The Scottish Law Reporter.

SUMMER SESSION, 1869.

COURT OF SESSION.

May 12, 1869.

SECOND DIVISION.

PURVIS *v.* DOWIE.

Appeal — Bankrupt — Claim — Voucher — Holograph Receipt — Affidavit — Conjunct and Confident. Held that a holograph receipt, acknowledging money to have been obtained as a loan, did not prove its own date, and could not be received to support a claim on a bankrupt estate, especially when relied upon by one confident with the bankrupt.

The appellant claimed to be ranked on Millar's sequestrated estate for the sum of £1500, with interest, alleged to have been advanced in loan to the bankrupt in various sums at different dates. The trustee rejected the claim *in hoc statu* as not satisfactorily vouched, and the appellant appealed to the Sheriff against the trustee's deliverance. Under that appeal, a record was made up in terms of the Bankrupt Statute, and a proof allowed. In the course of the proof the trustee consented to rank the appellant for £1000, with interest, sufficient evidence having been adduced to satisfy him that that amount had been advanced by the appellant to the bankrupt; but he adhered to his deliverance as regarded the remaining £500. The appellant, in support of that item of his claim, founded upon a holograph acknowledgment by the bankrupt (who had absconded), dated 15th December 1867, in which he acknowledged to have received from the appellant £500 "upon loan;" and in the affidavit emitted by him as concurring creditor in the sequestration, he stated that the bankrupt was indebted to him in that sum as "advanced in loan in cash upon the 15th day of December 1867." The ground of objection maintained by the trustee, and the import of the proof, will be found in the argument of the parties *infra*. The Sheriff-substitute (HAMILTON), on considering the proof, instructed the trustee to rank the claimant for the £1000 admitted; *quoad ultra* he sustained the trustee's deliverance, and found the appellant liable in expenses. The appellant appealed that judgment to the Second Division.

MAIR for the Appellant.—The document produced in evidence of the advance of the £500 is a good and valid voucher for that sum, and the trustee was bound to give effect to it and rank the appellant. The trustee's averment, that that document was *ex post facto*, and made in collusion with the bankrupt, was not proved. Such documents were not regarded with suspicion unless the parties were conjunct and confident, which was not the case here; for while the bankrupt was the illegitimate son of the appellant's wife, that constituted no relationship between the appellant and the bankrupt. The voucher was a good document of debt *in re mercatoria* and should be given effect to.

TRAYNER (with him GIFFORD), for the trustee. —The document founded on was not *in re mercatoria*, and the whole circumstances proved in regard to it rendered it useless as a voucher. (1) The parties were confident if not conjunct. The bankrupt had acted as the appellant's agent, and it was now clear that the £500 for which said document was granted was not advanced in cash, but was granted as an acknowledgment of debt to that extent for sums uplifted by the bankrupt as appellant's agent and not accounted for. This fact, admitted by the appellant, contradicted not only the acknowledgment itself, but the appellant's affidavit. (2) No proof whatever had been adduced in support of the statement that the bankrupt had uplifted or retained any such sum. (3) In a state of affairs made up by the bankrupt immediately before absconding, the appellant's claim is entered at £1000, and is repeated at that amount in a note of the claims added at the foot of the state, which is proved to have been made by the bankrupt and his agent when considering what amount of claims might be relied upon in support of the trustee nominated on behalf of the bankrupt in the event of a competition for the trusteeship. (4) The acknowledgment is dated 15th December 1867, but it is holograph, and does not prove its date. Besides, on the blotting paper in use in the bankrupt's office in Edinburgh at the time of his absconding in July 1868, there is a distinct impression of this acknowledgment, said to have been granted in Glasgow in December preceding. The inference was fair that the document had been manufactured on the eve of bankruptcy.

At advising—

LORD JUSTICE-CLERK—The only question is as to the evidence of loan or transaction of loan relied upon by the appellant, of which the acknowledgment by the bankrupt, dated 15th Dec. 1867, is said to be the evidence. I am of opinion that it is not such evidence as to entitle us to alter the interlocutor of the Sheriff-substitute. The document is an alleged receipt said to be dated 15th December 1869. The date is not proved by any extrinsic evidence to have been of that or any other date. For anything it appears it may have been written on the day of sequestration. We have nothing else to found upon but the statement of the claimant that the bankrupt was indebted to him. There

is nothing to verify the debt, and therefore it is impossible to hold the debt proved, or that the trustee could do anything but reject it. But, while holding these views, I cannot altogether approve of the course followed by the Sheriff in disposing of the burden of proof. But I am not for altering.

LORD COWAN—The question truly is, whether the claim advanced by affidavit No. 3 ought to have been sustained by the trustee. As to the adminicle of evidence, the document produced in support of the claim is inconsistent with the affidavit, and would have been enough to have rejected it. That is the ground upon which I go. His Lordship further commented on the course followed by the trustee in rejecting the claim at once, instead of taking further evidence, when that proved not to be satisfactory.

