Friday, January 16.

FIRST DIVISION.

[Lord Craighill, Ordinary.

JACK *v.* M'CAIG.

Lease—Hypothec—Rights of Landlord who had Sequestrated for Rent where a Creditor Subsequently Poinded in Ignorance.

Where a landlord sequestrated his tenant's furniture in security of an unpaid balance of rent, an ordinary creditor of the tenant subsequently poinded the same goods in ignorance of the sequestration, and then sold them. Previous to the sale the landlord had intimated the sequestration to the auctioneer. In an action raised by the landlord against the poinding creditor for payment of the whole balance of rent, the Court (*rev.* Lord Craighill, Ordinary) gave the pursuer decree for the amount of the net proceeds of the sale.

Question—Whether the defender was not in the circumstances liable for the whole amount of the debt?

Expenses—Diligence—Petition for Recal of Inhibition.

A defender having been successful in the Outer House, the pursuer reclaimed, and the defender thereupon used inhibition against him. The judgment being reversed in the Inner House, the pursuer was *held* entitled to the expenses of a petition which he had presented for recal of the diligence.

Andrew Jack let to William Johnston a house belonging to him in Portobello for the year from Whitsunday 1878 to Whitsunday 1879, at a rent of £45. Johnston having fallen in arrear with his rent (which was payable in monthly instalments), Jack, as landlord, on 20th January 1879, sequestrated the furniture and effects in the house on a summons under the "Debts Recovery (Scotland) Act 1867." On 13th February, R. B. M'Caig, a creditor of Johnston for £31, 9s. 6d., poinded the furniture in security of his debt, and after obtaining a warrant and advertising a sale, proceeded on 10th April to carry it out. The landlord having become aware of the proceedings, appeared at the commencement of the sale, informed the auctioneer of his previously existing sequestration, and desired him to desist from the sale. The auctioneer, however, refused, and the goods were duly sold, the majority of the articles not having realised their appraised values, and being knocked down to M'Caig as poinding creditor at that value, to the extent in all of £16, 10s. The goods so knocked down to M'Caig were removed from the house and sold for his behoof about a fortnight after. The free proceeds of the sale, which amounted after deduction of the incidental expenses and of the rates and taxes, to only 7s. 2d., were subsequently paid over to the defender's agent.

Jack raised this action against M'Caig for payment of £28, 15s., being the balance of Johnston's rent, on the ground that he had incurred liability therefor by disregarding the pursuer's protest, and committing a breach of the landlord's sequestration. It was averred that he was well aware that he was defeating the pursuer's right of hypothec. The defender averred his own *bona fides* throughout the transaction, and his ignorance until the pursuer's interference on the day of the sale of the previously subsisting sequestration.

The defender pleaded *inter alia*—"(3) On the hypothesis that the rent libelled was truly due, and that the alleged sequestration took place, and the alleged rights of hypothec existed, the defender is entitled to absolvitor. (4) In any event, the defender is only liable to the extent of the value of the effects poinded by him."

The Lord Ordinary (CRAIGHILL) on 28th Nov. 1879 pronounced this interlocutor:—". . . In the first place, Finds, as matter of fact, (1) That on 20th January last there was sequestrated at the instance of the pursuer . . . the furniture in the house in Bath Street, Portobello, tenanted and occupied by William Johnston, under the pursuer, for payment of the sum of £19, 5s., alleged to be an unpaid balance of rent due and payable by Johnston to the pursuer at and prior to 25th December 1878; (2) That on 13th February last there was poinded at the instance of the defender . . . the same furniture . . . for payment of a debt alleged to be due by Johnston to the defender; and this furniture on 10th April last was . . . sold at the instance of the defender; (3) That the defender, both at the date of the said poinding and at the date of the said sale following thereupon, was in ignorance of the sequestration used by the pursuer as aforesaid, and also of the fact that rent had become due and payable by Johnston which remained unpaid; (4) That the net proceeds of the said sale were less than the balance of rent for payment of which sequestration was used as aforesaid, and were also less than the rent which remained and became due and payable by Johnston to the pursuer at Whitsunday last—this last being the amount for which decree is concluded for in the summons; (5) That the said sale was advertised in terms of said warrant of sale, and the time at which it was to take place was known to the pursuer two days before the sale occurred, but nevertheless the pursuer neither applied for an interdict nor made any communication to the defender or to the agent of the defender for the purpose of preventing the sale; (6) That four days after the sale . . . the pursuer, through his agent, made a claim upon the defender for the whole rent due by Johnston for the year from Whitsunday 1878 to Whitsunday 1879 so far as unpaid; and liability for such a claim having been repudiated, the present action was raised; and (7) That the claim thus intimated, which is the claim sued for, was the claim primarily insisted on at the debate upon the proof; and the only alternative which was submitted for judgment on behalf of the pursuer was, that decree should at least be pronounced against the defender for payment of the £19, 5s., for payment of which Johnston's furniture had, as aforesaid, been sequestrated: In the second place, Finds, as matter of law . . . that the pursuer is not entitled to recover from the defender either the whole rent of the year from Whitsunday 1878 to Whitsunday 1879 so far as unpaid, or the portions of that rent for the payment of which, as aforesaid, the furniture of Johnston, the tenant and occupant, was

sequestrated: Therefore sustains the defences, &c. . . .

