Friday, November 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

TAYLOR *v.* NISBET.

Proof—Deposit for Safe Keeping—Writ or Oath — Prescription — Quinquennial — Onus of Proving Restoration.

Held (1) That the contract of deposit *custodiæ causa* may competently be proved *prout de jure*; and that this rule as to proof applied although the thing alleged to have been deposited was a bundle of bank notes; (2) that the quinquennial prescription does not apply to such a contract; and (3) (*diss.* Lord Young) that where the deposit is established the onus of proving restoration is upon the depositary.

Circumstances in which held that a depositary had not discharged that onus.

Opinion reserved (*per* Lord Young) on points (1) and (2).

This was an action brought in the Sheriff Court at Glasgow at the instance of Charles Taylor, Dunipace, against Henry Nisbet, Shettleston, in which the pursuer craved decree for £140.

The pursuer averred that in August 1890 he had handed to the defender for safe keeping the sum of £290, and that the defender had subsequently repaid to him £150, leaving a balance of £140, which was the sum sued for.

The defender admitted that he had in August 1890 received from the pursuer the sum of £275, but averred that he had returned it to the pursuer about a week later; that the pursuer had soon thereafter burned the money in his own house, and that a few days after the burning he had deposited with the defender the sum of £150, which the latter had repaid in three separate sums of £50 each.

The defender pleaded, *inter alia*—"(3) The pursuer's averments can only be proved *scripto vel juramento*."

The Sheriff-Substitute (SPENS) allowed a proof *prout de jure*.

It appeared from the evidence that the pursuer's mother, who died in 1890, left savings to the amount of about £300, and that the pursuer and his sister Mrs Cameron, being anxious to protect it from their father, who was of dissipated habits, the money was deposited in bank in the pursuer's name. Thereafter differences arose between the pursuer and Mrs Cameron, in consequence of which the pursuer uplifted the money and deposited it with the defender.

The pursuer deponed that when he deposited the sum (which he alleged to be £290) with the defender, the defender advised him to pretend to burn the whole of the money; that the defender took some old plans or tracing paper, and cut them up to the size and number of the notes in which the money was contained; that a packet was thus formed with a real £1 note at top and bottom, and that the pursuer, taking the first occasion of a quarrel with Mrs Cameron, locked the door as she left it for an instant, and while she looked through the window, threw the packet into the fire, where it was burned. The pursuer denied that the defender returned the money to him within a few days before this incident, but he admitted that he had subsequently received £150 in instalments of £50.

The defender deponed that the pursuer deposited £275 with him, and that about eight days thereafter the pursuer got it back on the ground of a probable agreement for division with his father and sister; that in a few days the defender heard a rumour of the burning and asked the pursuer for an explanation; that the latter called upon him and described a quarrel with his sister in which he had thrown the money in the fire, except a sum of £150 which he then handed to the defender, and it was agreed that it should be repaid in sums of £50, and that the defender subsequently repaid that sum as agreed.

Certain other portions of the evidence are referred to in the opinions of Lord Trayner and Lord Moncreiff.

The Act 1669, cap. 9, enacts that "all bargains concerning moveables or sums of money proveable by witnesses shall only be proveable by writ or oath of party, if the same be not pursued for within five years after the making of the bargain."

On 26th November 1900 the Sheriff-Substitute (BOYD) pronounced an interlocutor in which he found that the defender admitted the deposit of £275, and that he had repaid £150 thereof, and decerned against him for £125.

The defender appealed to the Sheriff (BERRY), who on 1st April 1901 adhered to the interlocutor appealed against.

Note.—". . . The original deposit of £275 with the defender is not disputed, and £150 having been handed back it seems to rest on the defender to show that the remaining £125 was also handed back. The account he gives of the whole having first been taken away by the pursuer, and only £150 afterwards returned to him for custody, is not a probable story, and it is uncorroborated. On consideration I think the Sheriff-Substitute's conclusion is right, that the amount in question was never handed back, and that the judgment should be adhered to."

The defender appealed to the Court of Session, and argued — Parole proof was incompetent in respect (1) of the rule that a money obligation over £100 Scots could only be proved by writ or oath—Bell's Pr. s. 2257; and (2) of the quinquennial limitation established by the Act 1669, cap. 9, which applied to deposit—Bell's Pr. s. 593. (2) Assuming that parole evidence was competent, the onus was on the pursuer to prove that the money had not been returned, not on the defender to prove that it had — Dickson on Evidence, s. 312; *Campbell* v. *Grierson*, January 15, 1848, 10 D. 361; *Kerr's Trustees* v. *Kerr*, November

16, 1883, 11 R. 108, 21 S.L.R. 89; *Chrystal* v. *Chrystal*, January 11 1900, 2 F. 373, 37 S.L.R. 278. On the evidence the defender maintained that the pursuer had not discharged the onus which rested on him.

