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

remove from a dwelling-house situated within the firm's premises; *held* (*diss.* Lord Benholme) that to sustain the action the pursuer must first of all clearly establish his own title to the subject.

Observed, per Lord Neaves, that the pursuer might either have proved his just right to continue his father's possession, or that his mother had expressly received a precarious right from him to occupy the house.

This was an action of removing at the instance of Adam Christie Traill, as "sole surviving partner of and, as such, trustee for behoof of the firm of Robert Traill & Co., ironfounders, Vulcan Foundry, Bonnington," against Mrs Ann Christie or Traill, his mother. The conclusions of the summons were as follows:—"Therefore the defender ought to be decerned to flit and remove herself, her family, servants, and all others; with their whole goods and gear, furth and from the dwelling-house and pertinents presently occupied by her, situated within the foresaid premises of Messrs Robert Traill & Company, at Vulcan Foundry aforesaid, and at and against the term of Whitsunday next, at which term any right the defender may have to occupy or possess the said dwelling-house and others will have ceased, and to leave the said dwelling-house and pertinents void and redd, to the effect the pursuer or others authorised by him may enter to and possess the same, and that under the pain of ejection, with expenses, but only in the event of the defender entering appearance and opposing the conclusions of this summons." As set forth in the condescendence, the circumstances were as follows:—By contract of feu, dated April 23 and 27 and May 7, 1866, William Walker Gibson sold and disponed to and in favour of Robert Traill and Adam Christie Traill, as trustees and for behoof of the firm of R. Traill & Co., and to the survivors of them and the heir-male of the last survivor in trust as aforesaid and their disponees, a piece of ground, part of the two parks of the lands of Pilrig. This feu-contract was recorded on the 16th July 1866. An *ex facie* absolute disposition of these subjects in favour of a Mr Cuthbertson was granted on 16th October 1868. The pursuer asserted that this was merely an heritable security for a loan of £600, and was qualified by the following letter, which was produced:—

"Messrs Robert Traill & Co.,
Ironfounders, Leith.

"*Leith*, 16*th October* 1868.

"GENTLEMEN,—I hereby agree to sell to you, at any time within five years from this date, the piece of ground, foundry plant, and others contained in disposition by you and the individual partners of your firm in my favour, dated this day, at the price of £600, with the addition of a sum of £27 for every year the same remains in my hands.—I am, gentlemen, your obedient servant,

(Signed) "A. G. CUTHBERTSON."

"*P.S.*—If I shall be put to any costs or charges of any kind in connection with the said property, it is understood betwixt you and me that there will fall to be paid by you to me all such costs and charges in addition to the above sums.

(Signed) "A. G. CUTHBERTSON."

Six receipts for interest were also produced. On the other hand, the defender stated that the property had been conveyed to Mr Cuthbertson. Robert Traill & Company, in terms of a stipulation contained in the feu-contract, erected upon this ground a foundry, in which their business of ironfounders was and is still carried on, and also a dwelling-house situated within the works. Robert Traill died on 30th October 1869, and prior to this both father and mother lived in this house with their son, the pursuer, and since the death of Robert Traill, the defender has continued to reside in the dwelling-house. The pursuer averred that the use of the dwelling-house was now required for business purposes, and that the defender had no title to remain in possession of the dwelling-house against his wish. Further, he denied that any contract of co-partnery between him and his father was ever executed, and he produced the original draft of an intended but not executed contract.

The pursuer pleaded—"(1) The defender having no right or title to occupy the dwelling-house after the term of Whitsunday 1873, the pursuer, the surviving partner of the firm of Robert Traill & Company, and the sole heritable proprietor infeft in said subjects, is entitled to the decree of removing sought under this action. (2) The defender having appeared to defend the action, the pursuer is entitled to expenses."

The defender pleaded—"(1) The pursuer has no title to sue. (2) The summons is irrelevant and incompetent, and the action ought therefore to be dismissed. (3) The pursuer's statements being irrelevant, and, moreover, being unfounded in fact and his pleas untenable, the defender ought to be assoilzied, with expenses."

