

Friday, March 5.

SECOND DIVISION.

[Lord Trayner, Ordinary.

LAILDLAW v. SHAW.

Loan.—Proof.—Writ or Oath.

Evidence on which a loan of money to a deceased person was held proved although no writ under the hand of the alleged debtor acknowledging the loan was produced.

Elizabeth Laidlaw, residing at Bankend, Jedburgh, brought this action against Alexander Shaw, the executor of her deceased sister Jane Laidlaw, for repayment of certain sums, amongst which was one of £57, 5s. 9d., alleged to have been advanced by her to her sister in loan.

The pursuer stated—(Cond. 2) “In the month of November 1876 the said Jane Laidlaw paid off a bond and disposition in security for £137, 2s. 11d. which she had granted over the said property. The pursuer had at that time a deposit-receipt in her favour with the Bank of Scotland at Lauder for £68, 17s. 10d., and from this receipt a sum of £57, 5s. 9d. was taken and applied towards payment of the said bond. The transaction was carried through by Mr Robert Romanes, writer in Lauder, who, as agent for and acting on behalf of the said Jane Laidlaw, duly authorised by her, borrowed the said sum of £57, 5s. 9d., and applied the same as aforesaid towards payment of the said bond. No part of the said sum was repaid to the pursuer, and the same is still indebted and resting-owing to her with interest from the term of Martinmas 1876.”

The defender answered—“Denied that Mr Romanes acted as agent for the said Jane Laidlaw. *Quoad ultra* not know and not admitted.”

The defender pleaded—“(1) The alleged loans can only be proved by writ or oath.”

The Lord Ordinary (TRAYNER) allowed the pursuer a proof by writ or oath.

Robert Romanes, the agent, deponed as follows:—“I knew the deceased Jane Laidlaw. . . . She had a piece of land at Lauder called the ‘Burgess Acre.’ There was a bond over it in November 1876 for £137, 2s. 11d. That bond was paid off in November 1876. Of that money £100 was borrowed from a Miss Davidson, and an assignation to that extent granted in her favour, and the balance was discharged. (Shown No. 21)—That is a deposit-receipt for £68, 17s. 10d. in favour of Elizabeth Laidlaw, Lauder. I endorsed that receipt, and the money was uplifted by me. Jane Laidlaw got an account from me with reference to that receipt showing that the amount with interest at 11th November was £69, 9s. 4d., and that on her account £57, 5s. 9d. had been deducted from that receipt and applied towards the payment of the balance of the bond, and another small advance which she had from me personally. On 11th November 1876 I wrote to Jane Laidlaw showing what I had done with Elizabeth’s £57, 5s. 9d., and enclosing a deposit-receipt for the balance of £12, 3s. 7d. (Shown No. 22)—That is the deposit-receipt. (Shown No. 23)—That is a copy of the letter which I sent to Jane Laidlaw. In the letter of which that is a copy I enclosed the deposit-receipt for

the £12, 3s. 7d. That letter was not returned through the dead letter office; in point of fact, the deposit-receipt was cashed shortly afterwards by Jane Laidlaw—it bears her endorsement. The letter contains this passage:—‘And have borrowed for you from Miss Davidson £100, and from your sister Elizabeth £57, 5s. 9d.,’—but with the sister Elizabeth I never had any transaction whatever. Jane Laidlaw brought me her sister’s receipt, and said,—‘Take from that receipt the balance required to finish the transaction,—and I understood it to be a loan, and so stated it in the letter. . . . (Shown No. 20)—That is a document in my handwriting, entitled ‘State for Miss Jane Laidlaw, showing the sums she fell to pay on 11th November 1876, and the mode in which those sums are to be met.’ That is a draft, and I have no doubt the principal document was sent to Jane Laidlaw. I have no recollection of ever seeing it again.”

The pursuer produced the following documents:—

1. A copy letter, dated 2d November 1876, to her from Mr Romanes, as follows:—“Madam,—I enclose a note showing how I have arranged your transactions for the 11th curt.—Yours truly, ROBERT ROMANES.”

2. Draft entitled “State for Miss Jane Laidlaw,” which bore “Sums to pay”—including Waddell’s trustees’ bond for £137, 2s. 11d.—and amounting in all to . . . . . £157 5 9

“Funds.