Argued for the pursuer and respondent—(1) There was no authority for the appellant's contention that deposit could only be proved by writ or oath. Nor did the Act 1669 apply to deposit, and the statement in Bell's Principles to that effect was ill founded. In analogous cases the Act had been held not to apply—*Macfarlane* v. *Brown*, January 7, 1827, 5 S. 189; *M'Kinlay* v. *M'Kinlay*, December 11, 1851, 14 D. 162; *Brown* v. *Gardiner*, April 11, 1890, 6 L. S. Rev. 149. (2) The defender having admitted the deposit, the *onus* was on him to prove that he had returned the money; and on the evidence he had failed to do so.

At advising—

LORD JUSTICE-CLERK — This is a very remarkable case. The circumstances as detailed in contradictory statements by the pursuer and defender are so extraordinary, and have so little to commend them as true circumstances, that they must, as I think, be rejected as untrustworthy except in so far as they are corroborated by independent testimony, or are to be accepted as given by the party because unfavourable to himself, and therefore presumably true. Dealing with the case upon that footing, I think it is sufficiently established that a sum of at least £275 was placed by the pursuer in the custody of the defender. This he admits, but couples his admission with the statement that he returned the whole of the money to the pursuer, he giving a most extraordinary account of what was done with a part of it, and then stating that the remainder was returned to him, and that he gave it back to the pursuer in sums from time to time. The case of the pursuer, on the other hand, is that £150 only of the money was returned, and that the defender has held the balance ever since.

The defender presents a legal contention which must be dealt with before considering the merits. He maintains that the quinquennial prescription applies, and that therefore the pursuer's case can only be proved by his, the defender's, writ or oath. I am of opinion that the quinquennial prescription Act does not apply to this case. That Act relates to "bargains concerning moveables or sums of money." This is not a case of bargain in any sense. No right of any kind was conferred. It is a case of alleged deposit solely for safe custody unconnected with any transaction or bargaining. There is, so far as I know, no authority for applying the Act in such a case as is presented by the pursuer or the defender. I am therefore of opinion that there is no ground for any limitation of proof to the party's writ or oath on the ground maintained. Nor do I think that such a restriction of proof can be maintained because of the nature of the arrangement between the parties. It was in no sense a loan or even a pledge. It is simply a deposit for safety in which specific return was implied of the thing deposited. Proof *prout de jure* is not to be excluded in such a case.

As regards the evidence, I feel it impossible, as I have already said, to place confidence in the parole testimony of either party in his own favour. But the evidence of the defender that he received the money being evidence against himself, coupled with the evidence of Forsyth, convinces me that he did receive the money. I think it lies with him satisfactorily to discharge himself of his custody of it. This he fails to do, for he has no evidence except his own statement, to which the judge who tried the case gave no credence, and which I cannot accept.

I am therefore of opinion that there is no sufficient ground for interfering with the judgment under review.

LORD YOUNG—[*After stating the circumstances*]—The only question of fact therefore on which the parties were (or I may say are) at issue is, whether or not the defender fulfilled his admitted contract obligation to return or repay to the pursuer the full amount deposited with him, viz., £275.

In considering the legal questions which arise I will for the sake of simplicity and clearness take the fulfilment averred by the defender to be this—I quote from the record (Ans. 1)—"About a week thereafter the pursuer called for and received back from the defender the said sum of £275 sterling," disregarding (but only in the meantime) his averment (denied by the pursuer) of a subsequent deposit of £150.

Contracts of deposit for safe keeping of any commodities other than money, or even of money if deposited on agreement, express or reasonably to be implied, that it shall be returned *in forma specifica*, may, I shall assume, be proved by parole. We were informed that so far as known no instance had hitherto occurred of such a money deposit contract (for return *in forma specifica*), and judging from the record and evidence I think this is not such. There is, if not a complete, certainly some *prima facie*, analogy between contracts of loan and contracts of deposit, and in the former the law of evidence distinguishes according as the subject is money or another commodity. This is, I believe (indeed counsel so informed us) the first action based on an unwritten contract of money deposit, and in it the conclusion is simply for decerniture against the defender to pay a sum of money as due on deposit-contract on the assumption that the deposit-contract averred imposes on one of the contractors the same obligation of payment as would a loan contract for the same amount, and confers on the other the same right to sue for it. Had the parties here been at issue regarding the constitution of the contract sued on, the legal question would have arisen whether it could be proved otherwise than *scripto vel juramento*. But as they are not at issue except on the question whether or not the admitted contract has been fully implemented, I desire to avoid expressing

an opinion on the general question which the counsel on both sides were agreed had not hitherto occurred.