The interlocutor of the Sheriff-Substitute (HALLARD) was as follows:—

"*Edinburgh*, 2*d July* 1873.—The Sheriff-Substitute having considered the closed record and productions, and having heard parties' solicitors thereon: Finds that, under the feu-contract produced, and by his father's death in October 1869, the pursuer then became and is now sole proprietor in trust of the subjects contained in said feu-contract, including therein the dwelling-house from which he now seeks to remove the defender: Finds that the pursuer's title as proprietor in trust as aforesaid is duly set forth in the summons: Finds that the same is a valid and sufficient title to pursue this removing; Finds that the pursuer's said title is not impaired by the transaction under which the late firm of Robert Traill & Company borrowed £600 from A. G. Cuthbertson, of Leith, on the security of an *ex facie* absolute conveyance; but, on the contrary, that, in a question with the defender, the pursuer is still undivested sole feudal proprietor in trust of the dwelling-house from which he seeks to remove the defender as aforesaid: Finds that, in a question with the defender, the pursuer's title is not impaired by the alleged contract of co-partnership, alleged in article fourth of defender's statement of facts; Finds said allegation irrelevant: Finds that the trust-disposition and settlement executed by the defender and her late husband, Robert Traill gives her no right to occupy the dwelling-house in dispute: Finds that the said defender has failed to show any title to continue in possession of said dwelling-house. Therefore decerns against her in terms of the conclusions of the libel: Finds the pursuer entitled to expenses, &c.

"*Note.*—The pursuer seeks the defender's removal from the dwelling-house in dispute, as occupied by her without a title. The defender retorts by a similar plea against the pursuer, and contends that he has no title to sue. In this conflict

the pursuer, in the Sheriff-Substitute's opinion, must prevail.

"Under the feu-contract produced, and which is understood to be duly recorded in the Register of Sasines, the feudal owner of subjects conveyed is not the firm of Robert Traill & Co., but the two individuals, Robert Traill and his son Adam Christie Traill.

"These two persons are owners in trust for the firm, and for any persons who may become partners thereof. There is a remainder over to the survivor. Robert Traill died in October 1869. The pursuer, therefore, is sole feudal owner in trust by survivance.

"This state of things is not set forth in detail in the summons, but the pursuer is there called 'surviving partner of, and, as such, trustee for behoof of the firm.' This, though meagre, seems sufficient, especially with production of the deed.

"The transaction with Cuthbertson is not one from which the defender can take any benefit in this contention. Peculiar as the terms of the back letter are, there can be no doubt that the *ex facie* absolute conveyance is a mere security. In a question with the defender the pursuer is undivested owner.

"Neither does the alleged contract of co-partnership, of which a copy has been produced, give the defender any help. It cannot affect the pursuer's right as trustee for the co-partnery to clear a part of the co-partnery buildings from the burden of the defender's occupancy.

"Lastly, it is quite certain that the mutual deed between the defender's late husband and herself, on which she founds, gives her no right, *per expressum*, to occupy this dwelling-house in the foundry. It could scarcely have done so consistently with the feu-contract and with the rights of the partners. Full use of the household furniture and plenishing during her life is given to the defender. But nothing is said, or could have been expected to be said, about the dwelling-house. A liferent right to all the deceased's free yearly income by no means implies a right to occupy during her life this dwelling-house, which is truly a part, not of her late husband's estate, but of the copartnery subjects.

"The defender's occupancy took its origin in the feudal right constituted by the feu-contract. That right is now exclusively vested in the pursuer. There is, therefore, no title in her sufficient to protect her against the conclusions of this action.'

On appeal, the Sheriff-Depute (DAVIDSON), on 25th July 1873, recalled the interlocutor of his Substitute, and pronounced one as follows:—"The Sheriff having considered the appeal for the defender, with the process, and heard parties' procurators, recalls the interlocutor appealed against: Finds that the pursuer does not set forth in his summons his right and title to the premises from which he seeks to remove the defender, or the character in which he pursues this action: Therefore sustains the defender's second plea in law, dismisses the action: Finds the defender entitled to expenses, &c.

"*Note.*—The Sheriff has dealt with this case no further than as to the objection to the relevancy. But, it may be observed, that enough has been disclosed on the merits to show how necessary it was for the pursuer distinctly to state his title.

