Counsel for Pursuers—Mr Duncan. Agents—Adam, Kirk, & Robertson, W.S.

Counsel for Heirs at Law—Mr Lancaster. Agents—Jardine, Stodart, & Frasers, W.S.

Counsel for Nephew—Mr Spittal. Agents—Mackenzie, Innes, & Logan, W.S.

(Before Lord Jerviswoode.)

RENTON *v.* NORTH BRITISH RAILWAY COMPANY.

Bastard—Parent and Child—Title to Sue—Reparation. Held that the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of the child.

This was an action concluding for damages and *solatium* at the instance of the mother of an illegitimate son, who was killed at the Portobello Station of the North British Railway Company through the fault of the railway company's servants. The defenders admitted their liability for the culpable negligence of their servants in causing the death of the pursuer's son, but pleaded (1) that the pursuer has no title to sue; (2) that the deceased having admittedly been an illegitimate son of the pursuer, the pursuer could not maintain the action for damages, and, *separatim*, could not maintain the same for *solatium;* and (3) that the defenders having settled with the widow and child of the deceased, the pursuer could not maintain the action.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the 1st, 2d, and 3d pleas in law stated in defences on the part of the defenders, and considered the record, with the minute for the pursuer, No. 7 of process, repels the said pleas, and allows the pursuer to lodge an issue or issues with a view to the trial of the cause as she may be advised within eight days from the date hereof."

"*Note.*—The question to which the pleas in defences, with which the Lord Ordinary has now dealt, relates, is one of considerable importance, more especially in respect to that branch of it which arises directly under the 1st and 2d pleas for the defenders.

"It seems somewhat singular that, as admitted on both sides of the bar, as the Lord Ordinary understood, no direct decision of this Court is reported on which a claim in all respects the same as that of the pursuer here has been either sustained or repelled.

"It is said, however, and the Lord Ordinary believes correctly, that in certain Sheriff-courts such claims have been made and sustained, and the Lord Ordinary has a distinct recollection of a question having been raised before himself as to the liability of an illegitimate child to support his mother who was in poverty, and where he sustained the relevancy of the claim. But, so far as he is aware, the case did not go farther, or at least is not reported.

"On the merits of the question itself the Lord Ordinary cannot say that he has here entertained much serious doubt. It may be true, and the Lord Ordinary proceeds on the footing that it is so, that the person who, either by admission or on proof, may be dealt with, and held to be the father of an illegitimate child, cannot insist in such an action as the present, and this may, and indeed must, be so held while the principle of law is recognised that the full relation of parent and child does not exist between them.

"But the position of the mother is altogether different. The relation in which she stands to her child admits of no doubt. She is in fact and in law its mother, and although the circumstances of the birth may, as here, bring sorrow and reproach upon her, still her comfort and consolation is that her child is spared to her, and is not the less dear to her affections, because for and on account of it she may have suffered much.

"On the whole, the Lord Ordinary is of opinion that the case for the pursuer is relevant, and should proceed to trial."

The action was subsequently compromised.

Counsel for Pursuer—Mr Robert Johnstone and Mr J. A. Reid. Agent—Jardine Henry, S.S.C.

Counsel for Defenders—Mr Shand. Agents—Dalmahoy & Cowan, W.S.

Wednesday, January 6.

(Before Lord Barcaple.)

REID *v.* HART.

Bill—Value—Banker—Security given to Banker by Promissory-Note granted by the Friend of a Customer. Held (1) that the security was terminable at any date by intimation from the granter; (2) that the note did not prove value, and the *onus* lay on the banker to prove that any debt was due at the termination of liability.

The pursuer in this action is the agent of the City of Glasgow Bank at Glasgow, and he sues the defender for payment of the sum of £150, being the amount of a promissory-note. He makes the following statements:—"(1) Of this date (August 27, 1866) the defender granted to the pursuer his promissory-note, in the following terms:—

'63 *Renfield Street,*

'£150 stg. *Glasgow, 27th August* 1866.

