on the said croft; and bind themselves and their foresaids, at their own expenses, to maintain and uphold the same in good repair during the currency of this lease, and at its expiry to leave the same to the proprietor or incoming tenant without any claim for payment." Skinner and his son continued in occupation of the croft under this lease until Martinmas 1884, when they were removed under decree of removing.

In January 1885 Skinner brought an action in the Sheriff Court at Aberdeen against Lord Saltoun for £100 as the value of the buildings he had erected on the croft under the missive of 1858. He founded on the missive and stated that the house which he had erected was of the value of £100. He further denied the defender's averment in answer, and explained "that the defender's factor approved of the said house.

The defender called on the pursuer to produce "written evidence that the defender's factor approved of the house built by pursuer, which house is not of a description for which defender is bound to pay under the said missives of lease, in respect that it is not built of stone and lime and slated."

The defender further in his statement of facts founded on the clause of discharge in the lease of 1877, and in answer the pursuer averred that that lease had been signed by him and his son in essential error and ignorance of its provisions, induced by the representations of the defender's agent.

The pursuer pleaded—"The pursuer having built a house, and the defender having agreed to pay for same, the pursuer is entitled to decree as prayed for. (2) The pursuer has never renounced his claim for said house, and is entitled to decree as prayed for. (3) *Separatim*—The 1877 lease having been signed by pursuer in essential error, induced by the active misrepresentation of the defender's agent, the pursuer is entitled to have the same set aside by way of exception."

The defender pleaded—"(1) Pursuer having failed to build a house of a description for which defender is bound to pay under the missives of lease founded on by pursuer, the defender should be assoilzied, with expenses. (2) The pursuer having renounced and given up in 1877 the claim made in this action, defender should be assoilzied, with expenses."

A proof was allowed. The evidence was to the following effect. The buildings erected by the pursuer were not of stone and lime, but of stone and clay, and in place of being slated they were tiled with some thatch added. They consisted of a dwelling-house and outhouses. The former the defender's witnesses valued at £22, 14s. 9d., the latter at £17, 3s. 6d. The pursuer put in a detailed state which brought out a total value of £70, 3s. for the dwelling-house and £38, 8s. 3d. for the outhouses. No written approval by the defender or his factor of buildings of this character was produced, but the pursuer and his son spoke to that approval having been given by the factor verbally. The factor was dead at the date of the action. The evidence bearing on the signing of the lease of 1877 by the pursuer and his son is sufficiently detailed in the Sheriffs' notes.

On 6th August 1885 the Sheriff-Substitute (Dove Wilson) pronounced this interlocutor—"Finds that by the pursuer's lease of 1858 he was entitled to receive at its expiry payment for the house to be built by him, if built of stone and lime and slated: Finds that the house was not built of these materials, but was built of stone and clay, and tiled: Finds that the pursuer has failed to prove that the defender had agreed to waive the stipulation in the lease on this point: Finds further, that under the lease of 1877, which was granted at the expiry of the former lease, the pursuer specially agreed to renounce all claim in respect of the said house, and that the pursuer has failed to prove that he entered into this renewed lease under essential error as to its terms: Finds that the pursuer has no claim, either at common law or under the terms of the leases libelled, for payment of the value of the said house: And therefore assoilzies the defender from the conclusions of the action: Finds the defender entitled to expenses, &c.

"*Note.*—The pursuer claims £100 as the value of a house built by him on the croft which he leased from the defender. It turns out that this claim is made up partly in respect of a dwelling-house and partly in respect of certain outhouses. The former the pursuer values at £70, 3s., and the latter he values at £38, 8s. 3d.; while for the defender the two are valued respectively at £22, 14s. 9d. and £17, 3s. 6d. The outhouses, however, are not covered by the terms of the lease, and they therefore by the action of the law fall to the landlord without payment, it being presumed that when the pursuer took his croft he had in view, in fixing the rent he could give, that whatever accommodation of this kind he put up he would have to leave it behind him. With regard to the house, the defender pleads that any claim which the pursuer might otherwise have had, under his lease of 1858, is excluded, firstly, by the pursuer not having built the house of the stipulated materials; and secondly, by the fact that when the renewal lease of 1877 was granted, the pursuer recognised this and renounced his claim. In the event of these two pleas failing, the defender pleads, thirdly, that the pursuer is due him as arrears of rent a sum, namely, £22, 16s. 10d., which is in