"As to the relevancy of the summons, as now framed, there seems no doubt. If in an action for rent it is necessary that the summons should set forth the character in which the pursuer sues, it is at least as necessary in an action of removing. (*M'Intosh*, June 9, 1835; *Hutchison*, July 18, 1846). The only words in this summons that can be referred to as touching the title of the pursuer are, 'dwelling-house situated within the works of the said Robert Traill & Co., Vulcan Foundry,' and 'situated within the foresaid premises of Messrs Robert Traill & Co., at Vulcan Foundry aforesaid.' But these words give no light whatever, and are much less definite than the words, 'possessed by the defender or her sub-tenants under the pursuer,' which were held insufficient in the case of *M'Intosh*."

An appeal having been taken to the Court of Session, the appellants (pursuers) argued (1), on the first part of their case, that the judgment of the Sheriff ought to be reversed, and that the action should not be dismissed owing to the defect in the summons on which his interlocutor was founded.

[After hearing junior counsel, the Court indicated that they did not desire further argument on this point, and the appellants' case was fully stated on the second question—that of title.]

(2) Although the feudal title was taken in the names of the partners of the firm of Robert Traill & Co., the real right was nevertheless in the company, the partners being trustees therefor. The company are now, and always were, in possession of the subjects. Prior to Mr Traill's death, both partners—that is to say, he and his son—occupied this house, and with them also Mrs Traill. The house is actually situated within the premises of the Vulcan Foundry, enclosed by its walls and gates. On his father's death the pursuer, Adam Christie Traill, allowed his mother to continue to live there and occupy the house; he had nothing to do with his mother in money mattters save to pay her a certain sum of money, and she had furthermore no interest whatever in the business of the company. The defender, who derives from the pursuer her whole rights of possession, is sought to be ejected by him.

The conveyance to Cuthbertson was merely intended to give him a security for the sums advanced by him to the firm. It was nothing else. An heir in apparency certainly could not without infeftment remove tenants, but he could remove servants, and squatters, and persons whose rights were analogous to these. The widow of his predecessor stands in this position. Mr Traill has succeeded to his ancestor's possession, and to justify that he need not be infeft; he may draw rents, though without infeftment he cannot remove a tenant.

This house is part of the company's premises, the pursuer is sole surviving partner of that company, and is in possession, therefore, of its premises generally, including, of course, this house. As sole surviving partner, he alone has a title to pursue; he allowed his mother to remain, and now, as his business requires it, he calls upon her—and he has a right to call upon her—to remove.

Authorities—*M'Intosh*, 9 June 1835; *Hutchison*, 15 July 1846.

The defenders (respondents) argued—(1) in the Sheriff Court the condescendence is not part of the summons. The Sheriff has only a power as to amendment up to the closing of the record. The summons must, as formerly in the Court of Session, set forth the grounds of action in its conclusions, and the slightest ambiguity in the summons as to the designation of the

title renders the whole of no avail. All the authorities only arrive at the decision that no change has been made on the former requirements of the Sheriff Court summons, and the Sheriff had no alternative but to dismiss the action. (2.) The defender here is in possession, and she was in the house when old Mr Traill was alive, and when the pursuer lived in family with him. The pursuer now says "you must remove," and he is quite right, provided he has any ground of title himself. He avers that in 1866 a feu-contract was entered into by the deceased Mr Traill and him as trustees for a company with certain persons, and that subsequently in 1868 they granted to a Mr Cuthbertson a disposition of the subjects, he giving them the back letter, as it is termed, which has been produced. This is not a good title on which to pursue an action of removing. The possession of the defender is good, unless against a person who has either a seisin, or a right such as courtesy, or where the possession has been derived directly from the pursuer in the action of removing. The disposition to Cuthbertson is *ex facie* an absolute one, and as to the letter, it simply amounts to a *pactum de retro vendendo*.

The action, in the form in which it has been raised, is not fitted to try any question (1) as to the terms of the alleged partnership; (2) as to the state of the partnership, its creation, termination, or subsisting rights; (3) as to the substantial or beneficial rights of parties as in a question between Cuthbertson and the granter of the disposition or his successor.

All it amounts to is an action of removing in the Sheriff Court by a proprietor professing to be infeft against a person in possession. The answer is—"You are not infeft, you are not the true owner, I am possessor, and that very fact of possession defends me against any one but the real owner." The assumed analogy to the position of a squatter is based upon no foundation whatever.

Authorities—*Act of Sederunt*, 10 July 1839, § 10; *Dallas* v. *Maun*, 14 June 1853, 15 D. 746; *Robertson* v. *Duff*, 2 D. 279; *Gardyne* v. *Royal Bank*.

