

Saturday, July 16.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

M'LAY, M'ALISTER, & M'GIBBON
v. HAMPTON.

Writ—Borrowing of Writs—Borrowing Receipt.

Where documents are borrowed on a borrowing receipt, the borrower is bound to return the documents in terms of the receipt, whatever claim he may have in regard to them otherwise.

Herbert v. Rutherglen, June 23, 1858, 20 D. 1164, *followed*.

Messrs M'Lay, M'Alister, & M'Gibbon, accountants, Glasgow, raised in the Sheriff Court at Glasgow an action against John Hampton, solicitor, Glasgow, in which they prayed the Court to ordain the defender to deliver up to the pursuers certain specified accounts.

The pursuers averred—“(Cond. 1) The pursuers are accountants in Glasgow, and Mr Dugald M'Alister, accountant there, is a partner of said firm, and trustee on the sequestrated estates of George Watson junior, builder, 2 Auchentorlie Street, Partick, and the defender is a solicitor in Glasgow, and carries on business there in an office at 217 West George Street, of which Charles Yule, accountant, is the tenant and occupant. (Cond. 2) The defender lodged a claim and affidavit on the said sequestrated estates of George Watson junior, on 11th June 1897, and in support of his claim the various accounts detailed in the prayer hereof. (Cond. 3) On or about the 17th day of November 1897 the defender obtained from the pursuers on loan the accounts detailed in the prayer of the petition, and granted in their favour a borrowing receipt of which the following is a copy—‘Glasgow, 17th November 1897. Borrowed from Messrs M'Lay, M'Alister, & M'Gibbon, C.A., Glasgow, to be returned on demand the following, viz. — Nos. 25/1 to 25/14 inclusive in the sequestration of George Watson junior—(Sgd.) John Hampton.’ Explained that said receipt, so far as not printed, is holograph of the defender. (Cond. 4) The trustee on the said sequestrated estates requires these accounts, and the pursuers have consequently applied to the defender for them, but he declines to return them.”

The defender in answer “Explained that on or about the date mentioned the defender, with the view of remodelling his claim upon the sequestrated estates of George Watson junior, builder, 2 Auchentorlie Street, Partick, applied personally to Mr Dugald M'Alister, accountant, 94 Hope Street, Glasgow, the trustee on said sequestrated estates, for the return of the vouchers which he had lodged in support of his claim, at the same time informing him what his object was in getting up the vouchers to enable him to remodel his affi-

davit and claim on the said sequestrated estates. Mr M'Alister agreed to the request, as he was bound to do by the provisions of the Bankruptcy Statutes, and he asked the defender to call for the documents on the following morning, by which time he would have them all looked out. The defender accordingly called, when he was met by Mr M'Alister, who handed him several accounts referred to in his claim upon the said estates with the printed form of a receipt to be filled in by him. Denied that the documents were borrowed from the pursuers, and that they were ever in a position to lend them, or that the documents were ever in the custody of the pursuers, the trustee in the sequestration alone being the custodian thereof, and he was bound when called upon to return them to the defender, whose property they have all along been. The defender avers that the only receipt which he intended to give, and the only one which the trustee intended to take and was entitled to get, was simply a memorandum or acknowledgment to preserve evidence of where the documents had gone to. The defender was quite within his rights in receiving up the documents.”

On 9th June 1898 the Sheriff-Substitute (SPENS) repelled the defences, and ordained the defender to deliver the documents as craved.

Note.—“The case of *Herbert v. Rutherglen*, June 23, 1858, 20 D. 1164, appears to me directly in point, and the Lord President's observations seem decisive against any defence being entertainable. I think the delay which has taken place in giving effect to the plain agreement upon which the writings were received by defender is intolerable. Counsel for the defender did not dispute that the case referred to was conclusive, had it not been, he argued, for the Sheriff Court Act of 1877. Under that Act he contended the borrowing receipt on which this action is founded should be set aside *ope exceptionis* on the ground that the defender was under a misapprehension when he signed it that it was a borrowing receipt. Such a defence I would hardly be inclined to accept from anyone, but certainly not from a law-agent, who must surely be expected to have looked at what he was signing. This document being swept aside, counsel was prepared to argue that the defender was owner or at least in right of the documents asked for. But whatever misapprehension there was on defender's part, there was none on the part of the pursuers. They let the documents out of their hands on a borrowing receipt of defender agreeing to return them on demand: They must be reinstated in the *status quo ante*. Pursuers are entitled to have the documents, and any question as between them and defender with regard to them would require to be fought out with the pursuers in the position of defenders.”