"*Note.*—The principle which was recognised and acted on in *Bell* v. *Gunn*, 21st June 1859, 21 D. 1008, and which has also been recognised and acted on in cases which have come before the Court since that decision, appears to the Lord Ordinary to afford the rule of decision on the present occasion, upon the assumption that he has correctly estimated the facts as established by the proof. Several other defences than the one which has been sustained, it may be added, were brought under the consideration of the Lord Ordinary in the course of the discussion upon the proof, but as he considers that the plea upon which judgment has been given is sufficient for the determination of the controversy between the parties, none of these have been made matter of judgment."

The pursuer reclaimed.

The defender having on the strength of the Lord Ordinary's interlocutor used inhibition against the pursuer on the ground that he was *vergens ad inopiam*, the latter presented a petition for recal of the diligence, which with answers for the defender was put out for hearing at the same time as the reclaiming-note.

Argued for the reclaimer—The defender had committed a breach of the sequestration, and had acted in bad faith, not having made due inquiry, as he was bound to do before executing a poinding. By his interference he had made himself liable to the pursuer for the whole balance of rent due, on the principle that an intromitter may be held liable in more than the amount by which he has profited.

Replied for the respondent—He had acted in good faith throughout. The action was barred by the pursuer's bad faith and acquiescence. Pursuer had sustained no damage through the interference. In any case, defender could not be liable for more than the amount he had so gained.

Authorities—*Bell* v. *Gunn*, June 21, 1859, 21 D. 1008; *Selkrig*, 1708, M. 6224; *Jackson*, 1745, M. 6245; *Love* v. *Forster*, Jan. 19, 1833, 11 S. 280; *M'Ghie* v. *Mather*, Dec. 1, 1824, 3 S. 337; *Stewart* v. *Peddie*, Nov. 14, 1874, 2 R. 94; 2 Hunter (Landlord and Tenant), 396.

In answer to a question from the Bench, counsel for pursuer stated that he would be content with decree for £16, 17s. 2d., being £16, 10s., the value of the goods knocked down to the poinding creditor at the sale, together with 7s. 2d., the balance of the proceeds of the sale paid to defender's agent, in place of the whole unpaid balance of Johnston's rent, viz., £28, 15s., sued for in the summons.

At advising—

Lord President—I am clearly of opinion that to the restricted extent now demanded the pursuer is entitled to prevail. Sequestration was used on the 20th January 1879, poinding was executed on 13th February, and the furniture was sold on 10th April. Now, I quite give credit to the poinding creditor for *bona fides*, and I believe that at the time when he used the diligence he was not aware of the landlord's sequestration, but no man is unaware of the existence of the right of hypothec, and when a creditor poinds he knows he is apt to be defeated if the tenant happens to be behind-hand with his rent, as is not unlikely to be the case with a man who owes a debt and submits to have his furniture poinded. In these circumstances the defender poinded the tenant's effects, and I think the pursuer in allowing him to do so acted very foolishly; he should have apprised him of the sequestration and warned him not to proceed, but he did not do so. The sale was consequently advertised, the day arrived, and the sale was about to commence before any step was taken by the landlord. He then interfered, and intimated to the auctioneer his claim as landlord, and that he had used sequestration. Whether the auctioneer chose to go on with the sale in the face of that intimation or not is of no consequence in law. It might perhaps have been prudent for him to adjourn the sale till further instructions, but as it was he proceeded to sell the poinded goods. The prices obtained were not for the most part up to the appraised values of the articles—for the interference of the landlord at the commencement of the sale went far to make it a bad one, and where the appraised value was not realised the goods were knocked down to the poinding creditor. A week after the sale the goods so knocked down to the defender were removed by him, and I think the true import of the evidence on this point is that in removing them he committed a breach of the sequestration. In poinding the goods originally he seems to have acted in *bona fide*; so also in advertising the sale; but he could not have so acted in removing the goods after the landlord's notice of his sequestration.

Now, supposing at this stage the landlord had come forward with a petition to the Sheriff to have the goods restored to him, I think the defender could have had no answer to that; the Sheriff must have ordered their restoration. This was not done however, and the defender sold the goods for his own behoof. What he realised by their sale is of no moment, for now that he is no longer in a condition to restore the goods to the landlord I am clearly of opinion that he must pay their appraised value, and to that extent I am for giving judgment in favour of the pursuer.

Lord Deas—I am of the same opinion. My only doubt is whether your Lordship does not carry the principle of *bona fides* rather further than the law warrants. Every man about to execute a poinding is bound to make proper inquiries, and to ascertain whether the debtor is proprietor or only tenant of the house he lives in—whether the goods in it belong to him or not, and so forth. Then, every tenant is understood to pay rent, and the poinding creditor must take care to inquire whether the rent has been paid. That is a thing he can ask, and should not assume. Thus, if the defender here was acting in *bona fide* in one sense, he cannot well be said to have been so in another, for I think his conduct was rash and ignorant in poinding the goods without proper inquiry beforehand.

