of practice like this I think it better to adhere to these decisions, and to hold that the reclaiming-note has not been presented in time.

The Court sustained the objection.

Counsel for the Reclaimers—J. Galbraith Miller. Agent—W. G. L. Winchester, W.S.

Counsel for the Respondents—W. Campbell. Agents—Welsh & Forbes, S.S.C.

Tuesday, January 21.

OUTER HOUSE.

[Lord Kincairney.

M'KECHNIE AND OTHERS, PETITIONERS.

Process — Petition for Appointment of Curator Bonis to Lunatic—Personal Service on Lunatic dispensed with.

In a petition for the appointment of a *curator bonis* to Robert M'Kechnie, a gentleman certified to be of unsound mind and incapable of managing his affairs, presented by his wife and the whole of his next-of-kin, two medical certificates were produced, "that to serve the petition for the appointment of a curator upon him personally would have a bad effect on his mind as he is apt to become very violent," and another from the physician superintendent of the asylum in which he was confined, "that he might be excited and seriously injured by the personal service upon him of a petition for the appointment of a *curator bonis*." In the special circumstances of the case personal service was dispensed with.

Counsel for the Petitioners — Gloag. Agents — Macritchie, Bayley, & Henderson, W.S.

Wednesday, January 22.

SECOND DIVISION.

[Sheriff of the Lothians, and Peebles.

STENHOUSE *v.* TOD.

Cautioner—Co-cautioner—Communication of Benefit—Appropriation of Payment to Particular Debt—Security.

Tod was cautioner along with Gilmour for a cash account for £500, and also along with Stenhouse for a cash account for £150, both for behoof of Ritchie.

Tod and Ritchie together borrowed £600, and Tod obtained possession of the money and applied it to extinguish the first debt. He then paid the second debt and sued Stenhouse for half of the amount.

The defender maintained that Tod was bound to apply the £600 rateably in payment of the two bonds.

The Court repelled the defence, *holding* (1) that there was no agreement that the money should be so applied; and (2) that the facts of the case did not impose any obligation on Tod so to apply it.

In October 1885 James Tod, engraver, Edinburgh, and John Stenhouse junior, stockbroker, Edinburgh, for behoof of William Ritchie, stationer, Edinburgh, Tod's nephew, became joint obligants with him in a cash-credit bond to the Commercial Bank for the principal sum of £150 and interest, with the proviso that the liability of the pursuer and defender for principal and interest should not exceed £172, 10s. On this security the bank, prior to 1st November 1886, advanced to Ritchie £150 exclusive of interest. Tod in 1888 paid to the bank the sum of £172, 8s. 6d. due under the bond, and raised this action against Stenhouse for £86, 4s. 3d., the half of the sum for which he alleged they were equally bound.

The defender alleged (1) that he consented to sign the bond on the undertaking of the pursuer to relieve him of all liability thereunder. (2) It is further believed and averred that the said William Ritchie, sometime in the summer of 1888, provided funds for payment, *inter alia*, of the whole debt due under the cash-credit bond which the defender signed, and handed the same to the pursuer to pay to the bank. The defender believes and avers that the funds so provided amounted to £600, and that the said William Ritchie instructed the pursuer to apply any balance over after paying the debt for which the defender was co-cautioner towards payment of another cash-credit bond for £500 or thereabouts of his to the Commercial Bank, under which the pursuer and another party were cautioners.

He pleaded—"(1) The pursuer having agreed to keep the defender free of all liability under the cash-credit bond referred to in the condescendence, is thereby barred from insisting in the present action. (3) The pursuer having received from the principal debtor in the said cash-credit bond the sum necessary to pay the debt due thereunder, with instructions, or at least on the understanding that it was to be applied primarily to that purpose, was bound so to apply it. (4) *Separatim*, and even if the principal debtor gave the pursuer no instructions as to the application of the fund primarily to payment of the amount for which the defender was security to the bank, still the pursuer having received a sum from the principal debtor to pay to the bank on account of his indebtedness, was bound to apply it equitably so as to relieve those who were his co-cautioners proportionately, and to that extent the defender is entitled to relief."

