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

estates. The claim or proceeding to which the action is said to be accessory is a petition by the pursuer claiming the Breadalbane Peerage, which was referred by Her Majesty to the House of Peers, and which the House referred to the Committee of Privileges on 26th June 1865. It is not said that the House of Peers during the period, upwards of three years and a-half, that the petition has been before them, has made, or been asked by the pursuer to make, any order in regard to the production as evidence of the writs which are the subject of this action. Nor is it said that the House may not make an effective order as to that matter.

"The pursuer's interest and title to bring this action depends entirely upon his having preferred a claim to the Peerage. He claims as being heir-male of the body of Duncan Campbell, eldest son of the first Earl of Breadalbane, but not his successor in the Peerage, which, in the exercise of a power conferred by the patent, the Earl destined to his second son. The pursuer alleges, (Cond. 16) that, upon the death of the third Earl, in 1782, the title devolved upon Duncan Campbell, the pursuer's grandfather, who was the grandson of the first Earl's eldest son, Duncan Campbell. Thus, according to the pursuer's statement, the title ought to have been taken up by his grandfather in 1782. But it was taken up by John Campbell of Carwhin, fourth Earl, descended from an uncle of the first Earl, who took it under the patent as nearest lawful heir-male of the first Earl. The pursuer, apparently in explanation of his grandfather not having asserted a claim, says that he had been concerned in the Rebellion of 1745, and was subject to attainder and to forfeiture of the title and family estates. If he was actually attainted, which could alone interfere with his right to succeed if he was the next heir, it would seem equally to exclude the right of the pursuer to take through him. The title was held by the fourth Earl, afterwards first Marquis of Breadalbane, from 1782 till his death in 1834, and by his son, the second Marquis, till his death in 1862.

"The pursuer does not produce a service or evidence of any kind in support of his demand in this action. His claim rests entirely upon his own assertion, which is denied; and his statement as to the marriage of Duncan Campbell, the eldest son of the first Earl, is expressly denied.

"The question which thus arises is, Whether the pursuer has set forth a case to entitle him, merely on his own assertion that he is heir-male of the body of Duncan Campbell, and therefore heir-male of the body of the first Earl of Breadalbane, which is denied, to have the defenders now ordained to deliver up to the Clerk of Court for custody the large number of deeds and writings to which the conclusions of the summons relate? This Court cannot judge directly of the right to the Peerage; and as little, it is thought, can it judge of it for the purposes of an action which is merely incidental to the direct claim to the peerage itself. The Lord Ordinary does not think that the pursuer can be allowed a proof of his averments in support of his title in this action, which would be substantially a proof of his claim to the peerage. As the matter stands just now, the pursuer's case is not different from what might be presented by any other party who should claim the title through the same line of descent, or through any other line, resting their claim entirely upon their own bare assertion. It is met by the fact that the alleged claim has never hitherto been asserted, though it emerged in 1782. The Lord Ordinary is of opinion that there is no authority in the law of Scotland, and no principle, for giving affect to an action of this kind, when brought in such circumstances."

The pursuer reclaimed.

GORDON, Q.C., MILLAR, Q.C., and MAIR for reclaimer.

Solicitor-General (YOUNG, Q.C.) and ADAM for Glenfalloch.

WATSON for Breadalbane's Trustees.

The Court adhered.

LORD PRESIDENT—My Lords, I confess I am not disposed to enter into technical grounds on which to rest the decision of this case, because there is one broad and obvious ground on which to rest our judgment. The only interest which the pursuer has to have the documents produced, or to have them made available in evidence, is as petitioner before the Committee of Privileges of the House of Lords. The defender is also a petitioner before the same Committee. Both are therefore subject to the House of Lords in every matter connected with these claims. Though the Committee may not have power to order the production of the documents, it is not suggested that the House of Lords could not make an order for their production. In the absence of any such suggestion, the competency of the action is doubtful, and, until a case of necessity is made out, it would not be becoming in this Court to entertain it; and I am therefore of opinion that the action should be dismissed.

The other Judges concurred, Lord DEAS observing, that even if it were expedient to comply with the demand of the pursuer, the action was not so laid as to enable the Court to give effect to his demand, for if the documents were delivered to the Clerk of Court he would be bound to retain them, and they would never get to the House of Lords.

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

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

Agents for Breadalbane's Trustees—Davidson & Syme, W.S.

COURT OF JUSTICIARY.

Saturday, May 15.

HIGH COURT.

(Before the Lord Justice-Clerk, Lord Cowan, and Lord Neaves.)

M'GARTH AND OTHERS *v.* BATHGATE.

Suspension—Criminal Trial—Adjournment of the Diet—Custody of the Jury—Interlocutor—Conviction—Sheriff. Sentence upon three panels to a term of imprisonment, following a verdict of the jury, *quashed*, in respect the judge who presided, in adjourning the diets of Court, rendered necessary by the protracted character of the proceedings, did not by interlocutor place the jury under custody, nor pronounce any warrant against their becoming separated.

The complainers were, on the 7th of April last, indicted before the Sheriff of Peeblesshire (NAPIER) and a jury, charged with the crime of culpable homicide, by furiously driving through the streets of Peebles and bringing a gig into contact with a woman, and thus causing her death, which proved