Sum borrowed from Miss Davidson,	£100 0 0	
Int. receipt of Elizabeth Laidlaw,	£68 17 10	
Interest on do.,	0 9 2	
		69 7 0
		169 7 0

Balance over, to be lodged for Elizabeth Laidlaw, . . . . . £12 1 3

“Elizabeth Laidlaw.

Old receipt and interest, . . . . . £60 7 0  
New receipt, . . . . . 12 1 3

Balance due by Jane Laidlaw, . . . . . £57 5 9

The interest on this sum at 4 per cent. is £2, 5s. 10d. yearly.”

3. A copy letter, dated 11th November 1876, from Romanes to her, as follows:—“Madam,—I . . . have borrowed for you from Miss Davidson £100, and from your sister Elizabeth £57, 5s. 9d. You pay Miss Davidson £4 yearly of interest, and your sister £2, 5s. 10d. . . . New receipt sent for £12, 3s. 7d.”

4. Deposit-receipt by the Bank of Scotland, dated 8th June 1876, in favour of Miss Elizabeth Laidlaw for £68, 17s. 10d., endorsed “Elizabeth Laidlaw” and “Robert Romanes.”

5. Deposit-receipt by the Bank of Scotland, dated 11th November 1876, in favour of Miss Elizabeth Laidlaw for £12, 3s. 7d., endorsed “Elizabeth Laidlaw” and “Jane Laidlaw.”

6. Bond and disposition in security in favour of Waddell’s trustees for £137, 2s. 11d.

7. Assignation of said bond by them in favour of Miss Margaret Davidson, to the extent of £100, and discharge in favour of Miss Jane Laidlaw to the extent of £37, 2s. 11d.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer has failed to prove *habili modo* the resting-owing of the sum of £57, 5s. 9d. . . . Therefore assoilizes the defender from the whole conclusions of the summons, and decerns."

The pursuer reclaimed, and argued—The contemporaneous writings produced by the agent who conducted the transaction clearly showed that this was a loan. He communicated this to his client immediately after the transaction.—*Wood v. Howden*, Feb. 7, 1843, 5 D. 507; *Thomson v. Lindsay*, Oct. 28, 1873, 1 R. 65; *Williamson v. Allan*, May 29, 1882, 9 R. 859.

The defender replied—(1) No writ had been produced as having passed from the hands of the pursuer or her agent to the lender—*Haldane v. Spiers*, March 7, 1872, 10 Macph. 537—Lord President's opinion, 541. (2) The pursuer attempted to prove the loan by the writ of the agent of the alleged borrower. Romanes' evidence showed that he had not received the money from the pursuer, but that the money had been handed to him by Jane Laidlaw. It must be proved by her writ, and none was forthcoming. (3) But granted that proof by agent's writ was to be looked at, the documents produced were neither probative nor holograph, nor could be set up by parole testimony—*Dickson on Evidence*, i. 385; *Stewart v. Syme*, Dec. 12, 1815, F.C. The letter of 11th November was not holograph, and could not be looked at. The draft state produced was a mere jotting undated and unsigned, found not in the lender's repositories, but in the hands of Jane Laidlaw's agent. It was worthless—*Waddel v. Waddels*, Dec. 20, 1790, 3 Pat. App. 188; *Wink v. Spiers*, March 23, 1868, 6 Macph. 657. The endorsed deposit-receipt raised no presumption of loan so as to admit of parole testimony—*Haldane v. Speirs*, *supra*; *Nimmo v. Nimmo*, Feb. 22, 1873, 11 Macph. 446.

At advising—

LORD JUSTICE-CLERK—Elizabeth Laidlaw sues in this action the executor of her deceased sister Jane Laidlaw, for certain sums said to have been advanced by the pursuer to her sister during her life. Of these we have only one to deal with under this reclaiming-note—a claim, namely, for the sum of £57, 5s. 9d. The pursuer alleges this sum was the balance of a deposit-receipt in her favour with the Bank of Scotland for £68, 17s. 10d. She says that this deposit-receipt was handed by her to her sister, who gave it to Mr Romanes, a law-agent at Lauder, who acted for Jane Laidlaw, and that he used this receipt to the extent of £57, 5s. 9d. in paying up a debt due by Jane under an heritable bond which had been called up.

