dinary thinks there is not a relevant case stated for this part of the claim, and that it should not enter the schedule."

Scott and Reid for pursuer.

Young and Shand for defenders.

The Court held that the pursuer was not entitled to make any separate or substantive claim under the second and third conclusions of his summons, although a proof of the averments upon which they were founded might have its proper effect with the jury in estimating the amount of general damage, and approved of this issue:—

"It being admitted that, on or about the 15th October 1866, the pursuer entered into an agreement with the defenders to serve them as a managing-director of their company, under the articles of association of the company, for three years from 1st November 1866, at a salary of £800 per annum, and a commission of 10 per cent. on the nett profits of the concern, after deduction of 6 per cent. on the paid-up capital, and a fair allowance for wear and tear, on the same principle as established in the York Street Flax-Spinning Company (Limited).

"Whether, on or about 7th October 1867, the pursuer was wrongfully dismissed from his said office of managing-director by the defenders, to the loss, injury, and damage of the pursuer?"

Damages laid at £2000.

Agent for Pursuer—J. Walls, S.S.C.

Agent for Defenders—J. N. Forman, W.S.

Wednesday, March 18.

CAMPBELL, PETITIONER.

(Ante, vol. iv, p. 84).

Title to Sue—Proof—Delivery of Document — Exhibition—5 & 6 Vict., c. 69—*22 Vict., c.* 20. A party having commenced in Chancery a suit for perpetuating testimony, alleging himself to be the immediate younger brother of a party who was entitled, to claim certain titles and estate, and having obtained an order appointing an examiner to take the examination of witnesses, petitioned in the Court of Session for an order on certain parties, custodiers of the family papers, to search for and exhibit, before the examiners, certain documents referred to in the examination of one of the witnesses; *Held* that the petitioner had no title to make this demand.

The Court having, by interlocutor of 11th June 1867, appointed the trustees and law agents of the late Marquis to appear for examination as witnesses before the examiners, Lord Jerviswoode and Mr Thomas Syme were examined. Lord Jerviswoode stated in the evidence which he then gave that the document then produced, (marked A) was a list of documents and papers which he had been informed by Messrs Davidson & Syme the complainer desired to have then exhibited; that he had none of the documents or papers with him; that the Trustees would not search for or exhibit the documents and papers called for without judicial authority; and that the reason they would not do so was, because there was a question raised as to the party who had right to the documents in the Charter Room of Taymouth Castle, or connected with the family or estates, and that they, the Trustees, thought it proper to do nothing in the matter without judicial authority.

The petitioner then, on 26th November 1867, presented a petition to the court, setting forth the previous procedure in the case, and praying the court to order the late Marquis' trustees and law-agents to search for, and to exhibit before the examiner, at such times and places as the examiner should appoint for their examination, "the writings and other documents above-mentioned and described in exhibit A, referred to in the depositions of the said Lord Jerviswoode and Thomas Syme, already taken before the said examiner, or such of the said writings and documents as are in their custody, possession, or power; and if it should appear to their Lordships to be necessary so to do, in order to give due effect to the said order, or to the prayer of the petition, to grant diligence for the recovery of the foresaid writings, and warrant to cite the said Earl of Dalhousie, Lord Jerviswoode, Alexander Currie, Laurence Davidson, and Thomas Syme, as havers, to produce the same, but all for the purpose of exhibition before the said examiner, as prayed for." The petition was partly heard on 27th November, and further hearing was adjourned till 5th December.

On 30th November the petitioner presented a note of suspension and interdict against John Alexander Gavin Campbell of Glenfalloch, stating that his agent had received on that day a letter from the agent for the late Marquis' trustees to the following effect,—"Subsequent to the judgment of the House of Lords in the Breadalbane Succession Cause, the present heir in possession of the entailed estates of Breadalbane has made application to our clients, the Trustees of the late Marquess, for access to the Charter Room at Taymouth; but our clients did not think it their duty, in the circumstances, to accede to them. The Earl has now, through his agents, intimated that, failing our client's assent by Monday first to his obtaining access to the Charter Room in the manner proposed by him, he will, at his own hand, direct the room to be opened, and its contents ascertained and inventoried."