'One day after date I, Thomas Hart, writer, Glasgow, promise to pay to William Reid, Esq., at City of Glasgow Bank, No. 2 Bridge Street, Glasgow, the sum of £150 sterling for value received.

'THOS. HART.'

"(2) The defender is due to the pursuer the said sum of £150, contained in the said promissory-note; but although he has been repeatedly required to make payment thereof he refuses, or at least delays to do so, whereby the present action has become necessary."

The defender maintained the following pleas in answer to the action:—"(1) The instance, in so far as regards the pursuer or pursuers, is defective and ambiguous. The pursuer or pursuers have no title to sue upon the document libelled. (2) The pursuer, William Reid, having fraudulently and wrongously retained the said document without delivering or sending to the defender the back-letter which he required in exchange therefor, the said document was not granted or delivered to the said William Reid, and he has no right of action thereupon. (3) The document in question never having been delivered to the pursuer, and, *separatim*, if delivered, having been so by the defender's messenger without authority from the defender, and in the knowledge by the pursuer that it was delivered without authority, the pursuer cannot enforce payment thereof. (4) At least the said back-letter having been kept and retained by the said William Reid, along with the said note or document, the defender is entitled to assume that the said two documents can only be read together.

(5) The defender having received no value for the said note, is entitled to absolvitor. (6) Even had said note not been fraudulently obtained by pursuer, its operation and effect are limited and qualified by the arrangement under which it was prepared; and the advance or overdraft to defender's clients at or about the date of the said document, and to which alone it had reference, having been repaid, the defender is entitled to absolvitor. (7) The sums due by the defender's client to the pursuer William Reid's Branch Bank at the date of said document, or at the date when, if duly completed and delivered, it would have become payable, having been repaid to the said Branch Bank, the pursuer has no right of action upon the said document. (8) The said document can in no event be competently used as a security for the fluctuating balance upon the Bank account of defender's clients. (9) The said document, even if it had ever been granted by the defender, having been discharged as a document of debt by payments made by defender's clients in their account-current with the pursuer's bank, the defender is entitled to absolvitor. (10) Even if said document could competently be used as a continuous security, the defender having intimated his non-liability before the alleged balance in favour of the Bank had arisen, is entitled to absolvitor."

LANCASTER for pursuer.

R. V. CAMPBELL for defender.

The Lord Ordinary pronounced the following interlocutor—"*Edinburgh*, 18*th July* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the closed record, proof, and whole process—Repels the first plea in law stated for the defender against the instance and title to sue: Finds that the defender has failed to prove that the promissory-note sued on was handed to the pursuer on the condition or understanding that he was in exchange therefor to grant to the defender a back letter in relation thereto, and that the pursuer fraudulently retained said promissory-note without granting said back letter, or to prove that the said promissory-note was granted merely to cover the overdraft on the account of James Gibb & Co. with the City of Glasgow Bank at the date thereof: Finds it is stated by the pursuer that the said note was granted and delivered to him to be held by him as a collateral and continuous security for any balance that might be due by Messrs Gibb & Co., arising either from advances, overdrafts, or discounts, or in any other way: Finds that, having regard to this statement by the pursuer, he could only recover under said promissory-note the amount of any such balance which he might show to be due by Messrs Gibb & Co., arising from any of these sources: Finds that there is no balance due by Messrs Gibb & Co. upon their account-current with the bank: Finds that the pursuer has failed to prove that there is any balance due by Messrs Gibb & Co. to the bank arising from discounts, or in any other way: Finds, *separatim*, that on 2d November 1866, the defender wrote a letter to the pursuer, No. 18 of process, which was delivered to him on or about that date, demanding back said promissory-note: Finds that, though the pursuer was entitled to retain said note as a security for any advances or overdrafts then made, or discounts on bills past due or then current, he was not entitled after said demand by the defender to hold it in security of any further advances, overdrafts, or discounts, and was bound to apply all sums thereafter received from or on account of Messrs Gibb & Co. to payment of any advances, overdrafts, or discounts in security of which the said note was held at the date of said demand by the defender to have the same returned to him: Finds that the pursuer has failed to prove that there is any balance due by Gibb & Co. arising from advances or over-drafts made prior to said demand, or from discounts on bills then due or current: To the extent and effect of the foregoing findings, sustains the last plea in law stated for the defender, assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuer liable in expenses; allows an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and report.

