Wednesday, October 22.

SECOND DIVISION.

TOSH (OGILVY'S CURATOR) *v.* OGILVY.

Process—Evidence—Commission—Assessor.

The pursuer, in an action for money alleged by the defender to have been repaid, applied for a commission to examine the party who was said to have received the payment (since become an inmate of lunatic asylum), and produced in support of his application a medical certificate—*held* that there was no legal disability in the lunatic to give evidence, and commission granted.

This was an appeal from the Sheriff Court of Forfarshire in an action at the instance of Alexander Tosh, *curator bonis* to Miss Jane Ogilvy, an inmate of the Royal Lunatic Asylum, Montrose, against James Ogilvy, her brother, for payment of the sum of £296, uplifted and received by the defender for the said Jane Ogilvy from the branch of the National Bank of Scotland at Kirriemuir on or about 31st July 1868. This sum of £296 was contained in a deposit receipt in the name of the said Jane Ogilvy, and it was alleged that the defender, who was her brother, having caused or procured her signature or indorsation to said deposit receipt, had uplifted the money from the bank, and had failed to pay or account for it to the said Jane Ogilvy. The defence was that the money so uplifted by the defender had been actually paid by him to Miss Ogilvy. On 18th January 1872, the Sheriff-Substitute (ROBERTSON) pronounced an interlocutor by which the defender was assoilzied from the conclusions of the summons, which judgment was, on 28th March 1872, adhered to by the Sheriff (MAITLAND HERIOT).

The pursuer appealed.

The case was heard in October 1872, and their Lordships appointed the defender and his wife, who had given evidence in course of the proof before the Sheriff, to be examined in presence of the Court. Thereafter, in respect that hopes were entertained of the convalescence of Miss Ogilvy, consideration of the case was superseded. On 21st October 1873 the pursuer boxed a note craving the Court to resume consideration of the case and grant commission to examine Miss Ogilvy.

Counsel for the pursuer produced the following certificate:—

"Montrose Royal Lunatic Asylum,
18*th October* 1873.

"I hereby certify that the present condition of Jane Ogilvy is such that, though considerably improved, the excitement of going to Edinburgh and being examined in Court would probably render her evidence of little value; still, if she were examined in the Asylum, her statements might to a considerable extent be relied on.

(Signed) JAMES C. HOWDEN, M.D."

In respect of this certificate he moved the Court to grant a Commission to take the deposition of Miss Ogilvy.

Counsel for the defender contended that even if Dr Howden's certificate were to be held as establishing Miss Ogilvy's sanity, or at least her fitness to be examined, what was proposed was to take her deposition as to what had occurred when, if the pursuer's case had any foundation, Miss Ogilvy was actually insane. Further, that the certificate by no means established that the present condition of Miss Ogilvy was such that evidence of any value could be expected from her.

At advising—

LORD JUSTICE-CLERK—It seems to me that in the present condition of this woman it would be a pity to prevent the taking of evidence such as she may be capable of giving. The mere fact of her being an inmate of a lunatic asylum is not necessarily a bar to the admission of her evidence; it is the condition of hermind itself; and I think the opportunity should not be lost of sifting the evidence in the cause carefully, and this woman may materially throw light on the questions at issue. Even though she be examined, its does not become necessary that the Court should ultimately accept her evidence; and it must be borne in mind that to obtain the aid of such evidence may be more than usually important in a trial involving, as this one does, something more than merely civil questions.

LORD NEAVES—I agree entirely with your Lordship. It would be incorrect to say that there is a legal disqualification against this woman's giving evidence, merely because she is in an asylum. That may affect the quality of her evidence and her ability to give any of value. Every precaution should be taken to prevent any abuse in the matter, and the commissioner should be empowered to take the advice of a neutral medical man to act as his skilled assessor.

LORD COWAN concurred.

LORD BENHOLME absent.

Commission granted.

Counsel for the Pursuer and Appellant—Watson. Agent—L. M. Macara, W.S.

Counsel for the Defender and Respondent—Lang. Agent—D. Sang, W.S.

Wednesday, October 22.