On 11th February 1889 the Sheriff-Substitute (RUTHERFURD) found that the first ground of defence could not competently be proved *pro ut de jure*, but allowed a

proof at large of the defender's second averment.

"*Note.*— The Sheriff-Substitute thinks there can be no doubt that parole evidence would be inadmissible for the purpose of proving that as in a question with the pursuer the defender's position was not truly that of a co-obligant under the cash-credit bond. Upon that point reference may be made to the observations of Lord Young and Lord Moncreiff in *Macpherson* v. *Haggart*, 1881, 9 R. 306.

"The case of *Smollett* v. *Bell and Rennie*, 1793, Dict. 12,354, which was cited on the part of the defender is not an authority to the contrary. In that case one of two joint obligants in a bond paid the whole amount, and afterwards, in a question with the creditors of his co-obligant, 'stated a variety of circumstances' tending to show that he was really cautioner for the latter and entitled to relief. The report bears that 'the Court had no doubt of the competency of a proof by facts and circumstances.' That, however, is a very different thing from a proof at large. In the present instance the defender has not specified any facts or circumstances of real evidence tending to support his averments with reference to the conditions under which he alleges he subscribed the cash-credit bond, and he has not proposed to lead any such proof.

"In the latter part of the defender's statement of facts, however, it is alleged that the pursuer paid the debt due to the bank out of the funds handed to him for that purpose by Mr William Ritchie, the person for whose behoof the cash-credit bond was granted. If that is true the pursuer is attempting to commit a gross fraud upon the defender, and the Sheriff-Substitute does not think that the defender is limited in his mode of proof as regards these averments."

The defender failed to prove by writ or oath the pursuer's alleged agreement with him.

The proof further established—"That the pursuer and Duncan Campbell Gilmour, commander of the steamship 'City of Manchester,' became co-obligants with and for behoof of William Ritchie, then wholesale stationer in Edinburgh, in a cash-credit bond to the Commercial Bank of Scotland, dated the 15th and 18th of December 1883 for the principal sum of £500, and interest thereon, with the proviso that the obligation of the pursuer and the said Duncan Campbell Gilmour for both principal and interest should not exceed £575. The bank on the security of the said bond advanced to the said William Ritchie prior to the first of November 1886 £499, 16s., exclusive of interest. On the 3rd of December 1886 the pursuer paid to the bank £23, 3s. 5d. of interest due under the bond for £500, and on the same day paid to the bank £7, 4s. of interest due under the bond for £150. No further payments were made to account of the principal or interest due under either of the said cash-credit bonds until the year 1888, when the pursuer, with concurrence of the said William Ritchie, took steps with the view of raising funds for payment of the debt due under the said bonds, and for that purpose obtained from Mrs Margaret Campbell or Smart or Tod a loan of £600 on the security of his own and Ritchie's personal obligation, and an assignation by Ritchie of his contingent right to one-fourth of the sum contained in a policy of assurance for £1500, amounting with bonus additions to £3000 or thereby, which had been effected upon the life of his father James Ritchie in implement of an obligation in his (James Ritchie's) antenuptial contract of marriage, whereby he became bound to apportion the sums to be realised from the said assurance among the children of the marriage. Ritchie's share amounted at the date of the action to about £1000. After deducting the expenses connected with the said loan of £600 the pursuer received from the lender's agents £584, 2s. 11d. which he applied in payment of the sum of £499, 16s. of principal due to the Commercial Bank under the cash-credit bond for £500 the sum of £23, 3s. 5d. of interest paid by himself as aforesaid on the 3rd of December 1886, and the sum of £44, 7s. 11d. of additional interest to the 24th of October 1888. After deducting the said sums of principal and interest, amounting in all to £567, 7s. 4d from £584, 2s. 11d. (the net amount of the loan of £600 aforesaid), there remained a balance in the pursuer's hands of £16, 15s. 7d. On the 31st of October 1888 the pursuer paid to the Commercial Bank the principal sum of £150 due under the cash-credit bond, in which he and the defender were co-obligants with Ritchie, together with £15. 4s. 6d. of interest to that date, and these sums (£150 and £15, 4s. 6d.), with £7, 4s. of interest previously paid by the pursuer to the bank on the 3rd of December 1886 amounted as above mentioned to £172, 8s. 6d. The pursuer, in respect of the payments made by him as aforesaid, obtained from the Commercial Bank an assignation in his favour to the said cash-credit bonds."