At advising—

Lord Justice-Clerk—It is needless to deny the fact that the summons in the Sheriff-court action, which has come before your Lordships on appeal, was, to say the least of it, a very slovenly production. Nevertheless, there is in it sufficient to indicate the fact that the action is brought by Adam Christie Traill as the proprietor of the subjects in question. Although formerly stricter views with regard to the essentials of a summons prevailed, I should not now be inclined to go as far as the Sheriff, and throw the action out of Court on such a deficiency as that alleged here.

Upon the more technical view of the statements put upon record, I concur in the argument addressed to the Court by the Lord Advocate. The Company were entirely divested by the conveyance to Cuthbertson, and had only a personal right to a re-conveyance on payment of the sum stipulated. The pursuer could not re-acquire the subjects conveyed to Mr Cuthbertson except by a re-conveyance. To this certainly the company was entitled, in terms of the letter we have in process, on repayment, but I do not think that this is a position of matters sufficient to sustain the pursuer in the position he now assumes as heritable proprietor pursuing an action of removing.

If the pursuer were shown to be the sole surviving and managing partner, I do not know that the demand made by him, calling upon this lady to give up the premises, might not be enough; but after hearing the argument addressed to the Court, quite apart from the question of feudal title, we don't know, and we have no evidence of what the pursuer's right to represent the company may be. There is no doubt that the substantial title is in the company, and as to who represents the right of company there is no information.

I think that the pursuer must establish his own substantial title in some way, in order to make it clear that he may deal with these subjects in the way that he could deal with them were they undoubtedly his own. The right must be first extricated before any such action as that now before us can be maintained.

Lord Cowan—This is an action of removing brought against a party who, by the wording of the summons itself, is recognised to have some right to remain in the occupation of the house until the Whitsunday following. [*His Lordship proceeded to quote the summons.*]

While I do not think the Sheriff should have been so strict on the technical point raised in the Inferior Court, still, behind, there lies the question whether this man is entitled to prosecute an action of removing. The defender, Mrs Traill, is in possession in virtue of a title not flowing from the pursuer; such title as she has is in herself. A defender is not, according to the law and practice followed in this Court, called upon to prove his title in an action of removing until the pursuer has first shown a sufficient title on which the action may be based.

There must be an infeftment. The party must, to enable him to show a right, be feudally infeft in the subjects, and, according to the view which I take of this case, the feudal title, as it now stands, is in Cuthbertson, and, as such, must be fatal to the pursuer's claims. It is urged *contra* that there was an obligation, founded on the letter produced, by which Cuthbertson left the pursuer's title intact. That letter appears to me to be nothing more than what has justly been termed in the course of the discussion a *pactum de retro vendendo*. If the party had been infeft, (and in this instance Cuthbertson was so), there would arise on this letter a personal obligation which would be simply a foundation for an action of damages in default of implement, but the heritable right is not affected; it is in Cuthbertson, and can only be got from him by a new disposition, and a new infeftment of the pursuer proceeding thereon. Supposing, however, that this had been merely a back-letter, I am not to be understood as implying that, if an action had been brought by the original proprietor, he might have been foreclosed. An heir apparent may bring an action against a tenant, and if in the course of it, at any time before decree, he produce this infeftment, he may avail himself of the position in which he is placed by such production. Your Lordship has alluded to the fact that, putting aside Cuthbertson's title altogether, there is even then no sufficient evidence before us of any title in the pursuer, and with this observation I am not prepared to say that I do not agree, but the position of Cuthbertson in the matter appears to me, apart from the pursuer's title, enough to bar the present action.