SECOND DIVISION.

[Lord Shand, Ordinary

CRAWFORD *v.* MUIR.

Bill of Exchange—Discharge.

The holder of a bill of exchange, accepted by a limited company, and which had been protested, granted a discharge to the company when in process of liquidation of his whole claims competent against them. In an action by the holder against the last indorser for the sum in the bill,—*Held* that the discharge to the acceptors amounted merely to a covenant not to sue them, and did not release the indorser.

The summons in this suit, at the instance of Robert Crawford, solicitor, Edinburgh, against George Walker Muir, granite merchant, Glasgow, concluded that the defender "ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to make payment to the pursuer of the sum of £200 sterling, contained in a

bill drawn by William Cleland, then manager of the European Assurance Society, London, now residing in Bedford Square, London, upon and accepted by the Scottish Granite Company (Limited), dated 27th September 1866, and payable at two months, with interest thereon at the rate of five per cent., from the 1st day of December 1866 until payment."

The facts, as stated by the pursuer, were these:—The Scottish Granite Company (Limited), by their acceptance to William Cleland, then manager of the European Assurance Society, London, now residing in Bedford Square, London, became bound to pay the said William Cleland the sum of £200 sterling, within the Clydesdale Bank, Edinburgh, at two months from 27th September 1866. The said William Cleland indorsed said bill to John Holmes, residing in London, and the said John Holmes indorsed the same to George Walker Muir, granite merchant, Glasgow, by the latter of whom the same was indorsed to the pursuer, or rather, the said William Cleland obtained the indorsation of the said John Holmes and George Walker Muir in order to give increased security to the pursuer, who agreed on their indorsing the bill to discount the same. The said William Cleland having applied to the said Robert Crawford to discount said bill, with said indorsations thereon, the said Robert Crawford advanced to the said William Cleland the sum of £200, contained in said bill, upon the security thereof. The said bill was dishonoured when it became due, and the same was duly protested. The whole obligants on said bill were duly advised of said dishonour and protest on 1st December 1866, the day after said bill fell due.