The Lord Ordinary has found that the pursuer has failed to prove this claim, on the ground that there is no written evidence under the hand of Jane Laidlaw acknowledging that the pursuer lent her this money. I have come to a different conclusion. I think the debt is clearly established by competent and conclusive evidence.

There are three facts which require to be proved. *First*, that the deposit-receipt for £68, 17s. 10d. was the property of the pursuer Elizabeth Laidlaw; *Secondly*, that Jane Laidlaw delivered it to her agent Mr Romanes; and *Thirdly*, that Romanes used it to the extent of £57, 5s. 9d. in

paying a debt due by Jane.

The first of these facts is proved by the deposit-receipt itself, which is produced. It is an acknowledgment by the Bank of Scotland of having received from Elizabeth Laidlaw the sum in question. It is endorsed both by Elizabeth Laidlaw and by Romanes.

The way in which it came into the hands of Romanes is proved by Romanes himself. He proves that he was employed by Jane to make up a sum of £137, 2s. 11d. to meet the heritable bond which had been called up. He says he borrowed £100 from a Miss Davidson, and he says, "Jane Laidlaw brought me her sister's receipt and said, Take from that receipt the balance required to finish the transaction." The third question, whether Romanes used this receipt which belonged to Elizabeth in paying off the debt due by Jane, seems equally clear. In the first place, Romanes says so, and in the question what he did with the money, his testimony is both competent and conclusive, there being nothing against it. *Secondly*, he produces excerpts from his books and copies of his letters to Jane, and proves also that these letters were sent. Among the letters was a note dated 2d November 1876 to this effect—"Madame, I enclose a note showing how I have arranged your transactions for the 11th *currt.*"

The note contains this entry:—

<i>Funds.</i>	
Sum borrowed from Miss Davidson,	£100 0 0
Int. receipt of Elizabeth Laidlaw,	68 17 10
Interest on do.,	0 9 2
	<hr/>
Balance over to be lodged for Elizabeth Laidlaw,	£167 17 0 12 1 3
	<hr/>
Balance due by Jane Laidlaw,	£57 5 9

A copy of the discharge granted by Jane's creditor is produced. In a subsequent letter from Romanes to Jane, dated Nov. 11, 1876, Romanes writes—"I have borrowed for you from Miss Davidson £100, and from your sister Elizabeth £57, 5s. 9d. You pay Miss Davidson £4 yearly of interest, and your sister £2, 5s. 10d." And he sends the new receipt for £12, 3s. 7d. That receipt is produced, and is signed by both the sisters.

This last document is a writing under the hand of Jane, indicating her participation and cognisance of the whole transaction, for the sum was a balance of the original deposit-receipt which belonged to Elizabeth, and the new receipt is taken in her favour because it did so. This proves under Jane's hand that she did not acquire the original receipt on any onerous footing, and corroborates the account of the arrangement given by Romanes. But I should have held the writ of her authorised agent quite sufficient.

LORD CRAIGHILL—The late Jane Laidlaw succeeded to house property upon the death of her father, which was burdened with a bond for £137, 2s. 11d. In August 1876 notice was sent to her that this money would be called up at the following Martinmas, and in consequence she puts the business into the hands of her agent Mr Robert Romanes, writer, Lauder, that what was required might be accomplished. The bond was paid, and this is the way, as appears from the documents