The letter addressed to the agents of the Trustees by the Earl's agents contained this passage:—"We therefore suggest that the contents of the Charter Room should be examined, and, so far as thought necessary, inventoried by us as the Earl's agents, at the sight of yourselves, as agents for the Trustees, or of some one appointed by you to attend while this is being done, and we are quite ready to concur in arranging a convenient time for this purpose. If the reasonable proposal now made be declined, the Earl will direct the room to be opened, and the contents ascertained, and, so far as thought proper, inventoried by proper persons on his own responsibility."

The Trustees' agents accordingly gave this intimation to the agents for the petitioner, who now presented this note of suspension and interdict, craving the Court to interdict the respondent from entering, "or in any way interfering with the Charter Room at Taymouth Castle, or with the titles, muniments, and other writings therein contained, relating to the earldom and other honours and dignities of the family of Breadalbane, or relating to that family."

On the suggestion of the Court, after hearing parties, an arrangement was come to, on the basis of the proposal contained in the letter by the Earl's agents to the agents for the trustees, quoted above, as to an inventory to be made at sight of the latter, in respect of which the note of suspension and in-

terdict was refused, and, on the motion of the petitioner, consideration of the petition superseded.

The petition was now moved in by the petitioner, who alleged that the Earl was not proceeding with the inventory, and apparently did not intend to proceed therewith. He therefore craved the Court to grant the prayer of the petition.

Dean of Faculty, Solicitor-General (Millar), and Mair for petitioner.

Young, Clark and Adam for respondent.

Watson for Trustees.

The Lord President said that, under the Statute 5 & 6 Vict., c. 69, the petitioner had a title to file this bill in the Court of Chancery, because he alledged himself to be the immediate younger brother of the person who, he said, was entitled to claim the estates of the family, and on the death of his brother, he would be entitled to claim in like manner. On the proceeding coming before the Vice-Chancellor, an order was pronounced by him, on which the petitioner presented a petition in this Court on 14th May last, praying that the Court would order the examination as witnesses before Mr Duncan, the examiner appointed by the Court of Chancery, of the trustees and law-agents of the late Marquis, and that these parties should produce and exhibit certain documents. An interlocutor was pronounced upon this petition, ordering the examination of these parties as witnesses, and *quoad ultra* superseding the case. Some of these parties were examined, but it soon appeared that they had very little to say. They were asked to produce a number of documents then in Taymouth Castle, but their answer was that they had no power to do so, for though they had the key, the room was part of Taymouth Castle, then in possession of the present heir. The petitioner came back to the Court with the present petition, in which, after limiting to some extent his call for documents, he asked the Court for an order on the trustees and law-agents to search for and exhibit before the examiner the writings and other documents referred to in the depositions of the witnesses already examined, or such as they had in their possession, and, if it should be necessary, to grant diligence for recovery of the documents, but all for the purpose of exhibition before the examiner. The first idea that occurred was, that if the petitioner had any title to demand delivery or exhibition of these documents, his remedy would be in this Court by some form of procedure known to the law of Scotland. If he could say that the documents were his, he would be entitled to demand them in a proper action. If he was merely entitled to sue for exhibition, there was an appropriate action for that purpose. But it was not contended that he had any such title; and yet in the petition he proposed to get exhibition as if he had such a title. There was a third case which might be mentioned. Documents might be in the hands of a third party which were in danger, but of which the party thinking there was danger had no title to demand delivery or sue exhibition. There might be a remedy for that, but it would not require the roundabout remedy of a suit in England for perpetuating testimony to secure the safety of documents in Scotland, and a remedy might be had, perhaps, by having the documents put under the care and custody of the Court. But that was not the nature of the present case, and these cases were mentioned merely for the purpose of showing that a party having a sufficient title would find a remedy in our Courts. The purpose of the petitioner here was to obtain some such remedy under the commission issued by the Court of Chancery. But that was a perversion of the instrument. It had not been shown that any such proceeding was competent in England, and if it had, that would not have necessarily made it competent here, for the duty of the Court in such a case was to exercise its judicial discretion, according to its own legal principles. There was no ground on which the Court could be called on to order parties to produce such documents at the suit of a party who had no title or interest whatever, and therefore the prayer of the petition must be refused.

