Friday, March 3.

OUTER HOUSE.

[Lord Kincairney.

STENHOUSE *v.* STENHOUSE'S TRUSTEES.

Proof — Competency — Proof of Non-Payment of Periodical Payment — Apocha trium annorum.

The production of three consecutive discharges of periodical payments, while it raises a presumption of payment of all preceding, does not limit the proof of non-payment to the writ or oath of the alleged debtor.

This was an action at the instance of Mrs James Stenhouse, widow of Mr James Stenhouse of North Ford, Fife, against the testamentary trustees of her son, the late William Charles Stenhouse, solicitor, Dunfermline, concluding for the payment of £1075 with interest from Martinmas 1885, being the balance due to her of an annuity of £150 left to her under the trust-disposition of her late husband.

Mrs Stenhouse made the following averments, *inter alia*:—"(Cond. 4) The pursuer became considerably involved by the failure of the City of Glasgow Bank, and she received pecuniary assistance from Mr William Charles Stenhouse to enable her to meet her difficulties. For this and other reasons the annuity was not at first regularly paid, and in November 1885 an arrangement was come to between the pursuer and Mr William Charles Stenhouse whereby she gave up all claims for the arrears of her annuity in consideration of his giving up his claims for the advances already mentioned. Under the said arrangement payment of the annuity to the pursuer was to be resumed as from Martinmas 1885. The arrangement was embodied in a holograph letter, addressed and delivered by Mr William Charles Stenhouse to the pursuer, of date November 1885. Denied that at that date the sum mentioned in the answer was due by the pursuer. Explained that the sums advanced by Mr William Charles Stenhouse to the pursuer had been balanced or nearly balanced (1) by the pursuer's annuity having been allowed to fall into arrear since the failure of the bank; (2) by Mr William Charles Stenhouse having been allowed to take up the shares to which the pursuer had become entitled in the Assets Company formed in connection with the liquidation of the bank; and (3) by the arrears of board due to the pursuer by Mr William Charles Stenhouse while he resided with her at Fod. (Cond. 5) Notwithstanding the above arrangement the annuity was not regularly paid to the pursuer after Martinmas 1885. No payment was made to her on account of it from the date of said arrangement until 9th August 1889, when she received £75, and only other two payments were made from the latter date to May 1894, after which the payments were made with greater regularity. The said William Charles Stenhouse acted as law-agent for the pursuer, and when he made payment of or to account of her annuity, he took from her receipts in terms adjusted by himself, and, as far as not printed, written in his own hand, and which receipts she signed at his request, and relying upon him to protect her interests as her agent. The pursuer is seventy-one years of age, and ignorant of business, and she was not informed by the said William Charles Stenhouse, as she ought to have been, and was not herself aware, that by signing receipts in the form presented to her, she might raise the presumption that prior arrears were discharged. In point of fact no receipts were granted by the pursuer except for the payments credited to the defenders in the state produced with the summons. The defenders limit their production of receipts to the three last, because they are aware that one of those immediately preceding, viz., that of February 1896, contains a statement in the handwriting of the said William Charles Stenhouse, to the effect that all previous sums due by the said William Charles Stenhouse were thereby discharged, as per arrangement then made, which statement, while unfounded in fact and unauthorised by the pursuer, is inconsistent with the defence now stated."

The defender produced the three consecutive receipts referred to, and pleaded—"(2) In respect of the production by the defenders of three consecutive receipts for termly payments, pursuer's averments can be proved only by the writ of the deceased or by defender's writ or oath, or otherwise, and in any event, payment of all arrears is to be presumed unless non-payment be proved.

The Lord Ordinary (KINCAIRNEY) on 3rd March 1899 issued an interlocutor repelling the defender's second plea-in-law and ordering proof.

Opinion.—"This is an action against the trustees of the pursuer's son William Charles Stenhouse who died in November 1898, and it concludes, *inter alia*, for payment of arrears of an annuity said to have been due by him to her going back to 1885. The defenders have produced three receipts granted by the pursuer for the half-years' annuities payable at Martinmas 1896, Whitsunday 1897, and Martinmas 1898, and they plead—'2. In respect of the production by the defenders of three consecutive receipts for termly payments, pursuer's averments can be proved only by the writ of the deceased, or by defenders' writ or oath, or otherwise, and in any event, payment of all arrears is to be presumed unless non-payment be proved.' That is to say, they plead the presumption arising from the *apocha trium annorum*, and contend that it cannot be overcome except by the writ of the deceased, or the writ or oath of the defenders. The pursuer does not dispute the presumption, but contends that it may be displaced by parole evidence. That was the only question debated.