in process, that the money was raised. The debt—principal, interest, and charges—with a sum of £14 due to Mr Romanes which was also to be provided for, amounted to £157, 5s. 9d.; of this £100 was raised by assignation of the bond to that extent to Miss Davidson; this is proved by the assignation; and the balance was provided out of the contents of a deposit-receipt for £68, 17s. 10d. granted to the pursuer by the Lauder branch of the Bank of Scotland, which was brought by Jane Laidlaw to Mr Romanes that the contents so far as necessary might be used in paying the balance of her debt. This receipt has been recovered. It is endorsed by her, and following her by Mr Romanes, her sister's agent, which shows that the contents of the receipt passed into his hands. All that was needed, however, was £57, 5s. 9d. and for the balance of £12, 3s. 7d. a deposit-receipt from the same agency, dated 11th November 1876, in favour of the pursuer, was sent through her sister to the pursuer by Mr Romanes. This deposit-receipt has also been recovered, and is endorsed by the pursuer and by her sister, the contents apparently passing into the hands of Jane. Now all these things were communicated at the time by letter from Mr Romanes to his client. The letter has not been recovered, but a copy taken from Mr Romanes' letter-book is in process, and it is perfectly certain that the letter itself not only was sent by Mr Romanes, but was received by Jane Laidlaw, for, as Mr Romanes writes, there was sent in the letter the deposit-receipt for £12, 3s. 7d. the contents of which were afterwards uplifted by Jane after the receipt had been endorsed by her and by the pursuer. The possession of this deposit-receipt sent in this letter proves with absolute certainty that the letter in which it was sent must have been received. Such is the evidence laid before the Court, and nothing could be more clearly established than the fact that £57, 5s. 9d. of the pursuer's money was used by Jane Laidlaw's agent, with her knowledge, in providing *pro tanto* for payment of her debt. It is said by the defenders, *non constat* that this money was a loan—it might have been a donation, or in payment of a debt—but neither the one nor the other of these things is to be presumed, and there is not a particle of evidence by which either can be supported. On the whole matter, therefore, I am of opinion that decree for £57, 5s. 9d. ought now to be pronounced.

LORD RUTHERFURD CLARK—I am of the same opinion. It is proved beyond the possibility of doubt that £57, 5s. 9d. of the pursuer's money was applied in payment of the debt which was undoubtedly due by her sister Jane. That fact itself establishes the debt that the pursuer now seeks to recover, unless it can be shown that the sum sued for was the subject of donation to her sister. That of course could not have been presumed, but besides any such idea is displaced by the evidence which we have in the case. It is plain that the money was given in loan, and was not given by way of donation, for the agent by whom the transaction was carried out records it by contemporaneous writing that the sum was given in loan, and the fact is communicated by him to his client immediately after the transaction was carried through. I confess I never saw a clearer case.

LORD YOUNG was absent.

The Court recalled the Lord Ordinary's interlocutor and gave decree for the sum sued for.

Counsel for Reclaimer—Rhind. Agent—Thomas Dalgleish, S.S.C.

Counsel for Respondent—MacWatt. Agents—Mack & Grant, S.S.C.

Friday, March 19.

## SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

SKINNER v. LORD SALTOUN.

*Lease—Croftler—Obligation to Erect Buildings—Construction of.*

The tenant of a croft of ten acres under a nineteen years' lease bound himself in the lease, *inter alia*, to erect a house on the croft for which he was to receive payment at the end of his lease "if built of stone and lime and slated." He built a house on the croft, which was not of stone and lime, but of stone and clay, and was not slated, but was partly tiled and partly thatched. *Held* that he had not so fulfilled his obligation as to entitle him to receive payment for the house at the end of the lease.

*Lease—Renunciation of Claims by Two Tenants, One of whom was Previous Tenant.*

The lease of a small croft in favour of two tenants contained this clause—"Further, the tenants hereby renounce and give up all claims in respect of houses and dykes on the said croft, and bind themselves and their foresaids, at their own expenses, to maintain and uphold the same in good repair during the currency of this lease, and at its expiry to leave the same to the proprietor or incoming tenant." Of the two tenants one had been sole tenant under the former lease. *Question*, Whether this clause imported a renunciation by this tenant of claims arising to him under the former lease, or whether the claims renounced must be claims in which both tenants were creditors?

*Lease—Verbal Alteration.*

The tenant of a small croft under a nineteen years' lease became bound in the lease to erect a house on the croft, for which he was to receive payment "if built of stone and lime and slated." The house erected was of stone and clay, and was partly tiled and partly thatched. *Opinion* (per Lord Rutherford Clark) that it was incompetent to prove a verbal agreement by the landlord's factor that the tenant should receive payment even for this house.

By missive dated in 1858 David Skinner offered for a nineteen years' lease of a croft of ten acres on Mormond, part of Lord Saltoun's estate, in, *inter alia*, the following terms:—First, Skinner was to enclose and improve the said croft according to certain specified conditions; Second, he was to possess it rent free for the first three years, he was to pay 2s. per acre for the fourth year, and