Tuesday, January 17.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WILSONS *v.* LITTLEJOHN.

Bill — Promissory-Note — Proof of Value given where Overdue Note transferred after Term of Payment—Endorsement after Period when Payable—19 *and* 20 *Vict. c.* 60 (*Mercantile Law Amendment Act* (*Scotland*), *secs.* 15 *and* 16.

Where a promissory-note had been transferred to a new holder after the term of payment—*held* (*per* Lord Fraser, Ordinary) (1) that forbearance to sue a debtor granted in consideration of receipt of the note was "value" in the sense of the statute; (2) that the transference without new endorsation of a note which had been blank endorsed imported in law the same consequences as if it had been, in the language of sec. 16 of the Mercantile Law Amendment Act, "endorsed after the period when such . . . promissory-note became payable;" and that therefore in such a case the transferee took the note subject to all objections or exceptions to which it was subject in the hands of the transferor.

The Mercantile Law Amendment Act (Scotland) 1856, provides by secs. 15 and 16—Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given by him for the same; but such proof may be made by parole evidence. Sec. 16—Where any bill of exchange or promissory-note shall after the passing of this Act be indorsed after the period when such bill of exchange or promissory-note became payable, the indorsee of such bill or note shall be deemed to have taken the same subject to all objections or exceptions to which the said bill or note was subject in the hands of the indorser.

This was an action by D. H. & T. Wilson, S.S.C., a firm of law-agents in Edinburgh, against J. & D. Littlejohn, wine merchants in Glasgow, and J. W. Littlejohn, the only known partner of that firm. The summons concluded for payment of £98, being the amount contained in a promissory-note granted by Thomas Robertson, accountant in Glasgow, and endorsed by the defenders; this note the pursuers averred had come into their hands in the course of business, they having received it from John Miller, a client, whom in consequence of his having handed it to them they forbore to press for payment of a business account.

The facts as found by the Lord Ordinary after proof led are set forth in the following interlocutor:—"Finds that Thomas Robertson, accountant, Glasgow, granted a promissory-note, dated 12th November 1875, for £98, payable twelve months after date, in favour of the defenders: Finds that the defenders blank indorsed the said promissory-note, and handed the same to James Martin, accountant in Glasgow, for collection from the said Thomas Robertson: Finds that the said promissory-note was never paid by Robertson, and remained in the possession of Martin for some years, and was stolen from him, and ultimately came into the possession of John Miller, formerly accountant in Glasgow, and now resident abroad, who gave no value therefor either to Martin or the defenders: Finds that Miller, thus in the possession of the stolen note, did, without endorsing the same, in September 1880, hand it over to the pursuers in security of a debt for law business done by them on his behalf: Finds in law, that the note having been stolen, the pursuers were bound to prove that value was given by them for the same; and finds that such value was given by taking the note as a security for a business account then incurred. But further, finds that the pursuers having taken the note after it was overdue, all objections or exceptions to which the note was subject in the hands of Miller may be competently pleaded against them; and as Miller could not have sued upon the note against the defenders, so neither can the pursuers: Therefore assoilzies the defenders from the action, and decerns."

His Lordship appended this note—"This case presents questions as to the construction of two sections of the Mercantile Law Amendment Act, in reference to the right of the holder, for onerous consideration, of a stolen promissory-note to recover the contents thereof, he having attained right thereto long after the promissory-note had fallen due.