The defender stated that the bill in question came to be drawn, accepted, and indorsed under the following circumstances:—In or about the year 1860, the Duke of Argyll granted a lease of certain granite quarries in the island of Mull to Thomas Frederick Beale, Regent Street, London; Alfred Wilson, Leadenhall Street there; and George Finch Montgomerie, of Liverpool. These lessees, along with others, formed themselves into a company called the "Ross of Mull Granite Company (Limited)," and of the said company the pursuer became either a director or the law agent. Sometime afterwards the company passed into liquidation, and was wound up by the Court of Chancery in England. The liquidators sold the lease of the said quarries to the said Alfred Wilson and George Finch Montgomerie. They took no title thereto, but entered into an arrangement with the said John Holmes, whereby he took an assignation of the lease in his favour, and after so acquiring it, he assigned the same to the said William Cleland. The said William Cleland had about the same time purchased from the trustee on the sequestrated estate of William Sym, quarryman, Glasgow, the Granite Polishing Works in St James Street and Scotland Street there, which had for sometime previously been carried on by Sym. The said William Cleland and the pursuer were then associated together as manager and director respectively of the European Assurance Company. After thus acquiring the said lease and polishing works, the said William Cleland and John Holmes proposed to form a joint-stock company to be called the Scottish Granite Company (Limited). This proposition was agreed to by the pursuer and some others, and with their aid carried out. The said William Cleland, or the said John Holmes, transferred certain of the company shares to them, and they became nominal directors. Two of the prospectuses are herewith produced. The pursuer was qualified as a director by receiving the said transfer of shares from the said William Cleland or John Holmes, but he never paid any price for the same, and with the exception of the shares held in name of the directors, the subscribers of the memorandum of association, and a very few *bona fide* purchasers, the shares all stood in the names of the said John Holmes and William Cleland. The said company was registered in England. The defender was, in or about the year , appointed manager of the works in Glasgow, but had no part in the conduct of the business of the company other than the polishing of granite. The financial business of the company was carried on in London, and was conducted by Cleland, Holmes, and the pursuer. The registered office of the company was in London, and the company carried on business there under the name of the "Scottish Granite Company (Limited)." It never fairly floated, but was kept going in anticipation of subscribers being obtained. During September 1866, the said William Cleland required money to carry on the business of the company, and accordingly he and the said John Holmes arranged with the pursuer that the pursuer should procure money for this purpose, and to enable him to do so the bill libelled on was entrusted by them to him. The defender was not aware at the time, but afterwards ascertained, that along with the bill, and of even date therewith, the said William Cleland executed in favour of the pursuer a bond and disposition in security over the Granite Polishing Works in Glasgow for £1000. The said bond was granted to secure the pursuer in repayment of the said bill, and of any further sum he might raise in the same or a similar way. The bill accordingly was included in the bond; but the sum in the bond was paid to the pursuer, in or about 31st July 1868, by assignation in favour of Mrs Hood, residing in Salisbury Road, Newington, Edinburgh, who discharged the debt, and thereby the sum in the bill was paid and extinguished, the pursuer receiving full payment of the contents of the same. As the defender never knew when the bond for £1000 was paid to the pursuer, he did not stipulate for the bill sued on being given up at payment of the bond. Since 1867 the defender has always understood that the bill was paid, or that, at all events, any claim competent to the pursuer was extinguished. The bill in question was not accepted by the Scottish Granite Company to the said William Cleland, and by him indorsed to the said John Holmes for value, and indorsed by Holmes to the defender, and by the defender to the pursuer, but, on the contrary, the said William Cleland, John Holmes; the pursuer and defender, all put their names upon the said bill as joint sureties for the said Scottish Granite Company, the defender having done so at the request of the pursuer, and after it was in his hands for the purpose of getting discounted, the proceeds being applied in making up the sum contained in the bond per £1000. With the four indorsations thereon, the bill was discounted by the pursuer with the Clydesdale Bank at Edinburgh, at which place the bill had been made payable, contrary to the usual place of the Company. Accordingly, on one of the parties paying the whole contents thereof, he is not in right to recover more than his share from the others; and, in this view, apart altogether from the payment operated by the

said bond, which is relied on by the defender as a separate and distinct ground of defence, the defender has already made full payment of his share, and in the following circumstances:—When the bill sued on reached maturity it was not paid, and the pursuer, acting as manager for the said Scottish Granite Company, drew a bill on H. Yates, contractor, Liverpool, for £70. The pursuer deposited this bill with the Clydesdale Bank, Edinburgh, in December 1866, with instructions to collect the amount, and place the same to account of the bill sued on. Through some inadvertency, the said bill for £70 was not paid to the Clydesdale Bank till 8th February 1867, and by that time the bill sued on had been placed by the bank to the debit of the pursuer; but on 28th February 1867 the proceeds of the bill for £70 were placed by the bank to the pursuer's credit, and thereby the defender paid in full his share of the said bill. The said payment of £70 was not marked on the back of the bill sued on, as when the defender deposited the said bill for £70 the bank were not aware whether it would be paid, and would not give credit for the amount till the cash was actually received. The defender is, in any event, entitled to credit for the sum of £70. The said Scottish Granite Company (Limited) passed into liquidation, and was wound up by the Court of Chancery in England. The winding up order was pronounced on or about April 1867, and the pursuer and Andrew Carrick Robertson, accountant, Glasgow, were appointed liquidators. Throughout the whole proceedings in the liquidation before mentioned, the bill sued on was never heard of; and further, the pursuer's estates were sequestrated on his own petition by this Court in or about 1870, and in the course of the proceedings thereafter, he gave up a state of his affairs as required by the statute, but in that state he did not include the bill sued on as an asset, because he well knew that he had received payment thereof in full. When the defender agreed to become a party to the bill he did so on the distinct condition that the proceeds should be handed to him to be applied for the company purposes. This condition the pursuer did not fulfil, but when he discounted the bill he handed the defender a part of the proceeds, which the defender applied to company purposes; and on the pursuer failing to hand over the balance to the defender the defender informed him, shortly after the bill had been drawn, that he would hold himself in no way liable for the contents of the bill, and from that time to the present the defender has heard nothing of the matter beyond paying the £70 before mentioned, which he only did as the bill was in the hands of the bank. The defender did not derive any personal benefit from the discounting of the said bill.