excess of the true value of the house, and that the one claim falls to be set off against the other. The terms of the original lease are quite distinct. The pursuer is promised repayment of the house if it is built of stone and lime and slated. There is no other promise of repayment; and as it appears the house was not built in the manner stipulated, but in a manner which was, in one respect at all events, very decidedly inferior, this promise is inapplicable. There is no evidence that the defender, or anyone on his behalf, consented to the substitution of any other promise. The pursuer and his son say that the factor for the time agreed to the change of materials, and it seems certain that the factor, at all events, did not make any objection. But the factor appears to have had no power to object to such a change. If the pursuer chose to build his house in an inferior manner he could do so, the only result being that he lost his claim for its value. What is wanted is evidence to shew that any promise was made to give value for the inferior house. Such a promise ought to have been made in writing, but there is not even satisfactory evidence that a verbal promise was made. Under the original lease, therefore, it appears to me that the pursuer has failed to make out his claim. Under the renewed lease of 1877 there is no question but that the claim for the value of the house was, as matter of fact, renounced. The question is, whether the renunciation was not given in essential error as to its terms? If it had appeared that the pursuer had had a claim to a considerable amount, I think that there would have been some force in his plea on this point. It would be a thing most unlikely in itself that the pursuer would surrender any large claim for the sake of getting merely a lease from year to year, which was all he got on renewing; and as it rather appears that he never saw a draft of the new lease, or heard it fully read over, or got a copy of it, the room left for his being under essential error as to its terms are pretty wide. But as it appears that the pursuer then had no claim under the original lease, the probability of his consenting to a formal discharge is great; and as he has not shown that he was wilfully misled in any way, and as he might, had he felt inclined, have taken his own time to read and examine the renewal lease, the discharge in it must stand. At common law it is needless to say that the pursuer had no claim to the value of anything which he might erect on the property of another."

The pursuer appealed, but on 13th November 1885 the Sheriff (GUTHRIE SMITH) adhered to his Substitute's interlocutor.

"*Note.*—At Martinmas 1858 the pursuer became tenant of a croft belonging to the defender for the space of nineteen years, under an agreement which bound him to build a house, for which he would be paid at the end of the lease, 'according to the regulations, if built of stone and lime and slated.' The house was built. . . .

"The defender is now sued for the value of the house, and objects, in the first place, that it was not 'slated,' but 'tiled.' I think this is a plea not entitled to much weight. The clause in the contract between the parties specifying the kind of building which was to be erected by the tenant was capable of being varied by mutual consent, and any reasonable evidence that assent was given by the defender's factor when the building was in progress, to the substitution of tiles for slates, ought, I think, to be accepted. The evidence to that effect which has been adduced is not very distinct, but it is considerable; and in the absence of evidence to the contrary I should have been disposed, if the case had turned on this point, to accept it as sufficient.

"The defender's second plea is, however, more serious. When the lease came to an end in 1877, a fresh lease was entered into, to run for no definite time, but to be terminable on a year's notice. That lease is signed by the pursuer and his son; it is a probative document, and in it the tenants 'renounce and give up all claims in respect of houses and dykes on the said croft, and bind themselves, at their own expense, to maintain and uphold the same in good repair during the currency of the lease, and at its expiry to leave the same to the proprietors or incoming tenant, without any claims for payment.' This clause clearly excludes the present claim; and the defender argues with some force that it was one of the considerations which induced him to execute the new lease in 1877, and under which the pursuer had seven years' possession of the croft down to November 1884. It is no answer for the pursuer to say that he signed the lease without reading it, and that it was always his belief that its legal effect was not to extinguish the claim for the houses, but to postpone it till his tenancy came to an end. I have read the evidence to see if there was anything of the nature of fraud or misrepresentation on the part of the factor to justify this plea. The pursuer explains that no draft of the lease was sent to him; and although he had it in his hands to read over in the estate office when he called to sign it, he did not take time to do that. Nothing was said about the houses, and he was not told that he was giving up his claim to meliorations; had he known that he would rather have left altogether. But apparently there was no misrepresentation by Mr Gray of the nature of the document. On the contrary, he began reading it, and he did not refuse to read the whole. But Mr Skinner says 'he had not very much time, and I had not very much either, so I just took it for granted what was in the rest. It was perhaps on both our suggestions that the lease was not fully read.'

"Such being the circumstances, according to the pursuer himself, attending the execution of the document, I fail to see any ground for saying he is not bound by it. Relief is often given against a deed which by mistake does not correctly represent the intention of both parties. But when the mistake is personal to one of them, and he cannot show that he was in any way misled, he cannot defeat the performance of the agreement because he mistook its legal meaning and effect. The mistake which entitles to relief must be not only material but free from culpable negligence; and a person who executes an instrument carelessly without even reading it must bear the consequences—(2 Pomeroy's Eq. Jur. 322). On these grounds the judgment of the Sheriff-Substitute appears to me to be right."

The pursuer appealed.

Authority—*Kirkpatrick* v. *Allanshaw Coal Co.*, Dec. 17, 1880, 8 R. 327.