Certain correspondence was produced. In October 1886 the bank intimated to the pursuer and defender their intention to call up the cash account for £150. The following reply was sent:—"Both Mr Tod and myself think that by allowing the overdraft on your bank of £150 by Mr Wm. Ritchie to remain for six months we may get him to pay so much per month to wipe it off by degrees. Should we pay it at once we think it highly probable he may never think it worth while to settle direct with us. We shall be obliged if you can see your way to do this.—JOHN STENHOUSE jr.; JAMES TOD."

This suggestion was agreed to.

In May 1888 Tod wrote to Ritchie—"After a great deal of trouble and anxiety I have got a friend to advance £600 at 4½ per cent. to affect a settlement with the bank. The interest will be £27 per annum, which I have no doubt you will be able to pay."

Ritchie replied—"I am glad to learn you have arranged matters so far, and I will certainly do my best to see after the interest, which I would suggest to be payable half-yearly. Now, the total sum due

on 31st October 1887, including interest, is £682, 3s. 11d. made up as follows—

1st Loan	£500	0	0
Interest	24	14	4
2nd Loan	150	0	0
Interest	7	9	7
	£682	3	11

Of course there is interest to be added since that date, and would be about £16 more, or say £100 more than you are borrowing. I do not know whether you intend paying off the total sum and getting done with the bank, or whether you mean the balance to run on. Would it not be better to borrow a sum of say £700 and clear the bank; the interest of course would be a little more for me to pay."

On 9th August 1888 Ritchie wrote to the defender—"I should like you to let me know if the Coml. Bank or Mr Tod have been pressing you. I may say I have signed a bond for £600 which was forwarded by me to Mr Tod last May, and I fullv anticipated that by this time the whole affair was arranged." He again wrote on 15th August—"I am duly in receipt of your letter of y'day's date, and in reply thereto I gave a bond for £600 to a Mrs Tod (no relation) for money she was to advance to me with the object of paying off the bank the sum you were joint security for, and the balance towards my other a/c. I understand that my uncle has obtained the amount, but he has done nothing as yet. My advice to you is to see my uncle with this, and request him to put the overdraft in order forthwith."

Ritchie deponed, *inter alia*—"I never understood it to be Mr Tod's idea that money should be raised to pay off the £500 to the exclusion of the £150 bond. I understand the money was being raised to pay off the bank loans. I had no desire that Captain Gilmour should be released from the obligation any more than Mr Stenhouse. I thought there would be a surplus of my share over after paying both bonds, and that is why I snggested raising £700 instead of £600. I anticipated that there would be a balance left over the £600 after paying the £500 bond and interest. I do not think that the £600 was to be applied only to pay off the £500 bond, but to be applied to both bonds, and Mr Tod would pay the balance, if any."