I think your Lordship has given him quite enough of credit, taking the proof into view. My only doubt would have been whether he had not made himself liable for the whole amount of the debt. I am glad we are not asked to decide

that question, and on the whole I concur in the judgment which your Lordship proposes.

Lord Mure and Lord Shand concurred.

The Court recalled the Lord Ordinary's interlocutor, and decerned in favour of the pursuer for £16, 17s. 2d., with expenses.

Counsel for pursuer then moved the Court for expenses in the petition for recal of inhibition, the prayer of which fell to be granted, as the Lord Ordinary's interlocutor in the action had been recalled. He urged that the use of diligence had not been warranted in the circumstances,—*Weir* v. *Buchanan*, Oct. 18, 1876, 4 R. 8.

The defender replied that it was the constant practice to use inhibition on the dependence of a reclaiming note, that the pursuer had been *vergens ad inopiam*, and that he was therefore not entitled to the expenses of the petition.

At advising—

Lord President—It is plain the inhibition must be recalled, and the only question is as to the expenses of the petition. It is said for the defender that this is the usual mode of procedure under the circumstances; I am not prepared to say it is incompetent, but if it is the correct practice, it is certainly not a commendable one. The defender in this action has been assoilzied from some very trifling claims by the Lord Ordinary, and found entitled to expenses, which cannot exceed (say) £40. The pursuer has reclaimed, and the defender used inhibition in security, not of any sum due, but of one which might become due in the event of the Lord Ordinary's judgment being affirmed. I think those circumstances did not justify such a proceeding, and that the pursuer is now entitled to the expenses of the petition.

Lord Deas—I am of the same opinion. I am not prepared to say that the inhibition was incompetent, but I hope no such practice exists as that which has been alleged. If such a practice were to receive countenance, the result might be that whenever a judgment was given in the Outer House with expenses, inhibition would be used for these expenses although the judgment was liable to be recalled in the Inner House, and if recalled, no expenses were really due at the time, nor ever would be due. It would be monstrous to suppose agents using inhibitions in this way, and I concur in thinking that any such practice would be disgraceful to the profession.

Lord Mure and Lord Shand concurred.

Counsel for Pursuer (Reclaimer)—Asher—Marshall. Agent—John Rutherfurd, W.S.

Counsel for Defender (Respondent)—Black. Agent—Lindsay Mackersy, W.S.

Thursday, January 22.

FIRST DIVISION.

[Sheriff of Midlothian.

PENNEY (JOLLY'S TRUSTEE) *v.* FERGUSON, DAVIDSON, & COMPANY.

Bill of Exchange—Proof—Whether prout de jure *or by Writ or Oath—Where Suspicious Circumstances Alleged.*

Wherever the averments of parties on record, as explained or admitted by the holder of a bill of exchange suing upon it, are such as to show that the bill came into the possession of the holder through some irregular dealing, and not in the ordinary course of business,—or are such as to lead to the inference that no actual value was given for the bill at the time,—or wherever the special circumstances in which the holder became possessed of the bill, as admitted or explained by him, are such as to render it desirable for the ends of justice that the inquiry into the facts should not be limited to the writ or oath of the holder,—the Court will allow a proof, before answer, of the averments; but (*diss.* Lord Shand) in all other cases the proof will be limited to the holder's writ or oath.

Circumstances and averments in consequence of which a proof before answer was allowed in regard to a debt said to be constituted by a bill of exchange.

Opinion (*per* Lord Shand) that where the *bona fides* of the holder of a bill is disputed, the Court should allow a proof *prout de jure* although no suspicious circumstances are stated or admitted by him.

The estates of Mr William Ramsay Jolly were sequestrated on 19th October 1878, and Mr J. C. Penney, C.A., was appointed trustee. Messrs Ferguson, Davidson, & Co., merchants, Leith, lodged a claim in the sequestration for £398, 7s. 2d., being the amount of a bill which Jolly had endorsed to them. The trustee rejected the claim "in respect that no value was given for this bill, and that the same ought to have been returned to the bankrupt or the trustee on his sequestrated estate." Ferguson, Davidson, & Co. appealed to the Sheriff, and in the record which was subsequently made up the trustee made the following averments as to the circumstances in which the bill was granted and came into Ferguson, Davidson, & Co.'s hands—"(2) The bankrupt, Jolly, about Whitsunday 1878 agreed to purchase certain house property at 11 Rosehall Terrace, Edinburgh, from Stevenson, at the price of £4500, of which £3600, with which the subjects were burdened, were to remain on the property, the difference only being paid by Jolly, and the transaction to be settled at Martinmas 1878. (3) On 12th August 1878 Stevenson wrote to Jolly in the following terms:—'Until such time as the papers for the above (11 Rosehall Terrace) be got ready, I would take it very kind of you by letting me have bill for £300 or £400 by Wednesday first.' Jolly replied on the 15th August as follows:—'If you will procure a bill and have it made out for £400, I will accept it at once for you for the period you mention. I wish you would push on with the papers, as I am waiting for them, and am