Lord Benholme—This is a case in which a son seeks to remove his mother from the house where she has resided for a considerable time, and this position of matters disposes me to deal strictly with the pursuer, and favourably with the defender. That consideration must not, however, weigh unduly. There arises two points in this action,—*Firstly*, the technical objection to the summons in the Sheriff-court, on which objection the interlocutor appealed against is founded. The pursuer therein describes himself as trustee for behoof of the firm, and the house is described, with reference to that statement, as being situated within the company's premises. On this point I agree with your Lordship in thinking that the Sheriff was wrong, and that he proceeded too strictly. *Secondly*, it is admitted that an *ex facie* absolute conveyance of the premises was granted to Cuthbertson in 1868, and infeftment having followed thereon, the question which arises is whether that is a circumstance upon which the defender can found to the effect of resisting the pursuer's claims upon her to remove from subjects to which she does not say she has any title. Now, in my opinion it would be a very strict view of the law to take, were it to be held that a party in an action cannot ascertain the real nature of a contract between him and his creditor. According to this, the defender, a third party, having no title whatsoever of her own, and having no interest in the capital or company funds, is entitled to say, "I am in possession; that original infeftment in your favour has been done away with by the subsequent one in favour of Mr Cuthbertson, and you have not any title to dispossess me." This is a very strong proposition, to which I am not prepared to assent. It is proved by Cuthbertson's own writ that his infeftment operated merely as a security. Mrs Traill founds on *jus tertie* in the strictest sense, and it is proved that the third party's right on which she founds was merely that of a creditor.

I regard the position of Mrs Traill in this case as that of a squatter, and I do not think a third party can intervene. I do not concur in Lord Cowan's views as to the effect of the wording of the summons, for it appears to me that the fact of the pursuer's giving an ordinary period of warning to quit, in place of a peremptory removing, renders his case not worse, but better. I think the pursuer is entitled to go on with his action.

Lord Neaves—I am in the peculiar position of agreeing with much that Lord Benholme has said, but nevertheless of concurring, on the whole, in the results at which the majority of your Lordships have arrived. I do not think that, in the circumstances, it was necessary for the pursuer to found on an infeftment. He might have proved one of two things—either that he was justly entitled to continue his father's possession, or that he had explicitly given to his mother a precarious right to occupy this house—a right flowing from him and superseding his own rights. This, as I have observed, he might have proved; as it is, we have only an indication of such a line of argument in Art. 5 of the Condescendence.

The pursuer is not correctly infeft, and although he in his defences says so, and terms himself "sole heritable proprietor," this is not, strictly speaking, correct. The defender, however, Mrs Traill, who from her husband's rights derives all her own, is not entitled now to come forward and impugn those rights. The pursuer refers his position to his trusteeship, to his being the sole surviving partner and trustee for the firm; but we have no means of knowing how he is trustee, what partnership, if any, existed, nor does he vouchsafe any explanation as to why he wants the house.

He has not then clearly indicated that the defender's possession flows from himself by direct concession; he has not enlightened the Court as to this partnership, to which he avers that he stands in the position of trustee, and in the absence of any evidence on these points I do not think the action for removing can be sustained.

As to the form of the summons, I do not go much upon that; a reasonable time is always given in the most summary process to allow parties to remove.

The Court pronounced the following interlocutor:—

"Recall the interlocutor of the Sheriff; Find that no sufficient title to the subjects in question has been relevantly set forth by the pursuer on this record: Therefore dismiss the action, and decern: Find expenses due by the pursuer in both Courts, and remit to the Auditor to tax and report."

Counsel for Pursuer and Appellant—Solicitor-General (Clark), Q.C., and Black. Agent—D. Curror, S.S.C.

Counsel for Defender and Respondent—Lord Advocate (Young), Q.C., and Asher.

S., Clerk.

Tuesday, October 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THOMSON *v.* LINDSAY.

Trust—Writ.

In a case where an insolvent firm made a composition with their creditors, A, the brother of one of the partners, became responsible for one of the instalments payable, and received in security certain sums from his brother B. He was relieved of his obligation, and soon after died without accounting for the sums so received, and B raised an action against the judicial factor on A's estate for repayment. *Held* that an entry in A's cash book and a relative letter by B, purporting to have been written and received at the time, were equivalent to A's writ, and as such sufficient to prove a trust against A's estate.

In 1858 the affairs of M. C. Thomson & Co., flax spinners, Glasgow, of which the pursuer was a partner, became embarrassed, and they made a composition with their creditors, one of the conditions of which was, that the deceased James Thomson, the pursuer's brother, should become security for one of the instalments payable under the composition. The pursuer deposited in the said James Thomson's hands, as security, certain sums amounting to £439, 8s. 9d., and the sums so deposited with the said James Thomson were duly entered by him in his books in his own handwriting to the credit of the pursuer, and the deposit was further explained, and its terms confirmed by the following letter, signed and addressed by the