Upon 11th December 1889 the Sheriff-Substitute (RUTHERFURD) pronounced this interlocutor:—"Finds in point of law that the pursuer was bound to have applied the said sum of £16, 15s. 7d. (being the balance of the said loan and the principal sum and interest due under the bond for £500) in liquidation *pro tanto* of the debt, £172, 8s. 6d., due to the Commercial Bank under the bond for £150: Finds that after deducting £16, 15s. 7d. from the said sum £172, 8s. 6d. there remains £155, 12s. 11d., of one-half whereof (£77, 16s. 5½d.) the defender, as co-obligant in the bond for £150, is bound to relieve the pursuer: Therefore sustains the defender's fourth plea-in-law in so far as regards the application of the said sum of £16, 15s. 7d., but *quoad ultra* repels the defences: Decerns and ordains the defender to make payment to the pursuer of the sum of £77, 16s. 5½d., with interest thereon at the rate of £5 per centum per annum, as follows, *videlicet*, on £3, 12s. from the 3rd of December 1886 until payment, and on £74, 4s. 5½d. from the 31st of October 1888 until payment: Finds the defender liable to the pursuer in the expenses of process."

The defender appealed, and argued—He acquiesced in the Sheriff's decision as to his first ground of defence, There was evidence that the loan of £600 had been raised with primary reference to the bond for £150. At all events, the pursuer was bound to communicate the advantage he had on getting that sum of money to his co-cautioner. Instead of doing so he had used all the money in paying off another cash-credit bond for £500, in which he (the pursuer) was interested, but under which the defender was not bound. The sum had not been borrowed by Tod alone but by Tod and Ritchie together, and the security was Ritchie's right of succession under his father's marriage-contract. Even had Tod paid the loan of £600 he could have got an assignation to the security. Ritchie was entitled to specify the purposes to which the money should be applied — *Bannatyne's Reps.* v. *Brown's Trustees*, February 26, 1825, 3 S. (N.S.) 408. The pursuer had no right to change the destination—*Freeth* v. *Hamilton & Company*, July 17, 1889, 16 R. 1022. It might be said that Ritchie's right to this security was not vested, the defender thought that it was, but it was not necessary to go so far as that—*M'Donald* v. *M'Grigor*, March 10, 1874, 1 R. 817. Had Ritchie borrowed the money alone there would have been no answer to the defender's right to share the benefit with the pursuer. The defender's position, was, however, not weakened by the interposition of the pursuer's personal obligation—*Atkins*, May 2, 1883, 24 L.R., C.D. 709. The duty of communication was clear whatever the source of the funds —*Christie* v. *Reid*, January 19, 1826, 4 S. 369. At least there was a clear understanding apparent especially by the letters that Ritchie had agreed with Tod that the loan of £600 was to be applied to paying off the two bonds of £500 and £150 *pro rata*. The £150 bond had been in view from the first of the negotiations which had ended in the present action. The bank's letter referred to this alone. Nothing was said about the bond for £500. The pursuer then busied himself in getting a loan, and it must have been to pay off this £150 bond. The defender would have been willing to take the same course as the pursuer in negotiating this loan, and it was only on account of the pursuer's sanguine disposition and greater interest in the matter that the defender was not applied to. He referred further to these authorities—Bell's Prin. sec. 563; Ersk. Inst. iii. 4, 2; *Campbell* v. *Campbell*, July 18, 1775, M. 2132.

The respondent argued—The loan had not been granted in respect of a security assigned by Ritchie, but upon the pursuer's

personal liability. Ritchie could only assign an expectancy under his parents' marriage-contract, but that was of no avail until his father died, and no money would have been lent upon such a security. That being so the appellant's whole case failed, because if the pursuer had really borrowed the money on his own security, he was entitled to apply it to reduce his debts in the way he thought best—*Jamieson* v. *Forrest*, May 25, 1875, 2 R. 701. If the loan was obtained to pay off the £500 debt to the bank, the defender had no claim to have any benefit from it communicated to him because he was not a co-cautioner with Tod in that bond. There was no evidence to show that Tod and Ritchie had really agreed to pay off both debts rateably.