The other judges concurred.

Agent for Appellant—William Spink, S.S.C.

Agent for Respondent—P. S. Beveridge, S.S.C.

Thursday, May 13.

FIRST DIVISION.

CAMPBELL *v.* CAMPBELL AND OTHERS.

Action of Exhibition—Documentary Evidence—Committee of Privileges of House of Lords—Title to Sue. A claimant of a peerage, presently a petitioner before the Committee of Privileges of the House of Lords, brought an action in the Court of Session against another claimant, also petitioning before the Committee, and the trustees of the last deceased holder of the peerage, for exhibition *in modum probationis* of certain documents relating to the peerage. Action *dismissed*, on the ground that the parties, being before the Committee of Privileges, were subject to the House of Lords, who had power to order the production of the documents if necessary.

This was an action brought by John Campbell, residing at Fort William, in the county of Inverness, claiming to be Earl of Breadalbane, against John A. Gavin Campbell of Glenfalloch, also claiming to be Earl of Breadalbane, and against the trustees of the late Marquis of Breadalbane, concluding that the defenders should be decerned and ordained to exhibit and produce *in modum probationis* in presence of the Court, or before a Commissioner to be appointed by the Court, certain documents, writings, and titles specially mentioned in the condescendence annexed to the summons; and also all writings, documents, rights, and titles in their possession, or in the possession and custody of any of them, relating to the transmission of the honours, dignities, and estates of the earldom of Breadalbane, which should be condescended on by the pursuer in the course of the process; and that the said defenders should be decerned and ordained to deposit the said several writings, &c., whether the same shall have been so exhibited and produced as aforesaid or not, in the hands of the clerk to the process, and that for the purpose of the same being preserved or kept in safe custody by or under the direction of our said Lords, and all proper orders should be made by the Court for securing the said writings, and preventing the same from being carried away or in any respect vitiated and interfered with; and that the defenders, the trustees of the late Marquis, should be interdicted from giving possession of the said documents to the other defender, John Alexander Gavin Campbell, who should also be interdicted from taking possession of or interfering with the same.

The pursuer's case was that both he and the defender Glenfalloch are claimants to the earldom before the Committee of Privileges of the House of Lords; that the documents in question are necessary to support his claim, which is founded on the allegation that he is the heir-male of Duncan Campbell, eldest son of the first Earl; and that they (the documents) were in danger of being made away with or lost, being at present in the charter-room of Taymouth Castle, in the custody of the defenders.

The defender Glenfalloch pleaded, in defence, that the pursuer had stated no relevant case, and that he had no title to insist in the action. The defenders, Breadalbane's trustees, pleaded that they merely held the key of the charter-room, and that the question whether they were bound to deliver it over to the other defender being at present *sub judice* in an action before the Court, no decree could be pronounced against them for exhibition of the documents, except conjunctly with the other defender.

The Lord Ordinary (BARCAPLE) pronounced this interlocutor:—"Finds that the pursuer has not set forth a relevant case to entitle him to insist in the conclusions of this action upon the title libelled: Sustains the second and third pleas in law stated for the leading defender: Finds that no order or decree can be pronounced against the other defenders except conjunctly with the leading defender, and sustains the second plea in law stated for them: Dismisses the action as against the whole defenders, and decerns: Finds the pursuer liable in expenses," &c.

"*Note.*—This is not what is termed by the institutional writers a *substantive* action for exhibition and delivery of writs to the pursuer as being his own property. The summons concludes for exhibition and production of the writs *in modum probationis*, and their depositation in the hands of the clerk to the process for the purpose of being kept in safe custody. Such actions were always considered incidental or accessory, and in ordinary practice they were early superseded by incident diligence being granted in the principal action; St. 4.33.3. But the Lord Ordinary does not doubt that in exceptional cases the action of exhibition *ad probandum* may still be competently brought. That seems to have been assumed, though there was no occasion to decide the point, in *Campbell* v. *Crauford*, 2 W. & S. 440. Lord Stair speaks of sequestrations of charter chests, and inspection thereof, which he classes among incident actions, and treats as on that account ranking among extraordinary actions; St. 4.36.3. There is another class of cases, where the action is of a different kind, the pursuer alleging a right, though of a limited kind, in the writs; *e.g.*, the right of an heritable creditor in the titles of the lands over which he holds a security—*Ritchie* v. *Wilson*, 6 S. 552; *M'Neil* v. *Blair*, 14 S. 14; *Hamilton* v. *Brown*, 1 D. 725.

"There is no process either now depending or which the pursuer says he is about to bring in any ordinary court of law, in Scotland or elsewhere, to which this action is accessory. Though many of the deeds concluded for are the titles of the Breadalbane estates, the pursuer does not allege that he has, or is about to claim, any right to these