At advising—

Lord Young—This action is directed against Lord Saltoun for payment of £100 as the alleged value of a house which the pursuer as Lord Saltoun's tenant erected upon his farm or croft. There is apparently no distinction between a farm and a croft except a difference in size, and the pursuer's farm or croft extended to about ten acres and according to the custom of the district it is called a croft. The lease under which the claim is made is in the form of a letter, but a tested letter, and it expresses a contract of lease between the pursuer and the defender for nineteen years—a contract of lease for this farm or croft. The rent ultimately was to be £5, but for some time the tenant was to have the land rent free, the condition being that he should bring it into cultivation. The particular clause in which we are interested is the 4th. By it the tenant binds himself "to build a house on said croft within the first three years of the lease, and that agreeably to a plan and in such a situation as shall be approved of by you, for which I am to receive payment at the end of my lease according to the regulations, if built of stone and lime and slated." The £100 for payment of which this action is brought is the sum alleged to be due to the pursuer in respect of the house which he built in terms of this clause, and the questions before us are these two—first, Was the house, or the house and outhouses, of the character and quality stipulated for as the condition of any payment being due by the landlord? and secondly, assuming that they were of this character, was the claim which thereby arose discharged by a clause in the new lease which was entered into in 1877 on the expiration of the old lease of 1858, by which "the tenants hereby renounce and give up all claims in respect of houses and dykes on the said croft, and bind themselves" and so on?

Now, I should very much have liked to give the pursuer here the value of the buildings which he left upon the farm—I mean their value to the landlord who got them. The pursuer's valuation of the whole is rather over £100, about £8 over, and therefore about £8 over the sum he claims in the action, the landlord's valuators value the house at £22, 14s. 9d. as it was left, and the outhouses at £17, 3s. 6d., making together £39, 18s. 3d, —that is the value to the landlord which the landlord's witnesses put on the subjects, and I should very much have desired to give that value to the pursuer. But I understand it to be the opinion of all your Lordships that the Sheriffs are right in their conclusion upon the evidence that the house and outhouses are not really of the quality and character bargained for—that they are not built of stone and slated, and with all the desire I have expressed to give the crofter the value of what he left to the landlord, and to make the landlord pay the value which his own witnesses put on what he got, I must say that I am unable to take a view of the evidence which would justify me in going against the prevailing opinion. I must therefore assent to that view, and hold that the pursuer's claim in this action is bad on that ground.

Should that be the opinion by the Court, that renders the other ground of no materiality. I shall therefore only say with respect to it that I should not for my part have been able to affirm that the claim, if good, was discharged by the new lease, for that was given not to the father—the present pursuer—alone, but to him and his son. I would certainly have been greatly disposed to read the clause which the landlord founds upon as a discharge by both tenants of a claim which both had in respect of houses and fences, and the only claim which they both have in respect of houses and fences—and it is a serious and material one—is that the landlord should put them into tenantble condition. I think the clause might reasonably be read as subject to that limitation, which receives countenance from what follows in the lease for the tenants bind themselves to maintain the houses and fences in good and tenantable condition. But as I have said, if the judgment of the Court is to proceed on the first ground it is unnecessary to determine this.

Lord Craighill—I concur in thinking that the Sheriff's judgments should be affirmed. If we had been of opinion that the buildings here were of the stipulated kind and quality, it would have been necessary to determine whether the outhouses were within this provision of the lease, but in my view it is not necessary to determine that. My reading of the obligation in the lease on which the pursuer founds, is that he was bound under it to erect a house, but that he was not bound to erect a house of stone and lime and slated. If, however, he chose to erect a house which was not of stone and lime and slated, then he was not to be entitled to the value of it, but if he did erect a house of that description then he would be entitled to get its value as at the time of his departure as compensation. Now, the house for which compensation is here sought was not a house of stone and lime—there was no lime in the building—and it was not slated. It was said in the course of the argument that one kind of building was practically as useful for farm work as the other. That may be so. It might have been a very reasonable thing to provide accordingly in the lease, but provision is made not for that but for something quite different. This view of the contract seems to me to be confirmed by the conduct of the parties. The old lease expired in 1877. It was a nineteen years' lease, and the end of that period was the time at which, if the pursuer was entitled to payment at all, he ought to have made his demand. But he made no mention of his claim until he had been removed from possession of the farm. The institution of this action was the first intimation that the landlord had that such a claim was to to be brought forward. Now I think it is inconceivable that a person in the circumstances of the pursuer, entitled to make such a claim, should not bring his claim forward before that time. I have therefore, on these grounds, no difficulty in reaching the conclusion at which the Sheriffs have arrived.

With regard to the other ground of defence—that founded on the clause of discharge in the lease of 1877—I confess that for my own part I should have been disposed to say that if a claim had existed it was surrendered when the pursuer took a new lease in the terms which we have here. That is the inclination of my opinion, but as the first ground of judgment is sufficient for the decision of this case it is unnecessary for me to

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 communings 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 granter'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. 18; 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 defraud 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