At advising—

LORD YOUNG—I do not think we require further argument. The pursuer and the defender are, or were, co-cautioners on a cash-credit bond to the Commercial Bank for £150. The principal debtor was William Ritchie. The pursuer paid that debt, the principal debtor being out of Scotland and unable, or believed to be unable, to pay it. Having paid the debt, the pursuer now brings this action for payment of half the amount of it by his co-cautioner.

Two defences were stated on record. The first was that the pursuer before the obligation was undertaken agreed to relieve the defender of all liability under it. That defence went to proof and the Sheriff-Substitute after hearing the pursuer's evidence on a reference to his oath, decided it against the defender. We were told by the defender's counsel that the defender acquiesced in that decision.

There remains the other defence, which is thus expressed—It is further believed and averred that the said William Ritchie, sometime in the summer of 1888, provided funds for payment, *inter alia*, of the whole debt due under the cash-credit bond which the defender signed, and handed the same to the pursuer to pay to the bank. The defender believes and avers that the funds so provided amounted to £600, and that the said William Ritchie instructed the pursuer to apply any balance over after paying the debt for which the defender was co-cautioner towards payment of another cash-credit bond for £500 or thereabouts of his to the Commercial Bank, under which the pursuer and another party were cautioners." The plea founded on that averment is that "the pursuer having received from the principal debtor in the cash-credit bond the sum necessary to pay the debt due thereunder with instructions, or at least on the understanding that it was to be applied primarily for that purpose was bound so to apply it." I have by reading that averment and plea read the whole record applicable to the defence which is now before us. I think it is not doubtful that, with the Sheriff, we must negative this defence also in point of fact. But it was argued to us that there was an arrangement between the principal debtor and the pursuer that money should be raised on the bond to Mrs Tod now before us to the amount of £600, and that in security of the loan the principal debtor should transfer his interest in expectancy under his father's marriage-contract, consisting of part of the proceeds, if he survives his father who is now aged 63, of a policy on his father's life, and that the money having been so borrowed, it was a wrong on the part of the pursuer to apply it to the bond to the bank for £500 in which he was cautioner along with Gilmour and not to that also for £150 in which he was cautioner along with the defender.

Now, I am not disposed to be too critical of records so as to prevent the real question in a case being decided though the record be defectively framed, but I must say I cannot allow such views to go the length of allowing such a case as was argued to us to be raised on the record which I have read. Such a defence is one involving the statement of very special equitable considerations; as to those I am not myself favourable to the defender. But is it such a case that he intended to raise? I think clearly he did not, and that it cannot be raised on this record. In my opinion we ought to negative the statement of fact which I have read and to repel the plea which was founded upon it.

But after the point which was argued to us I may say that I do not think that there has been on the pursuer's part any interference with or violation of any equity between him and his co-cautioner the defender in the manner in which he has applied the £600 which was borrowed from Mrs Tod. The application of it was in payment of the other debt in which the pursuer was cautioner and had Gilmour as his co-cautioner. If the defender could establish any contract by which the pursuer was to apply this or any other sum in paying off the bond for £150, he might have had a remedy on the ground of that contract. But his case must be brought to this, that the pursuer was under some obligation to him enforceable in a court of law to pay off the bond for £150. I can find no evidence that such an obligation rested on the pursuer. I am therefore of opinion that we must negative the defender's statement as to the facts and repel his pleas.

LORD RUTHERFURD CLARK—I am of the same opinion. It is very clear that the defender has not proved his case as it is stated on the record. I think it is equally clear that the special agreement maintained at the bar on his behalf is not proved. Therefore I think the defender's case fails in fact. Further I do not go, for though there was some argument to the effect that apart from agreement the pursuer was bound to make the £600 available for the defender as well as himself, I do not think that was ultimately pressed by senior counsel.

LORD LEE—I agree that no sufficient cause has been shown for altering the Sheriff's judgment. If it had been shown that the fund, the £600, which the pursuer

obtained, and with which he paid off the £500 bond, was a fund provided by Ritchie, the principal debtor, I should have thought that difficult and delicate questions of relief between cautioners were raised. But that allegation is not substantiated by the proof.