"The promissory-note in question was in the following terms:—'£98. *Glasgow, 12th November* 1875—Twelve months after date I promise to pay Messrs J. & D. Littlejohn the sum of ninety-eight pounds sterling, for value received. (Signed) THOMAS ROBERTSON.' (Addressed) 'To Thomas Robertson, Esq., accountant, Glasgow.' This note was not paid by Robertson, the granter, when it became due, whereupon the grantees, J. & D. Littlejohn, blank endorsed it, and handed it to James Martin, an accountant in Glasgow, for the purpose of collection. It was thought that payment could be more readily obtained through the intervention of Martin than by the direct action of the grantees themselves against Robertson. Martin failed to obtain payment from Robertson, but did not return the note to Littlejohn. He kept it in his desk in his office in Glasgow, amongst a number of other papers, and both he and Littlejohn seem to have forgot altogether about it. Another accountant in Glasgow, of the name of John Miller, occupied the same room with Martin; and he had access to Martin's desk, which was left unlocked during the day. Whether Miller stole the note from that desk is not clearly proved; but it is proved that it was stolen, and was in the hands of Miller on the 8th September 1880, when he handed it over to the pursuers of the present action in security of an account for law business carried out by the pursuers on his account. Miller did not endorse the note when he gave it the pursuers, but merely transferred it by delivery, with the blank endorsation upon it of J. & D. Littlejohn.

"The pursuers by that transference were made holders of the note at a time when it had been nearly four years overdue. It is proved that Martin gave no value to Littlejohn, but held the note simply as Littlejohn's agent, for the purpose of recovering payment; and it is also proved that Miller gave no value either to Littlejohn or to Martin, and the question now is, whether the pursuers, as holders through Miller, can force payment of this stolen note, obtained as it was in the very peculiar circumstances now stated?

"According to the law of Scotland prior to the Mercantile Law Amendment Act, a party who was holder of a bill or note transferable by delivery, was presumed to have acquired the bill or note onerously and *bona fide*, and this presumption in general could not be redargued except by his writ or oath. The decisions upon this subject are numerous, and will be found noted in Thomson on Bills, second ed. (but not the third), p. 94. The law in England was different from this, and the Mercantile Law Commissioners in their second report recommended that the law of Scotland should be assimilated to that of England. They said—'In England and Ireland proof that a bill or note had been lost, stolen, or fraudulently obtained rebuts the original presumption of consideration, and casts upon the holder the burden of showing that he gave consideration for it. In Scotland it is otherwise, and the party sought to be charged must show that the holder gave no consideration; but as that is a fact not within his knowledge, but within that of the holder, we think it much more reasonable that the latter should be called upon to prove the affirmative.' In terms of this recommendation it was enacted by the Mercantile Law Amendment Act (sec. 15)—'That where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note, suing or doing diligence thereon, shall be bound to prove that value was given by him for the same; but such proof may be made by parole evidence.' The question under this section is as to whether the pursuers have proved that they gave value in the sense of the Act, seeing that the alleged value was taking the note in security of a past due debt. It is proved that the pursuers had business accounts against Miller to the extent of £152, 17s. 11d., almost the whole of which had been incurred prior to the 8th of September 1880, when the note was handed to them by Miller. The pursuers did do a little business for Miller after receiving the note; but, in the view which the Lord Ordinary takes of this matter, he does not think it necessary to ascertain the precise amounts of the debt owing to the pursuers by Miller before and after the transference of the note. He is of opinion that the word value here means, not exclusively a sum of money instantly paid down, but simply valuable consideration; and it has been repeatedly found that forbearance to sue a debtor upon a debt, in return for the bill or note granted, was valuable consideration (see *Stewart* v. *Wylie*, June 9, 1848, 11 D. 1123; *Balfour* v. *Sea Assurance Co.* Nov. 7, 1857, 27 L.J. C.P. 17; *Baker* v. *Walker*, June 27, 1845, 14 L.J. Ex. 371). So also has it been held that an antecedent debt is sufficient consideration (*Poirier* v. *Morris*, 22 L.J. Q.B. 313; and *per* Lord Mure in *Ferguson* v. *Jolly*, 7 R. 505). Therefore the enactment in the Mercantile Law Amendment Act requiring the holder of the stolen bill to prove value has been in this case satisfied by the pursuers.