Lord Curriehill concurred.

Lord Deas differed, and was rather for taking steps to ascertain what was the practice in England in such cases.

Lord Ardmillan—I am of opinion that the prayer of this petition, of 26th November 1867, for Donald Campbell, in the terms and to the extent set forth, cannot possibly be granted. The petitioner could not bring an action for delivery or an action of exhibition. He has no present title or right to make application to this Court for production or exhibition of the multitude of titles and documents, which he has set forth in this list—a very singular list, such as I have never seen, even in an action of exhibition, being not only a fishing demand, but a fishing with a net, so constructed as to let nothing escape. The petitioner is not a competing claimant; he is only the brother of a person who is, or was, a claimant. His proceedings here, with his call for production of writings, are quite irregular and incompetent, unless in so far as they are authorised by the Statute 5 and 6 Vict., cap. 69, entitled, an Act for perpetuating testimony in certain cases. Apart from that Act, he has no title and no *persona standi* to sustain such demands. Now, without detaining your Lordships by stating my reasons at length, I am clearly of opinion that the very wide and sweeping demand here made—first for a search, and thereafter for exhibition of titles and documents—is not within the scope of the Statute for "perpetuating testimony." This is a proceeding under pretence of perpetuating testimony. Titles are not testimony. Titles in safe custody, under double lock, so that Lord Breadalbane cannot get them without the consent of the trustees of the late Marquis, are not in danger of being lost by death of witnesses, or failure of memory, and do not require perpetuating in the meaning of the Act; and unless for perpetuation of testimony, the petitioner cannot proceed under that Act; and, apart from the Act, he can have no right whatever to enter the Charter-room at Taymouth. Taking the prayer of this petition as it stands, I certainly could not concur in granting it [*reads prayer* ut supra]. It appears to me to be inconsistent with the bill which this petitioner filed in Chancery, under 5 and 6 Vict., and to be, in this Court, quite out of the question. The Solicitor-General, at the close of his argument, seemed disposed to urge the claim of the petitioner in a more moderate, and, it may be, a more reasonable manner; and the footing on which the process of suspension was dealt with in respect of an arrangement between the Earl and the trustees, sanctioned by the Court, does to some extent tend to place the petitioner's claim to obtain (of course at his own cost), an inventory in a rather more favourable position. That is not, however, within the prayer of his petition, and, after careful

consideration, I am of opinion that the objection of the respondents, that the claim here made for production of titles and documents, or exhibition of titles and documents, is not within the provisions of the Act for perpetuating testimony, is a conclusive objection, and that we must therefore refuse the prayer of this petition. The Act of 22 Vict. is merely an auxiliary statute, in order to obtain aid in this Court to the proceedings in the English Court, which here were under the 5 and 6 Vict. It brings to us the power of contributing to give the remedy; it cannot extend the scope and nature of the remedy; and that remedy, which is exclusively in relation to the perpetuation of testimony, is not what is here sought. The petition is quite without precedent, and, I think, without support or authority in the Acts founded on.

The Court gave no expenses to the Earl of Breadalbane, on the ground that for upwards of three months no steps had been taken by him by way of fulfilling the arrangement under which the suspension and interdict presented by the petitioner had been refused, and consideration of the petition superseded.

Agents for Petitioner—J. & W. C. Murray, W.S.

Agents for Respondent—Adam, Kirk & Robertson, W.S.

Agents for Trustees—Davidson & Syme, W.S.

Wednesday, March 18.

SECOND DIVISION.

FAIRBAIRN *v.* FAIRBAIRN.

