

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 assolized 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 Thereafter, in respect that hopes were entertained of the convalescence of Miss Ogilvy, consideration of the case was superseded.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,
18th 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 her mind 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, it 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