COURT OF JUSTICIARY.

GLASGOW CIRCUIT.

Tuesday, June 20.

H. M. ADVOCATE *v.* DEVANEY.

Justiciary Cases — Indictment — Relevancy — Statute 10 *Geo. IV. c.* 38, *sec.* 2 *— Loaded Firearms.*

An assault was stated in the major proposition, and also in the affirmation of the minor proposition, as aggravated by being committed by discharging firearms, but the subsumption did not contain any statement that the firearms had been discharged—the aggravation was *held* to be irrelevant, and was struck out of the indictment.

Thomas Devaney was charged at common law with "assault, especially when committed to the injury of the person, and more especially when committed by means of presenting loaded firearms at any of the lieges to their great terror and alarm and injury of the person, and by discharging loaded firearms." The indictment also contained the statutory charge of shooting with intent to injure under sec. 2 of 10 Geo. IV. c. 38.

The affirmation of the minor proposition was in the following terms:—"That you the said Thomas Devaney are guilty of the crime of assault at common law above libelled, aggravated by its having been committed by means of presenting loaded firearms at any of the lieges, to their great terror and alarm and to the injury of the person, and by discharging loaded firearms, and of the statutory crime and offence set forth in the 2d section of the statute above libelled of wilfully, maliciously, and unlawfully shooting at any of Her Majesty's subjects."

The narrative applicable to the common law charge stated that the panel "did present at or towards the person of the said Thomas M'Binnie a revolver, pistol, or other kind of firearm, loaded with cartridges or powder and bullets," but it was not said that the panel had discharged said pistol, and nothing was said about discharging. The indictment then went on to narrate the circumstances applicable to the statutory charge. Objection was taken to the relevancy on the ground that *species facti* were not set forth to support the aggravation of discharging loaded firearms libelled in the major and affirmation of the minor, which was sustained, and the words "by discharging loaded firearms" were, on the motion of the Depute-Advocate, struck out of the indictment.

Counsel for H. M. Advocate—Henderson.

Counsel for the Panel—James Reid.

COURT OF SESSION.

Tuesday, July 4.

FIRST DIVISION.

[Lord Lee, Ordinary.

FRASER *v.* MACLEAY AND OTHERS.

Process—Reduction—Fraud—Transaction.

The brother and heir-at-law of a deceased person who had conveyed his estate past him by *mortis causa* settlement, executed two writings by which he accepted a sum of money and discharged the representatives of his brother under his will of all claims competent to him, and bound himself not to challenge the settlement. Thereafter he raised an action for reduction of his brother's settlement, as having been impetrated from him by fraud and circumvention when he was not of sound disposing mind, and also of the discharge he himself had granted as having been unfairly obtained from him when in ignorance of his right to reduce his brother's settlement, and when unable from infirmity caused by age and disease of attending to or understanding business. *Held* (*aff.* judgment of Lord Lee) that the question whether the pursuer was bound to set aside the discharge before he could call for production of the settlements was a question of discretion, and that in the circumstances production ought to be satisfied, and the effect of the discharge discussed along with the merits in the same inquiry.

William Fraser, residing in Innerleithen, raised this action against George Macleay, writer in Tain, and others, disponee and legatees under the general disposition and settlement of Mrs Catherine Munro or Fraser, who was the widow of the pursuer's brother James Fraser, and who died on 13th March 1881, and also against George Munro and others, as executors-nominate of the said Catherine Munro or Fraser, pretended executrix and universal disponee of the deceased Donald Fraser, another brother of the pursuer. The pursuer was heir-at-law and next-of-kin of his brother Donald, and raised this action in that character to obtain reduction of (1) a disposition and settlement of Donald Fraser, dated 1st August 1872, which was in favour of the said Mrs Catherine Munro or Fraser; (2) a second disposition and settlement by Donald Fraser, also in favour of Mrs Catherine Munro or Fraser, and dated 21st September 1876; (3) a docquet or writing subscribed by the pursuer at Innerleithen, dated 25th October 1881, and endorsed upon a letter by the pursuer to the defender George Macleay, and which purported to withdraw the letter on receipt of £80 sterling; (4) a discharge, dated 26th October 1881, granted by the pursuer to the defenders George Munro and Christina Munro, and all others in any way representing Donald Fraser and Catherine Munro or Fraser, of all claims competent to him through the death of these parties or either of them. The ground of reduction of the settlements of Donald Fraser was his alleged weakness and facility from

drunken habits and other causes, of which facility the pursuer averred that his sister-in-law Mrs Catherine or Christina Munro or Fraser had taken advantage in order to impetrate in her favour the two settlements libelled. In particular, he averred that each of them had been obtained from him when he was under the effects of specially hard bouts of drinking, and when he was quite unable to understand their effect or to transact any business.