Proof—Writ or Oath—Prout de jure—*Receipt.* A party alleged that he paid the rents of certain lands into his own funds, on behalf of his brother, but took the receipts in his brother's name—he being the person by whom the rents were truly due. *Held*, that this averment might competently be proved by evidence *prout de jure.*

This case came before the Court on a reclaiming-note from Lord Jerviswoode's interlocutor, in a question as to the mode of proof. The pursuer concluded for payment of a sum of £1369, 8s. 9d. principal and interest, in respect of certain furnishings and disbursements, which he alleges he made to, and on behalf of, his late brother, the husband of the defender. These consists partly of loans of money and prescribed bills, as to which it was admitted that the proof must be restricted to writ or oath. But a question arose with regard to certain payments of rents, accounts, &c., which the pursuer is alleged to have made on behalf of his brother, and for which he holds receipts in his brother's name; the defender maintaining that the proof as to these ought also to be restricted to writ or oath, while the pursuer contended for a proof *prout de jure.* The Lord Ordinary sustained this latter contention.

The following is the interlocutor of the Lord Ordinary:—

"The Lord Ordinary having heard counsel on the matter referred to in the preceding interlocutor of the 14th February last, and made avizandum, and considered the debate and whole process—Finds that the averments contained in the 8th and 11th articles of the revised condescendence for the pursuer may competently be proved by writ or oath, but not otherwise; and second, that the averments contained in the other articles of the same, in so far as not admitted, may be competently proved by evidence *prout de jure:* And, with reference to the foregoing findings, appoints the cause to be enrolled, with a view to further procedure therein.

"*Note.*—The questions with which the Lord Ordinary has dealt in the present interlocutor present features of some delicacy, and were argued before him in a very satisfactory manner.

"He has since examined the various reported cases to which he was referred in the course of the debate, and has come to the conclusion that, while the averments in the 8th and 11th heads of the condescendence can be competently proved by writ or oath only, as indeed was fairly admitted on the part of the pursuer, it would be inconsistent with justice, and with the authorities referred to, so to limit the proof as regards the remaining averments.

"The cases bearing on this matter appear to be very correctly noted by Mr Dickson in his work on Evidence, vol. i, pp. 286-7, § 396, where he states consistently, as the Lord Ordinary holds, with these authorities and the true state of the law as now recognised, that the legal presumption that a debt which has been paid has been so paid by the debtor, or with his funds, may, under the later cases, "be redargued by a proof *prout de jure*, or by contrary inferences.

"Looking to the state of the facts here, and having regard to the relationship and character of the transactions between the pursuer and his deceased brother, as set forth in the record, the Lord Ordinary is of opinion that the investigation demanded by the pursuer ought to be allowed. In what form it ought to proceed may probably be best considered when it is ascertained whether or not the views on which the Lord Ordinary has so far proceeded are to regulate the mode of proof."

The defender reclaimed.

Solicitor-General and Darling for him, argued that, notwithstanding the receipts were in the hands of the pursuer, the presumption of law in favour of payment by the proper debtor, strengthened as it was by the actual terms of the receipts, could only be redargued by writ or oath; and it was maintained that the pursuer's delay in making the claim, and the fact that the debtor was now dead, were circumstances in favour of a restriction of proof.

Scott and Strachan, for the pursuer, answered that the possession of the receipts raised a presumption that the payments were made with his (the pursuer's) funds; and that it was not an unusual thing, where one person paid the debts of another, to take the receipts in the name of the proper debtor.

A great part of the argument consisted of an examination of the cases cited in Mr Dickson's work on "Evidence," pp. 395-6.

The Court adhered to the Lord Ordinary's interlocutor. They held that the tendency of the cases was in favour of an open proof, and observed that much of the argument adduced for the defender might still be considered when the evidence which the pursuer proposed to lead came to be dealt with. Their Lordships were of opinion that serious injustice might be done if any rule were laid down founding so strictly on the terms of receipts as to bar all inquiry, by any other means than writ or oath, into the source from which the payments were made.

Agent for Pursuer—Hugh Watt, S.S.C.

Agent for Defender—J. Stormonth Darling, W.S.