The pleas in law for the pursuer were—"(1) The defender, George Walker Muir, the last indorser of the bill libelled, is liable in payment thereof to the pursuer. (2) The defender having failed to pay the said bill when it came to maturity, and the same being still resting owing and unpaid, the pursuer is entitled to decree in terms of the conclusions of the summons, with expenses."

The pleas in law for the defender were—"(2) In respect the contents of the said bill for £200 have been already paid to the pursuer, he is not in right to sue upon the same. (3) The defender being merely a joint surety with the pursuer and others on the bill sued on for payment to the holder, and having made payment of his share, cannot be now proceeded against. (4) *Esto*, that the defender is held liable for the whole contents of the bill, with right of relief against Holmes, he is entitled to credit for the said sum of £70. (5) The bill sued on having, both during the liquidation of the said Granite Company and in the sequestration proceedings of the pursuer, and otherwise, been treated by him as paid or extinguished, he is not now entitled to raise action on the same. (6) By raising action at such a time as to make it impossible for the defender to operate his relief against the other parties to the bill, the pursuer has lost his right of recourse against the defender. (7) The defender having become a joint obligant on the said bill on a certain condition, and that condition not having been implemented by the pursuer, the defender is entitled to absolvitor. (8) The pursuer is not entitled to recover two separate and independent decrees for the sum in the bill. (9) The averments of the pursuer being unfounded in fact and law, the defender is entitled to absolvitor, with expenses."

The Lord Ordinary, after granting a diligence, pronounced the following interlocutor:—

"*Edinburgh*, *20th May* 1873.—The Lord Ordinary having heard counsel for the parties, Finds that the defences maintained can only be instructed by the writ or oath of the pursuer as the holder of the bill libelled: Finds, that although a full diligence has been granted for recovery of the pursuer's writings, the defender has failed thereby to instruct his averments. Therefore, decerns against the defender in terms of the conclusions of the summons: Finds him liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report."

The defender reclaimed, and obtained leave from the Court to add the following statement and plea to his record:—"Further, the pursuer has, without communication with the defender, freed and relieved the said Granite Company, the acceptors of said bill, of his whole claims against said company, including his claim on the said bill, by discharge dated 28th May 1872, whereby he renounced and discharged any claim which might otherwise have been competent to him against the defender.

Plea.

"The pursuer having discharged the acceptors of said bill, and thereby renounced and discharged any claim which might otherwise have been competent to him against the defender, the defender is entitled to absolvitor."

The discharge founded on was as follows:—

"*Glasgow*, *28th May* 1872.—Received from Mrs Janet Chirnside Hood or M'Cubbin, executrix of the deceased David M'Cubbin, accountant in Glasgow, who was one of the liquidators of the Scottish Granite Co., Limited, the sum of £20 sterling in full of all claims and demands competent to me against the said Scottish Granite Company, Limited, or liquidators thereof, or the said David M'Cubbin, or Mrs Janet Chirnside Hood or M'Cubbin, as his executrix, all which are hereby for ever renounced and discharged; reserving entire my claims against any obligants, other than the said Granite Co., presently bound to me, along with said Granite Co."

Cases cited—*Heansley* v. *Cole*, 16 Meeson & Wellsby, 128; *Price*, 4 El. and By., 60; *Lewis*, 15 D. 260; *Owen*, 17 E. Jurist.

At advising—

LORD JUSTICE-CLERK—I think the judgment of the Lord Ordinary is right on the point he has decided. Since that time, however, in consequence of the discovery of the discharge which has been printed, the defender has added a plea of discharge which was not before the Lord Ordinary. The question substantially is, Does this document amount to a discharge of the debt, and relieve the endorsers of liability? Now, in the proper sense of the word, it is clearly not a discharge, because the document of debt is to remain in the hands of the creditor to enable him to enforce his claim against the co-obligant. It really is of the nature of a covenant not to sue the acceptor of the bill, reserving right to sue the endorsers or drawer. Is that a discharge of the debt? Such questions in England have arisen generally between principal and surety, and it has been held that such a paction amounts to merely a covenant not to sue. In the case of *Owen*, in 1851, and in the case of *Price*, in 1855, it was laid down that such a paction did not amount to a release.