With regard to the docquet and discharge which in the third and fourth place he sought to reduce, the pursuer averred that although his brother Donald died in September 1878, he only became aware of it in October 1881, when he at once, on 22d October, communicated with the defender Macleay, requesting him not to divide his brother's estate until his claim on it should be admitted or otherwise disposed of, and that he was about to appoint an agent to attend to his interest. He further averred that on the 25th of the same month he was waited upon by Mr Ross, a solicitor, on behalf of the defenders, who represented to him that he had no claim against the estate either of Mrs Fraser or Donald Fraser, but stated that he was authorised to make the pursuer a present of £80, and induced the pursuer to sign upon the back of his letter of 22d October the docquet now sought to be reduced, whereby he withdrew that letter in consideration of a payment of £80. The docquet was not holograph or tested. The next day he averred Mr Ross again called, bringing with him the discharge which in the last place he sought to reduce, and which Mr Ross represented to him to be merely a formal receipt for the £80 given him on the day before. He averred that he was at the time not only unaware of the true nature of the discharge, which was not read over to him before signature, and unaware of his legal right to reduce his brother's pretended settlement, but that he was also much enfeebled by age and disease, afflicted with extreme deafness, and incapable of understanding business, except of a simple nature, and when carefully explained to him. He was not assisted by any legal adviser, and he alleged that he was anxious at the time to obtain the assistance in the matter of the Inspector of poor of Innerleithen, with whom he was acquainted, but that Mr Ross said the Inspector had nothing to do with it, and that he was merely receiving a present.

With regard to the docquet, he pleaded that it was null and void, being defective in the solemnities required by law; and he also pleaded—"(6) The said docquet or writing, and the pretended discharge libelled on, having been impetrated from the pursuer while under essential error as to their import and effect, or at least induced by concealment and misrepresentation and circumvention, ought in the circumstances to be reduced as craved."

The defenders denied the whole material averments of the pursuer. With reference to the docquet and discharge, they admitted the payment to him of the sum of £80 by Mr Ross, but averred that it was given him, not because he was believed to have any right to reduce his brother's will, but simply to avoid litigation; that he was at the time quite able to do business, and understood the transaction perfectly; that he had refused to obtain professional assistance, though advised by Mr Ross to obtain it; and that the discharge was read to him before signature.

They pleaded, *inter alia*—"(1) The pursuer has no right or title to call for production of the settlements libelled, nor are the defenders bound to satisfy the production *quoad* these writs so long as the foresaid docquet and discharge granted by the pursuer stand unreduced."

The Lord Ordinary (Lee) pronounced this interlocutor:—"Repels the said defences as preliminary and exclusive of production of the settlements libelled; and appoints the defenders to take a day to satisfy the production in so far as not already satisfied, reserving the effect of the docquet and discharge granted by the pursuer to be discussed along with the merits; and reserves all questions of expenses: Further, on the motion of the defenders, grants leave to reclaim against this interlocutor."

His Lordship added this opinion:—"The pursuer in this action calls for production (1) of the settlements of his deceased brother Donald Fraser in favour of a sister-in-law, Christina Fraser; and (2) of a docquet and discharge granted by him to the defenders, who are the representatives of Christina Fraser.

"He claims to have Donald Fraser's settlements reduced on the ground of insanity, or otherwise of facility and circumvention by Christina Fraser, and he seeks to have the docquet and discharge set aside as having been impetrated from him while in ignorance of his legal rights and of the circumstances of Donald Fraser, by Christina Fraser's representatives, the defenders, taking advantage of his ignorance, and misrepresenting to him the facts.

"The defenders plead that they are not bound to satisfy the production so far as the settlements of Donald Fraser are called for while the docquet and discharge stand unreduced. It is obvious that if the pursuer's allegations are well founded the effect of sustaining this plea as a preliminary defence must be to render necessary two trials in the same cause. I do not recollect of any case in which this course of procedure has been held necessary in order to dispose of a plea in bar of the leading conclusions of the action. But, on the other hand, no case similar to the present was cited to me, and no authority exactly applicable to the point was referred to.

"I regard the question as one of procedure, in which the Court has a discretionary power—*Officers of State* v. *Magistrates of Brechin*, 5 S. 672. But even viewing it as a question of right, I see no sufficient ground for holding the defenders entitled to stand upon the discharge or docquet as excluding the title of the pursuer to call for production of the alleged settlements, and to require an answer upon the merits of the whole cause. It may be quite true in a sense that while the discharge stands unreduced the pursuer is not entitled to challenge the settlements. But the pursuer offers to prove his allegations against both, and seeks to reduce the whole. The question is, Whether the defenders are entitled to refuse to go into the allegations concerning the settlements until the discharge shall have been set aside?

"My opinion is that the defenders are not entitled to take up this position, and that it is not supported by the necessities of the case.

