

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—Neil M. Campbell, W.S. Agent—

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—Infestment—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