The onus of proving his case is on the pursuer, and assuming, as I do, in his favour that the fact of the deposit alleged by him is unqualifiedly admitted by the defender, and that beyond what is thus admitted there is no evidence except the conflicting averments and testimony of the parties themselves, the legal question I desire now to consider is, Has the pursuer satisfied the onus upon him? Assuming that the evidence before us was properly allowed, I shall refer to it by and by to see whether or not the assumption that it proves nothing beyond the admitted fact of the deposit is accurate. Before doing so, however, I desire to make some further remarks, I hope not uselessly, on the general question of *onus probandi*, the reason of the judgment under appeal being put by the Sheriff thus—"The original deposit of £275 with the defenders is not disputed, and £150 having been handed back it seems to rest on the defender to show "that the remaining £125 was also handed back." I dissent from this view without indicating any view that resting-owing or indebtedness on this or any contract of deposit may be proved by parole not only directly but circumstantially and in an infinite variety of ways. The proposition from which I dissent is this—that the admission (or proof) that a contract of deposit (or of loan) was made between the parties is and ought to be sufficient to convince a court of law that it has not been implemented if the depositary (or borrower) does not prove affirmatively that it has, or, in other words, that the pursuer satisfies the whole onus upon him by proving the deposit (or loan), and thereby puts on the defender the onus of proving restoration or payment. Of course a depositary (or borrower) who has given document is not in safety to restore or pay without written receipt while leaving the document in the possession of the depositor (or lender). Mr Spens in his note (6th March 1900) characterises the contract here as "one of voluntary and gratuitous deposit." Certainly no document ever existed, and nobody witnessed anything that passed between the parties in speech or action relating to the deposit. A loan given by a relation or friend privately without document or witnesses is of common, indeed familiar occurrence, and is frequently, I should say usually, repaid without witnesses or written receipt. Or, to instance in a reasonably supposable case of voluntary and gratuitous deposit, suppose A to oblige B, and without document or witnesses, receives from him his cash, jewel, or plate-box to be kept in his press or safe for a season or till wanted back The subject deposited may, for illustrative purposes, be anything and of any value—a bank-note for £5, £10, or £50, or a ring, jewel, or book of any value. In such cases I could not assent to the proposition that the pursuer of an action for restoration *in forma*, or failing that for money value, would satisfy the onus upon him by proof of the deposit and no more. He might, indeed, competently prove facts and circumstances beyond the mere fact of deposit which would create a presumption of retention by the depositary, and so put upon him the onus of removing it. But without proof *ultra* the fact of deposit made a few days or weeks, or it might be as here many years, before action raised, the pursuer could not in my opinion succeed. Is there any such proof *ultra* here? Had there been, the Sheriff's judgment being on evidence, ought to and no doubt would have specified the facts proved.

[*Having examined the evidence and expressed the opinion that the pursuer had failed to prove his case*]—I am of opinion that the judgment appealed against is wrong and ought to be reversed, having regard to the only facts which we can find established by the evidence, and to the opinion which I have expressed, and I hope intelligibly explained, upon the legal questions, and particularly that of *onus probandi* which the case presents.

LORD TRAYNER—I do not intend to go into any detail of the facts out of which this case has arisen. Nor shall I express any opinion regarding the conduct or character of the parties beyond what is involved in my saying that I place no reliance on any statement made by either of them except where the statement is adverse to the interest of the party making it (in which case he may be presumed to be telling the truth), or is corroborated by independent testimony.

The defender maintained that the proof which had been allowed and taken was incompetent in respect that the pursuer's averments could only be proved by the defender's writ or oath under the provisions of the Act 1669, cap. 9. I think this contention cannot be sustained. The quinquennial prescription has never been held to apply (so far as I know) to the case of a deposit *custodiæ causa*, and I am not prepared so to apply it now for the first time. The "bargains concerning moveables" to which the Act applies do not seem to me to include such a deposit as is here in question. I think such "bargains" do not include transactions under which no right in the moveables is transferred by the bargain. I therefore think the pursuer was entitled to prove his averments *prout de jure*.

Taking the proof as we have it the case stands thus—The pursuer avers that in August 1890 he gave the defender for custody and safe keeping the sum of £290. The defender admits that in August 1890 a sum of £275 was given to him by the pursuer to keep until the pursuer and his father and sisters had "come to some arrangement" about it. It is therefore proved by the defender's admission that he received £275 from the pursuer *custodiæ causa*.