"The pursuer makes an exceptional case, because she avers that her son, the debtor in the annuity, was her law-agent, and wrote the receipts which she granted him-

self and never informed her that by signing them she would raise a presumption that prior arrears were discharged.

"If these averments are true the pursuer will certainly suffer much injustice if she is denied an opportunity of proving them in the ordinary way and without restrictions which would probably make a proof impossible, and I do not think her demand to be allowed a proof can be refused unless there be some well-settled principle or practice opposed to it. I am of opinion that there is no such settled principle or rule of practice. I do not see any reason or principle against such a proof. It is no doubt improbable that a creditor should give three consecutive discharges leaving arrears unpaid. But although that is a reason for requiring the pursuer to prove her debt it is hardly a reason for refusing to allow her to do so. I am further of opinion that there is no settled rule of practice against a proof at large in such a case. The authority chiefly founded on by the defender is the case of *Finlay* v. *Kinnaird's Trustees*, March 5, 1829, 7 S. 548, in which in an action by a landlord against a tenant, the tenant produced five consecutive receipts each bearing to be for the balance of his rent; and Lord Corehouse found it presumable in respect of these discharges that no arrears of rent previous to the last of them were due, and 'in respect the respondents do not offer to prove the reverse by the writ or oath of the advocator,' assoilzied the defender, and the Court adhered, Lord Balgray in the Inner House making particular reference to the special terms of these receipts. It is to be observed that the judgment of Lord Corehouse does not bear to proceed on the *apocha trium annorum*, but on the particular receipts on which the defenders founded. It is not a judgment to the effect that the presumption recognised as created by the *apocha trium annorum* cannot be overcome except by the writ or oath of the alleged debtor. There is no such judgment. At most there are dicta that the presumption may be elided by the defender's writ or oath—Stair, i. 18, 2; E. iii. 4, 10, iv. 40. 35—but no positive dictum that a wider proof would in all circumstances be incompetent. In *Cochrane* v. *Stewart*, 1669, M. 11,398, the proof actually offered was the oath of party, and it was held sufficient; but there is nothing in the judgment warranting the contention that no other evidence would have been allowed. In *Grant* v. *M'Lean*, February 11, 1757, M. 11,402, general evidence appears to have been held admissible, and in Tait on Evidence, p. 472, More's Notes, p. 124, and Hunter, ii. 445, the law is stated to be that the evidence afforded by three years' consecutive receipts is presumptive only, and may be overcome by proof to the contrary or of the establishment of a stronger presumption. In *Buccleuch* v. *M'Turk*, June 24, 1845, 7 D. 927, Lord Medwyn said that he had always understood that discharges for three years' rent 'only afforded a presumption of payment, throwing the burden of proof on the party alleging non-payment,' and I consider that this is a correct statement of our practice.

"The question came up more recently in the case of *Cameron* v. *Panton's Trustees*, March 19, 1891, 18 R. 728, where in an action for arrears of annuity payments for three consecutive terms was pleaded in defence, and it was agreed that the presumption could only be elided by the writ or oath of the debtor. This argument was overruled in the Outer House, and a proof before answers was allowed. That judgment was not taken to review, but the final interlocutor was. I do not observe that the plea that the evidence was incompetent was taken in the Inner House—at all events the Court in that case rejected the presumption altogether; they proceeded, or as I think must have proceeded, on the view that if it existed it had been overcome, for they decerned in favour of the pursuer. It is true that in the Inner House nothing was said about the prescription at all—it was ignored as if no such thing existed. This case cannot be quoted as a judgment in favour of the competency of a proof; but it may be permissible to notice that although it was agreed in the Outer House that a proof at large was incompetent it was not considered worth while to reclaim against the interlocutor allowing a proof, or to renew the argument in the Inner House.

"On the whole I think there is no authority for the proposition that this presumption cannot be overcome except by writ or oath. It was not disputed that if my judgment should be against the defender's plea there must be a proof."

Counsel for the Pursuer — Constable. Agents—Constable & Johnston, W.S.

Counsel for the Defender—C. N. Johnston. Agents—Turnbull & Herdman, W.S.

Friday, April 7.

OUTER HOUSE.

[Bill Chamber—Lord Kinnear.

BLAIR & COMPANY *v.* MACKENZIE

Bankruptcy — Sequestration — Competing Petition by Debtor—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 29,

By section 29 of the Bankruptcy Act 1856 it is provided that where a petition for sequestration is presented "by or with the concurrence of the debtor" the Lord Ordinary or Sheriff "shall forthwith issue a deliverance by which he shall award sequestration of the estates which may belong or which shall thereafter belong to the debtor before the discharge." *Held* that the section was not applicable where a creditor had already presented a petition for sequestration, and that in that event the debtor's petition fell to be dismissed.