LORD JUSTICE CLERK—I concur in the opinion of Lord Young.

The Court pronounced this judgment:—

"Find in fact, 1st, that the pursuer did not agree to relieve the defender of liability under the cash-credit bond referred to; 2nd, that Mr Ritchie did not provide funds for payment of the debt due under the cash-credit bond, and did not hand any funds to the pursuer or to the bank; 3rd, that the pursuer paid to the bank the whole debt due under the said bond amounting to £172, 8s. 6d: Find in law that the pursuer is entitled to relief against the defender to the extent of one-half of said annuity, being £86, 4s. 3d: Therefore recal the interlocutor of the Sheriff-Substitute appealed against, repel the defences, and decern against the defender in terms of the conclusion of the petition."

Counsel for the Appellant—Dickson—Constable. Agents—N. Briggs Constable, W.S.

Counsel for the Respondent—Sir C. Pearson—F. T. Cooper. Agent—P. Morison, S.S.C.

Thursday, January 23.

SECOND DIVISION.

[Sheriff of Forfarshire.

MARTINEZ Y GOMEZ *v.* ALLISON & SONS.

Principal and Agent—Pledge—Right of Agent to Pledge Principal's Goods—Factors Act 1842 (5 *and* 6 *Vict. cap.* 39), *sec.* 3—*Antecedent Debt.*

The Factors Act 1842 (5 and 6 Vict. cap. 39), section 1, provides—"From and after the passing of this Act any agent who shall thereafter be entrusted with the possession of goods, or of the documents of titles to goods, shall be deemed and taken to be owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bona fide* made by any person with such agent so entrusted as aforesaid, as well as for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract and agreement shall be binding upon and good against the owner of such goods and all other persons interested therein." Section 3 . . . . "And nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given."

In March 1888 a firm of British manufacturers sold goods to a Spanish firm, and sent them for transport to the forwarding agent of the buyers in Dundee. In the same month this agent pledged these goods to merchants in Dundee in security of a debt contracted by him to them in the preceding month of December.

In an action by the Spanish firm against the pledgees, *held* that the agent had no power at common law to pledge the goods, and even assuming that he was a factor in the sense of the Factors Act 1842, the Act did not apply, as the goods had been pledged for an antecedent debt.

In March 1888 the Bessbrook Spinning Company, Armagh, Ireland, sold to Martinez y Gomez, merchants, Valencia, Spain, a case of linen goods, and sent it for transport to David Dorward Bain, Dundee, the agent of the buyers. Bain instead of forwarding the case deposited it with the Ladywell Callendering Company in Dundee.

On 23d December 1887 James Allison & Sons, rope and sail makers, Dundee, drew a bill for £82 at three months, which Bain accepted, which was discounted, and of which he received the whole proceeds. When the bill fell due on 26th March 1888 Bain could not meet it, and it was taken up by Allison & Sons. This payment was made by them in consideration of the case of goods above mentioned being transferred from Bain's name to their name and order in the books of the Callendering Company, as security for repayment of the said £82.

Decree of cessio was granted against Bain, and a trustee was appointed on his bankrupt estate on 7th June 1888. He thereafter absconded.

In October 1888 Martinez y Gomez brought an action against Allison & Sons for recovery of this bale of goods pledged to them.

The defenders pleaded—"(5) The defenders having obtained possession of said case of goods in security for a debt which has become due and is still unpaid, are entitled to retain said case until payment is made, and ought to be assoilzied with expenses. (6) The defenders being in possession of said case, and having acquired possession in *bona fide* and in security of a debt which is resting-owing, the pursuers are bound to prove a preferable title to said case."

The Factors Act 1842 (5 and 6 Vict. cap. 39), sec. 1, provides—"From and after the passing of this Act any agent who shall thereafter be entrusted with the possession of goods, or of the documents of titles to goods, shall be deemed and taken to be owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or