"But there arises another questionupon the 16th section of the Mercantile Law Amendment Act, and that is in regard to the objections pleadable against the holder of a bill who has taken it after it was overdue. In regard to this point, the former law of Scotland and the law of England differed, and this constituted one of the 'inconveniences to trade and commerce' referred to in the preamble to the Act, The difference is thus explained in the report of the Commission:—'A party taking a bill or note overdue, in England or Ireland, takes it subject to all equities and objections to which it was subject in the hands of the indorser, so far as they are intrinsic to the bill; but not subject to any collateral matter, such as a right of set-off against the former holder. In Scotland, the indorsee of an overdue bill is not subject to latent objections attaching to it, if there be no marks of dishonour on the bill, and nothing suspicious in the transaction. But it seems to us that the English and Irish rule is preferable; that the fact of the bill being overdue must be noticed by every person exercising reasonable care; and that the non-payment of the bill at maturity ought to be considered sufficient to put the party on his guard as to taking it.' Following out this recommendation, the 16th section of the Mercantile Law Amendment Act is as follows:—'Where any bill of exchange or promissory-note shall, after the passing of this Act, be indorsed after the period when such bill of exchange or promissory-note became payable, the indorsee of such bill or note shall be deemed to have taken the same subject to all objections or exceptions to which the said bill or note was subject in the hands of the indorser.' Thus the same rule is now applied to bills overdue as is applied to assignations—*assignatus utitur jure auctoris*. The present case is not exactly within the very words of this clause of the Act of Parliament, because Miller, the transferor of the note to the pursuers, did not indorse it. But the evil which the Legislature intended to remedy was one which could only be met by extending the construction of the statute so as to meet a case like the present. The object was to assimilate the laws of the two countries upon this point; and according to the law of England, the same objection that could be stated to the holder of a bill who took it when overdue from one who indorsed it, can be stated against a transferor by delivery. In the last work on the law of bills in England, the author states the rule absolutely thus:—'The fact that a bill is overdue is equivalent to notice of all facts relating to it' (Chalmers on Bills, second ed., p. 118). Now, it is quite clear that Miller could not have sued upon the note, because if not himself the thief, he obtained it from the thief without value, and any objection that can be stated against Miller can by the Act of Parliament be stated against the pursuers, though they gave value in account to Miller.

"The conduct of the defender Littlejohn has not been very creditable in reference to his representations to the pursuers. While the note was in the hands of the pursuers as holders, they, as authorised by Miller, raised an action in Miller's name for payment against Robertson, the granter of the note, to which action Robertson lodged defences averring that the note was not in the lawful possession of Miller, but was stolen by him from Martin. In consequence of this defence, the pursuers applied to Littlejohn for an explanation, and he (as he now says), under mistake, wrote to the pursuers that Miller had given value for the note, and was entitled to sue for payment. It turns out that no injury resulted to the pursuers from this false statement, and that the defender Littlejohn in a few days intimated that he had made it under misapprehension, and without having his books beside him. The ex-

planation of the mistake was somewhat confused, but the Lord Ordinary has accepted it as sufficient. Neither party examined Miller, who is now in London, but a letter from him is in process, dated 17th December 1880, in which he intimated that he had not given value for the note; that it belonged to Littlejohn, and requested Littlejohn to write to the pursuers to deliver it up, which Littlejohn did, but instead of receiving delivery he was served with the present action."

The pursuers reclaimed, and the Second Division being of a different opinion from the Lord Ordinary as to the proof of the theft of the note by Miller, recalled his Lordship's interlocutor, and proceeding on grounds entirely special, dismissed the action and found neither party entitled to expenses.

Counsel for Pursuers — Trayner — Rhind. Agent—D. H. Wilson, S.S.C.

Counsel for Defenders — Guthrie Smith — M'Kechnie. Agent—John Gill, S.S.C.

Wednesday, January 18.

SECOND DIVISION.

[Sheriff of Fife.

THOMSON *v.* SCOULAR.

Poinding of the Ground — Possession — Sale — Bankruptcy.