"*Note.*—The Lord Ordinary is of opinion that the defender has not succeeded in proving that the promissory-note was handed to the pursuer on the expressed understanding that he was to give a back letter in exchange, and was fraudulently retained by him without granting such a letter. The conflict of evidence on this point is substantially between that of the pursuer himself and of the witness Gibb. The burden of proof lies strongly upon the defender; and the Lord Ordinary does not think that he has overcome it by the evidence of Gibb, which is distinctly contradicted, though only by the opposite party himself. The subsequent conduct of the defender in not making an immediate and positive demand for the back letter or return of the note, though it may admit of explanation, is the reverse of confirmatory of his allegation.

"Proof of the alleged agreement as to the purpose for which the note was to be held could only be by writ or oath, and no writ is produced for that purpose. The Lord Ordinary does not think that this, which is the ordinary rule of law arising from the presumption of onerosity in the holder of a bill or note, is set aside in the present case by the fact that the pursuer admits or states that the note was taken as a security. The defender has the benefit of that admission as limiting the demand which can be made upon the note to the balance due by Gibb & Co.; but it cannot, in the opinion of the Lord Ordinary, dispense with the necessity for writ or oath to prove a still more limited purpose for which the defender alleges that the note was granted. In short, it does not throw the whole matter open to parole proof on both sides, as if the presumption of onerosity had been altogether set aside. The Lord Ordinary would refer to the case of *M'Gregor* v. *Gibson*, 9 S. 483, where full effect was given to the rule, notwithstanding that the drawer of a bill admitted that the whole parties, including himself, had joined in it for the accommodation of a third person, and accordingly only sued the acceptors for their proportional shares.

"The note must therefore, it is thought, be treated as, according to the statement of the pursuer, a continuing security for any fluctuating balance that might be due by Gibb & Co. to the bank. It is not disputed that there was no balance due by them on their account-current at its close. The pursuer alleges, however, that there is a debt due to the bank by the firm, arising from discounts granted to them, which did not enter the account-current. He depones in his evidence that there were about £2000 of bills discounted current at the date of the note on 27th August 1866, and that he has still bills unpaid to the extent of £800—the firm having been sequestrated in May 1867. But neither these bills, nor any entries in the books of the bank

in regard to them, are produced. The Lord Ordinary does not think that the unsupported testimony of the pursuer on this subject can be received as sufficient proof of the existence of a debt by Gibb & Co. for which the defender is liable under his note. Even if parole evidence, and that of a single witness himself the party, could be sufficient, it is in the present case of the most general and unsatisfactory kind. It does not appear either what was the amount of bills due and current at the date of the bankruptcy, nor what sums have been received on them as dividends or from other obligants. The Lord Ordinary does not think that the holder of a note, which he admits to be only a security, is exempted from proving the existence and amount of the debt so secured in respect of the legal presumption of onerosity attaching to such documents. By the admission, the existence of the secured debt is the essential condition and limit of any demand upon the granter of the note. The point seems to have been decided in the case of the *British Linen Company* v. *Thomson*, 15 D. 314. It is true that reference was there made by the Lord President, not only to 'the admitted nature of the case,' but also to the structure of the summons, which set forth the security nature of the transaction. But the Lord Ordinary does not understand that the judgment was rested upon that specialty.