There is one case in Scotland on the point (that of *Smith* in 1821), where the Court did not proceed on any knowledge of the surety, and held he was not liberated, and the decision was affirmed on appeal. The case of *Lewis*, referred to, comes under a different category. There is a passage in Stair, Brodie's edition (supplement, page 945), which bears on the subject. I am of opinion that the question between an indorser and the holder of a bill is not the same as between a principal and cautioner, and that, as this was a mere agreement by the holder after the acceptor had failed to pay, and protest had been taken, and the affairs were in process of liquidation, it does not amount to a discharge of the indorser.

LORD COWAN—I think the Sheriff's decree was right, and I concur in your Lordship's opinion on the question of discharge.

LORD NEAVES concurred.

LORD BENHOLME was absent.

The Court repelled the plea of discharge, and *quoad ultra* adhered.

Counsel for Reclaimers—Henderson and P. Fraser. Agent—D. Milne, S.S.C.

Counsel for Respondent—Brand and Solicitor-General (Clark). Agent—J. Somerville, S.S.C.

Friday, October 24.

FIRST DIVISION.

JOHN LAMB MURRAY (MURRAY'S CURATOR), PETITIONER.

Process—Petition—Statute 20 *and* 21 *Vict. c.* 56 (*Court of Session Act* 1857), § 4.

A petition was presented to the Junior Lord Ordinary by the curator nominated by a minor, praying for delivery of his bond of caution, and stating that the minor had attained majority, that the petitioner had accounted to him for his management and handed over the whole funds, and that the minor had granted a full and ample discharge. The Lord Ordinary refused to entertain the petition, holding that it was not one of the petitions which are competent before the Junior Lord Ordinary under the Court of Session Act 1857, § 4. The petition was then presented to the First Division, who ordered intimation and service, and upon expiry of the induciae, remitted to the Junior Lord Ordinary. The Lord Ordinary, without making any further remit, reported that a sufficient discharge had been produced, and the Court thereupon granted the prayer of the petition.

Counsel for the Petitioner—Melville. Agent—Thomas Paterson, W.S.

Saturday, October 25.

FIRST DIVISION.

[Sheriff of Forfarshire.

HUNTER, COX, AND OTHERS *v.* KERR.

Sheriff-Court—Process—Jurisdiction—Servitude—1 *and* 2 *Vict. c.* 119, § 15.

The seller of a house and ground declined to deliver any disposition of the property which did not contain a clause of servitude under which he had himself held the subjects. The purchaser, considering that he was entitled, in the circumstances, to a disposition unqualified by such a restriction, presented a petition in the Sheriff-Court to compel delivery of the disposition.

Held, that this, although *ex facie* a petition *ad factum praestandum*, was in reality a petition to do something which would have the effect of transferring a title to heritable property, and therefore incompetent before the Sheriff-Court; and that, so far as the question raised was one of servitude, it was not of such a nature as to come under the application of the statute quoted.

Observed—This case was ruled by that of *Gordon*, M. 12,245.

Counsel for Appellant—Asher. Agents—M'Ewen & Carment, W.S.

Counsel for Respondent— . Agent—Neil M. Campbell, W.S.

Saturday, October 25.

SECOND DIVISION.

TRAILL *v.* TRAILL.

Process — Summons of Removing — Sheriff-Court Action.

An objection was taken to the relevancy of a summons in an action of removing in the Sheriff-Court, on the ground that it did not set forth the title in which the pursuer sued —*Held* (reversing the judgment of the Sheriff) that the summons was relevant.

Title to Sue—Infeftment—Partnership.

A son as "sole surviving partner of, and as such trustee for" a firm, brought an action against his mother to have her decerned to