A party from motives of friendship to a bankrupt purchased from the trustee in his sequestration his household furniture, and allowed the bankrupt to remove it to a house belonging to him with respect to which a petition for poinding the ground had been served prior to the sequestration. In an action at the instance of the purchaser to interdict the heritable creditor in the poinding from attaching the furniture, the Court being satisfied on the proof that the sale was an honest one, *granted decree* as craved, on the ground that the furniture was the property of a third party, viz., of the purchaser of it.

On 17th November 1879 James Rignall, machine and implement maker, Cupar, borrowed from John Scoular, implement maker, Crook, near Stirling, the sum of £300, in security of which he granted in favour of the latter a bond and disposition in security over certain subjects situated at West Braes, Cupar, and which in May 1880 were occupied by him. On the 29th May 1880, founding on this bond, Scoular raised and executed against Rignall, in the Sheriff Court at Cupar, a petition of poinding of the said subjects, on which a decree of poinding of the ground and subjects situated thereon was granted on 1st December 1881, and thereafter on 17th February 1881 the said decree was carried into execution, the whole effects being inventoried and appraised.

In these circumstances the present action was raised in the Sheriff Court of Fifeshire at Cupar, by Peter Thomson, commission agent, near Abernethy, for the purpose of interdicting Scoular from selling or in any way interfering with or disposing of the household furniture, implements of husbandry, and other effects which the pursuer averred belonged to him, and which had been poinded as above by the defender in the dwelling-house erected on the lands of West Braes. The grounds on which the action was based were these:—On 1st June 1880 Rignall's estates had been sequestrated, and on 23d June thereafter George Wallace, accountant, Cupar, was confirmed trustee on the said estates. On 7th September 1880, Wallace, at the request of the bankrupt's creditors, sold to the pursuer, for the sum of £44, 5s. 9d., the household furniture and implements of husbandry which had belonged to the bankrupt, and for this sum the pursuer granted his bill, payable at two months' date, which was retired at maturity.

The pursuer pleaded—"(1) The household furniture, implements of husbandry, and other effects specified in the prayer of the petition being the property of the pursuer, and the defender having poinded and applied for warrant to sell the same, the pursuer is entitled to interdict as prayed for, with expenses."

The defender pleaded—"(2) The effects claimed by pursuer being the property of the said James Rignall, are completely poinded by the defender. (3) The articles poinded being in the possession of and used by the said James Rignall, and being found upon the subjects contained under the defender's bond, fall to be dealt with as forming part of his security."

In the proof which was held the following facts appeared:—The trustee on Rignall's sequestrated estate was authorised by the creditors to dispose, either publicly or privately, of the bankrupt's estate, which for the most part was lying in an uninhabited house of which the trustee kept the key. The commissioners had a feeling that if Rignall had a friend who would purchase the furniture, it would be better that the latter should get the first offer. They were desirous that the bankrupt should have an opportunity of continuing his business pending the sequestration. Accordingly Thomson offered to purchase the furniture and other effects, and they were sold to him by the trustee, between the raising of the summons and the execution of the poinding of the ground by Scoular. The price was duly divided amongst the rest of the creditors. Thereafter the furniture was removed under Thomson's sanction to the house at West Braes with reference to which Scoular had raised his summons of poinding.

The Sheriff-Substitute (LAMOND) granted *interim* interdict, and thereafter found that it was not proved that the articles specified in the petition, with the exception of the chaff-cutter and oil-cake breaker, were on the lands of Gladstone Cottage, disponed in security to the defender, on 29th May 1880, when the defender executed the summons of poinding of the ground against the bankrupt Rignall: Found that said articles were bought by the pursuer, and were, with the exception aforesaid, his property: Therefore continued the interdict, except as regards said chaff-cutter and oil-cake breaker, and decerned.

On appeal the Sheriff-Principal (CRICHTON) recalled the interlocutor of the Sheriff-Substitute, and found "in point of fact—(1) that on 17th November 1879, James Rignall, machine and implement maker, Cupar, granted in favour of the defender a bond and disposition in security for