It is true the defender in his evidence says "that money was all got back by the pursuer in the course of eight days," and it is maintained by the defender that his ad-

mission that he got the money can only be taken with the qualification that he returned it. I am not prepared to admit that. It is a rule of our law, no doubt, that any admission made on record which is qualified must be taken with the qualification, and under a reference to oath any statement made with a qualification must be so accepted if the qualification is intrinsic. But when we are dealing with the evidence of a witness I know of no rule which compels the Court to accept the whole of the witness' deposition or wholly to reject it. The contrary is everyday practice. Now, when I say the defender admits receiving £275 I am dealing with his evidence as a witness *in causa*, and as a witness he is just in the same position as any other witness adduced. His evidence is to be dealt with and is open to criticism exactly like the evidence of any other witness. Accordingly, in the view I have already expressed, I take the defender's statement which is adverse to his interest as true. I decline to accept his evidence in his own favour unless corroborated, which in this particular it is not. But I think the deposit is proved without the defender's admission. The pursuer swears he gave the money to him, the defender admits it, and says that when he got it he showed "the full amount" to Forsyth. Forsyth speaks to being shown by the defender two notes of £100 each as money belonging to the pursuer.

I have no doubt the pursuer gave the defender £275 at least, and that this is sufficiently proved even without the defender's admission. The defender therefore is charged with the custody of £275. There is no proof that he gave it back except his own statement, which is not enough (even if I believed him) to prove repayment. The parties are agreed that £150 has been paid back, and that leaves the defender debtor to the pursuer in £125. For that sum the Sheriff has decerned, and I think that judgment should be affirmed.

Lord Moncreiff — I am of opinion that both the Sheriffs have come to a right conclusion.

1. The first question is whether the action is excluded by the quinquennial limitation under the Act 1669, cap. 9. I am of opinion that it is not. The statute applies to "all bargains concerning moveables or sums of money provable by witnesses." These words have by practice and decision been interpreted to apply only to sales or other bargains concerning corporeal moveables. Notwithstanding the statement of Professor Bell (Bell's Prin., sec. 593), there is no case in the books in which the limitation has been applied to gratuitous deposit. On the other hand, it has been held not to apply to a consignment of goods in security of an advance of money, although coupled with a power to sell in the event of the money not being repaid within a specific period — *M'Farlane* v. *Brown*, 5 S. 205.

2. The next question is whether proof *prout de jure* is competent. I am of opinion that it is. Even if deposit as a general rule could only be proved by writ or oath I should have been prepared to hold that proof *prout de jure* is competent in this case, because the transaction is tainted with fraud, a fraud which affects the interests of a third party. But apart from this there is no authority for the proposition that deposit can only be proved by writ or oath of the depositary.

Pledge can be proved by witnesses — Bell's Prin. (sec. 204); and gratuitous deposit is in a more favourable position. Loan stands in an exceptional position, it being well settled by practice and decision that it can only be proved by writ or oath. The same rule also still applies to advance or payment of money above £100 Scots. The tendency of modern times, however, has been to relax restrictions as to the mode of proof of obligations; and in the absence of any authority to the contrary I am not prepared to hold by analogy (supposing an analogy to exist, which I dispute) that the rules of evidence which apply to loan apply to deposit.

This was not a case of loan; it was a deposit of a bundle of bank notes which was entrusted to the defender for safe keeping to be returned when asked for, and it was accepted and put away by him on that footing. The character of the transaction was not in my opinion affected by the fact that when the pursuer wished repayments by instalments the defender at his request changed one of the large notes. Deposit of money with a bank on deposit-receipt is of a totally different character. There the money is in substance lent to the bank, the bank having the use of it in return for interest; and according to the invariable practice of bankers the bank gives the depositor a written document of debt.

3. The next question is, whether the pursuer has proved his case. The main difficulty is the pursuer himself. Both the pursuer and the defender have been proved to have been parties to an exceptionally base act of deception, and therefore their evidence is to be received with suspicion.

At one time I doubted whether the pursuer's claim was not barred by the legal maxim *in pari delicto potior est conditio possidentis*, but as the defender's counsel did not think fit to argue the point I am not disposed to press it—the less so because to enforce the rule might operate injustice to the party defrauded by both the pursuer and the defender, viz., the pursuer's sister.

I have formed a very bad impression of the pursuer, and I confess that I cannot take the charitable view of his conduct which the Sheriff-Substitute takes. But, on the other hand, the conduct and evidence of the defender is just as bad, and therefore we have the difficult task of deciding between the stories of two discredited witnesses, with the assistance of such independent evidence as is available.