The defender appealed to the Court of Session.

Counsel for the pursuers were not called on.

LORD JUSTICE-CLERK—I am of opinion that the defence is wholly irrelevant, and that the appeal must be dismissed.

LORD TRAYNER—I agree. I am surprised that the defence here stated should have been persisted in. The law is that where anyone borrows documents on a borrowing receipt his duty *ante omnia* is to return the documents whatever claim he may have in regard to them otherwise.

LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“Dismiss the appeal and affirm the interlocutor appealed against: Of new repel the defences, and ordain the defender to deliver the documents as craved.”

Counsel for Pursuers—Baxter. Agents—Wylie & Robertson, W.S.

Counsel for Defender—Macaulay Smith. Agent—W. A. Hyslop, W.S.

Saturday, July 16.

FIRST DIVISION.

[Sheriff of Ayrshire.

**PARISH COUNCIL OF KIRKMICHAEL
v. PARISH COUNCIL OF KILMARNOCK.**

Poor—Relief—Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. c. 83), sec. 71.

Where the father of an illegitimate child was in good circumstances and acknowledged his liability to support it, held that a parish was not entitled, under sec. 71 of the Poor Law Act 1845, to recover outlays made on account of the child from the alleged parish of its settlement, the child not being a proper object of parochial relief.

Marion Fulton, whose settlement at the time was in the parish of Kilmaurs, gave birth on 16th October 1887 to an illegitimate son Robert Fulton or Hay, who was deaf and dumb from his birth.

In 1888 or 1889 Marion Fulton married William M'Connell, whose settlement was in the parish of Kirkmichael. On 22nd November 1889 William M'Connell removed with his wife to the parish of Kilmarnock, where he acquired a settlement.

In May 1894 the child was placed in the Ayr District Asylum, but after the lapse of about ten weeks was discharged on the ground that he was not insane. He was thereupon taken charge of by the Inspector for Kirkmichael, and was placed on the roll of that parish as an ordinary pauper. His putative father, however, who was a farmer, paid accounts rendered to him for the outlays made, both during the child's detention in the Asylum, and thereafter from time to time by the parish of Kirkmichael.

In January 1896 the boy was sent to an institution in Glasgow for training the deaf and dumb, his name was struck off the roll of paupers for Kirkmichael, and the putative father discharged all outlays made by that parish down to that date.

Thereafter the superintendent of the institution intimated that the boy was a hopeless imbecile, and requested that he might be removed. Accordingly on 16th April 1896 Kirkmichael removed him from the institution, and restored his name to their roll as an ordinary pauper. The boy was boarded out, and the agents for Kirkmichael, on applying to the agent for the putative father, received payment from him of certain sums which they remitted direct to the woman with whom the boy was boarded. All outlays down to 2nd July 1896 were thus discharged by the putative father, and the boy's name was once more deleted from Kirkmichael roll. On 30th July, however, it was again replaced on the roll, no account for outlays since 2nd July having been presented to the father, and no payment having been made.

In these circumstances the Parish Council of Kirkmichael raised an action in the Sheriff Court at Kilmarnock against the Parish Council of Kilmarnock to be relieved of advances made by them on account of Robert Fulton or Hay down to February 1897, amounting to £12, 5s. 4d., and of all further sums paid on account since that date.

In addition to the facts above set forth, the pursuers averred that it was by the advice of the Local Government Board that they took charge of the boy on his removal from the institution in Glasgow.

The defenders explained that the putative father had always been and still was able and willing to pay all outlays incurred on account of the boy. They further produced a letter from the father's agent to the pursuer's agents in the following terms:—“Dear Sirs, — I have received intimation from Messrs J. & J. Sturrock & Co. that your clients have raised an action against the Parish Council of Kilmarnock in this matter, and that they look to my client for relief. I have, of course, nothing to do with the merits of the action, nor with your client's object in raising it; but in view of the intimation referred to I desire to intimate to you, as I have done to Messrs Sturrock, that my client does not repudiate liability for the child's maintenance. If, therefore, your clients have made disbursements, and have any account against him for maintenance, I shall be glad that you render it, and if correct it will be paid.”

The pursuers pleaded—“(1) The said pauper child Robert Fulton or Hay being illegitimate, followed the settlement of his mother, the said Marion Fulton or M'Connell, and the latter being married takes the settlement of her husband, and the same being now the parish of Kilmarnock, the defenders are liable in the sum sued for.”

The defenders pleaded—“(4) The putative father being willing to continue to relieve pursuers of their outlays on behalf of the said Robert Fulton or Hay, and never hav-