

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which the suspension and interdict presented by the petitioner had been refused, and consideration of the petition superseded.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. 296-7, § 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.