"It is admitted that the pursuer is heir-at-law

and next-of-kin of the deceased Donald Fraser. His claims upon the succession therefore are unanswerable, unless they are excluded either by the deed of Donald Fraser or by some deed executed by himself. His claims are said to be excluded both by deed of settlement executed by Donald Fraser, and also by a deed which he himself executed in favour of the defenders as representing the executor under that settlement. He alleges that both of these obstacles in the way of his legal rights have been wrongfully and illegally set up by the defenders, or by their author, Christina Fraser. Why should it be necessary to inquire separately into the merits of his allegations as to each? His allegations are not said to be irrelevant as to either, and I think that at this stage it must be assumed that he has a relevant case against both. It appears to me that the merits of the discharge are a good deal mixed up with the import and effect of the alleged settlements. The terms of the deed itself show this, for the discharge refers to the settlements as having been 'seen and examined;' but the pursuer alleges that the statements in the discharge to that effect are false, and that he was imposed upon and induced to sign in ignorance of the nature of the document and of the true state of his rights.

"It appears to me to be possible, consistently with justice to the defenders, to inquire into the merits of the whole cause at once. Even if the discharge had contained a conveyance by the pursuer to the defenders of his whole rights as heir-at-law and next-of-kin, it might not have made any difference, but it is noticeable that the form of the deed is that of a discharge merely.

"I see no good reason why the plea that the pursuer is barred by this discharge from questioning the settlements should be kept separate from the question whether the settlements are challengeable on the grounds stated. Had it been homologation that was pleaded as a bar to the pursuer's claim, I think that there is an authority and practice against dealing with that as a preliminary defence — *M'Michan* v. *M'Michan's Trustees*, 1839, 1 D. 1085; *Gall* v. *Bird*, 1855, 17 D. 1027. The production of a formal discharge makes no difference in the procedure necessary for the trial of the question between the parties, excepting that the *onus* is laid upon the pursuer of setting aside the discharge as well as the settlements.

"The case of *Hamilton* v. *Henderson*, 11 D. 579, was cited, but the peculiarity of the pursuer's position in that case was, that he had no title at all excepting a marriage-contract conveyance, which was under the express burden of the writs challenged. The title of the pursuer in this case is clear.

"I think it right to mention the case of *Maule* v. *Maule*, reported in 5 S. (N.S.) 238, though not cited at the discussion before me. A defender was there found entitled to found upon a decree of absolvitor from a reduction of the titles of Panmure as *res judicata*, and to refuse to produce the titles called for until the decree had been set aside. But it does not appear from the report what were the grounds upon which the decree was challenged. It is obvious that if it afforded ground for a plea of *res judicata* that case was very different from the present.

"The case of *Irvine of Drum* v. *The Earl of Aberdeen and Others*, 2 Paton's App. 249, appears to be the nearest to the point, but it is not well reported, and I have therefore preferred to put my judgment upon general grounds rather than upon any of the authorities mentioned."

The defenders reclaimed, and argued—The pursuer was in the meantime barred by the discharge from reducing the settlements. He must first therefore reduce it. Now that was a separate matter, depending on other evidence from a different part of the country, from the much larger question of Donald Fraser's testamentary capacity, and it would be a hardship on the defenders to bear the expense of meeting the case on the latter point till the way was cleared for it by the reduction of the discharge. The case of *Crichton* v. *Crichton's Trustees*, March 3, 1874, 1 R. 688, where the Court added a proof before answer as to the circumstances connected with the deed which formed the preliminary ground of defence in a similar action, was quite in point—See also *Gibson Craig* v. *Forbes*, 3 S. (N.S.) 113, and the authorities cited by the Lord Ordinary.

The pursuer replied—The question was a question of discretion, and unless serious hardship would arise to the defenders from having only one trial in the case, which was not in the least to be feared, the whole matter could be best sifted in an inquiry.

At advising—

LORD PRESIDENT—This is a question of discretion, and I am of opinion that the Lord Ordinary has exercised his discretion quite soundly. I am for adhering to the interlocutor.

LORD DEAS—I concur; and the reasons so fully given by the Lord Ordinary confirm me in coinciding with your Lordship.

LORD MURE and LORD SHAND concurred.

The Court adhered, with expenses since the date of the Lord Ordinary's interlocutor.

Counsel for Pursuer—D.-F. Macdonald, Q.C.—Kennedy. Agent—D. Lister Shand, W.S.

Counsel for Defenders—Strachan. Agent—P. Douglas, S.S.C.

Wednesday, July 5.

OUTER HOUSE.

[Lord Adam.

YOUNG *v.* YOUNG.

Husband and Wife—Divorce for Desertion—Relevancy—Imprisonment—Statute 1573, *cap.* 55.

A husband had left his wife for two and a-half years, during which he had no communication with her. He was then convicted and sent to penal servitude for five years, and still held no communication with her. When four years had elapsed from the time he left her, the wife brought an action for divorce on the ground of desertion. *Held* (*per* Lord Adam, Ordinary) that the action must be dismissed as irrelevant, as during the time he was in prison he could not