The proof stands thus. It is not disputed that in 1890 the defender received from the pursuer the whole of the money which the pursuer's mother had saved, and which fell to be divided between the pursuer and his

father and sister. The defender says that the amount was only £275, and for the purposes of this case that may be taken to be the true amount. The fact that he received the money does not depend solely on his admission on record or in the witness-box. The pursuer's sister Mrs Cameron says that the money saved by her mother, which was uplifted by the pursuer, consisted of two one-hundred-pound notes, a fifty-pound note, a twenty-pound note, and some small notes. Now, the witness William Forsyth says that in 1890 the defender showed him the two one-hundred-pound notes and told him that it belonged to the pursuer.

It being thus fairly established that these notes were deposited with the defender, I am of opinion that it lay upon him to prove that they were restored or repaid to the pursuer. The onus of proving restoration is on the depositary. Otherwise a depositor would be at the mercy of a dishonest depositary. He would have to prove affirmatively, that the deposit was made, and negatively that it was not returned, while in the absence of corroborative evidence the depositary would go free in either case. In some cases little more may be required than the evidence of the depositary to discharge the burden of proof. Proof of circumstances may be sufficient, but in the absence of direct corroboration the depositary's evidence must at least be unambiguous and credible. In this case the defender's evidence is stamped with improbability. He says that within eight days after the pursuer gave him the notes he gave them all back to the pursuer just as he got them. That seems to be a very improbable statement. The money was given to the defender for the very purpose of keeping it out of the reach of the pursuer's father, and the last thing that the pursuer was likely to do was to give his father another chance of carrying it off.

Then the defender says that in a few days the pursuer brought him back £150 of the money, consisting of a one hundred pound note, two twenty pound notes, and a ten pound note; and the defender's statement is that he kept that money in that state, used neither by the pursuer nor by himself, for seven years until 1897, and that he thereafter paid the whole £150 back to the pursuer in three instalments of £50 each. I do not believe this story. In August 1899 the witness David Paterson had a conversation with the defender, who was apparently becoming alarmed on account of inquiries being made by Mrs Cameron as to money in his hands. He told Paterson that he had got money belonging to the pursuer to keep, and that the pursuer had got the money as he wanted it. He did not say that he had repaid the whole of the money; and the witness says—"I did not understand from what he said that he had had the money and had given it back. He did not say that he had at present money of the pursuer's in his possession. I gathered that he had had money at some past time, but I understood he still had it when he was speaking, although he did not say so."

There are two other matters in connection with the defender's conduct which do not impress me favourably. He knew quite well that the pursuer's sister had a claim upon the money, and yet for nine years he concealed from her the fact that he had at least part of it in his hands. And when an attempt was made to have an interview with him he sent evasive messages and kept out of her way. My impression on the whole matter is, that the defender, although at the outset he had no dishonest intention, retained and ultimately appropriated the balance of the money entrusted to him by the pursuer, trading on the fact that the pursuer had given out that he had burned all the notes, which the defender trusted would preclude him from denying the defender's averment that he had returned the whole of the notes to him. In any view the defender has failed to prove restoration beyond £150.

The Court pronounced an interlocutor in effect affirming the findings of the Sheriffs, and decerned against the defender for £125.

Counsel for the Pursuer and Respondent —Ure, K.C.—T. B. Morison. Agent—John Martin, Writer.

Counsel for the Defender and Appellant —Lees, K.C.—Chree. Agents—Adamson, Gulland, & Stuart, S.S.C.

Saturday, November 9.

SECOND DIVISION.

BRODIE *v.* MACGREGOR.

Expenses—Jury Trial—Breach of Promise — Tender — New Trial — Averments Impeaching Chastity — Damages Awarded Less than Sum Tendered.

In an action of damages for breach of promise, in which the defender made averments impeaching the pursuer's chastity, the pursuer obtained a verdict for £5000. The Court having granted a new trial on the ground of excessive damages, the defender made a judicial tender of £1500 and expenses, which was refused by the pursuer. At the second trial the pursuer obtained a verdict for £500.

On a motion to apply the verdict, the Court *found* the pursuer entitled to expenses up to the date of the tender, and found the defender entitled to expenses after that date.

Mrs Catherine M'Ewen or Brodie brought an action against David MacGregor, in which she concluded for £30,000 in name of damages for breach of promise of marriage.

The defender denied that he had ever promised to marry the pursuer, and averred that she had endeavoured to entrap him into a promise, with the object of compelling him to marry her, or of extracting money from him. He also made averments reflecting upon the pursuer's chastity.