"There is, further, a separate ground on which the Lord Ordinary thinks that the demand in this action must fail. On 2d November 1866 the defender wrote to the pursuer 'to hand to the bearer my promissory-note for £150, which ought to have been returned by Mr Gibb to me, and which you retain unnecessarily.' Delivery of this letter to the pursuer by a clerk of the defender is proved. In the view which the Lord Ordinary takes of the proof, it must be held that the pursuer was entitled to retain the note against any such demand as a security for the whole debt then due, or which might become due on discounts then current. But the defender was entitled to bring his security obligation to an end at any time. By his letter he clearly intimated to the pursuer that he did not consent to his bill being longer held as a security for advances of any kind to Gibb & Co. Such an intimation was effectual against the pursuer to the extent to which the defender was entitled to bring the security transaction to an end. That is, it was effectual to the extent of preventing the pursuer granting further accommodations of any kind to Gibb & Co. upon the security of the note. The consequence was, that any balance which may have then been due by the firm is the debt for which a demand can be made under the note. As the note then ceased to be a continuing security for a fluctuating balance, all payments by Gibb & Co. from that date fell to be applied in payment of the balance secured by the note on the principle recognised in *Lang* v. *Brown*, 22 D. 113, and prior cases. A small balance which was due on the account-current by the firm to the bank on 2d November 1866 was immediately wiped off, and considerable payments were afterwards made into that account. There is no evidence at all as to the state of the discount account at that date, or as to payments to that account subsequently received and fresh discounts granted. The Lord Ordinary thinks that the pursuer was bound to have proved the debt which was due when further transactions on the security of the note were brought to an end by the letter of 2d November 1866. For anything that appears, any debt that was then due may have been paid off by the subsequent operations on the account-current. So long as its existence and amount is not proved, there does not appear to be any *onus* upon the defender to take the initiative by entering into an accounting in order to prove that, if not discharged by the payments into the account-current, it was so by operations in the discount account."

The interlocutor has become final.

Agents for Pursuer—H. & A. Inglis, W.S.

Agent for Defender—Alexander Wylie, W.S.

Wednesday, January 20.

FIRST DIVISION.

MILNE'S TRUSTEES *v.* LORD ADVOCATE.

(*Ante*, v, 629.)

Salmon-Fishing — Barony — Prescriptive Possession — Jury Trial. In a question of prescriptive possession of salmon-fishing on a barony title, a verdict finding forty years' possession by the pursuers was entered up for the defenders, the possession not being sufficient in law, not having been ascribed during the whole period to the barony title.

This case was tried in December 1868 before the Lord President and a jury, on the following issue:—"It being admitted that the pursuers are proprietors of the lands and barony of Muchalls, excepting the parts and portions of the said lands and barony under-mentioned, viz.—(1) the farm of Elrich and others, parts and portions of the said lands and barony disponed by the commissioner of the late George Silver of Netherly to the trustees of the late George Symmers, by disposition dated 8th and 9th August 1842, and that the same do not adjoin the sea or seashore; (2) the following parts and portions of the said lands and barony disponed to Dr Keith: The mill and mill lands of Muchalls, and those fields forming part of the home farm of Muchalls, which are situated on the east side of the turnpike road leading from Aberdeen to Stonehaven, and south of the road leading therefrom eastward toward the seashore, which lands above described are bounded from the other parts of the said lands and barony of Muchalls as follows, viz.—by the said turnpike road leading from Aberdeen to Stonehaven, and by the said road leading from the said turnpike road eastward towards the broad shore of Muchalls till the said road reaches the top of the cliffs, where two march stones have been placed, and thence by the gully directly opposite into the sea, being the first gully south of the broad shore, the line of march passing in the direction of the centre of said two stones and along the south side of a small sharp pointed rock, and along the north side of a rock partly covered by the sea, according to the state of the tide:

"Whether, for forty years prior to 16th April 1862, or for time immemorial, the pursuers and their predecessors and authors have, as proprietors of the said lands and barony of Muchalls, possessed the salmon-fishing in the sea and sea coast opposite to the said lands and barony of Muchalls belonging to the pursuers?"

After evidence was led for the parties, it was arranged between them, on the suggestion of the Court, that, as the true question was, whether the possession had by the pursuers and their pre-