The procedure which we have before us was in terms of the General Police Act. The Superintendent of Police presented a complaint against Lowe, and craved a warrant to bring him into court. The magistrates having considered the complaint, granted the warrant to apprehend. There was therefore a regular warrant issued. The next fact appearing on the record is, that on the 29th April Lowe appeared, under a warrant of this date, and, the complaint being read over to him, pleaded not guilty. That is in express conformity with the Act of Parliament and regulations. It is not requisite that there should be an execution of the warrant. We have it therefore set out as matter of fact that Lowe was, under a warrant, brought before the magistrates on a charge of reset. If so, he was regularly before them on a regular warrant. The direction of the Act is, that the magistrates should proceed to trial. If the accused demands delay, they may grant it. But here the party, instead of asking delay, pleaded not guilty. There was no application for delay, no refusal of it by the magistrates. The complainer objects to the competency. I don't think there was anything incompetent in the procedure, and on that head, therefore, I have no difficulty. The only other question is that of oppression. The evidence of the case as to that is, that he had previous communications with the police constable on the subject of the bushes alleged to have been stolen; he is told he is wanted in the Police Court, he attends, and is put on his trial. It does not appear that there was any oppression in that. We may fairly hold that a man in such circumstances, accused of such an offence, if he wishes delay, will ask it. He pleads surprise, but he is sufficiently aware of the nature of the charge against him from the complaint, which was read over to him in the Police Court, and he deliberately signs a plea of not guilty. Can we believe that a man in such circumstances, having a previous knowledge of the matter, from inquiries by the constable, and having no reason to believe that any other party was to be tried, will be so put out as not to be able to judge for himself? It does not appear to me that there is such a ground of oppression stated here as necessitates our entering on an inquiry. The case of *Cogan*, which is in some aspects of the same character as the present, the offence charged being the same, turned on a departure from the particular forms of procedure required by a certain Act.

Lord Cowan—I concur, and shall only add an observation on the case of *Cogan*. That was a case certified from the Inverness Circuit. The objection there was, that a provision of statute (the Inverness Burgh Police Act 1847), which required citation, had not been complied with. It was alleged that, though there had not been citation, there had been an equivalent, but we thought it had not been established. Here everything has been done that the statute required; and, as to oppression, the very statement of the complainer shows that there was no such thing. He could not but know that he was there to answer for having possession of the goods, and if he had been startled by being put into the dock, he might have asked delay. But he did not do so.

Lord Deas—I agree that the suspension must be refused. As to the case of *Cogan*, the court there construed the forms which had been settled under the statute in connection with the statute itself, as making it imperative that there should be citation or some notice equivalent. And on that I did not differ. The question then came to be a question of fact, whether there had not been such notice as was equivalent to citation. I thought there had, and, therefore, that the statute had been complied with. But I did not differ on the principle that there must be notice. The objection came to be one of incompetency—that the statute had not been complied with. There is no room for that here. Here the statute has been complied with. This statute does not require previous citation. If the man was found in the police office, there is no incompetency in trying him there. That is often done. The complainer's only ground could be that there was an oppressive exercise by the magistrates of their power under the statute. Such a case might be stated, but it must be a case of some specialty. There is nothing of that here. This was the case of a man of full age, of business habits, and who knew the nature of the case about which the inquiry was. There was a regular warrant of apprehension, the complaint was read to him. He deliberately pleaded, and three witnesses were examined. He never suggested an adjournment. We cannot order an inquiry in such a case.

Suspension refused, with expenses, modified to £5, 5s.

Agents for Suspender—Lindsay & Paterson, W.S.
Agent for Respondent—A. J. Dickson, S.S.C.

COURT OF SESSION.

Tuesday, June 11.

FIRST DIVISION.

CAMPBELL, PETITIONER.

Proof—Commission—5 and 6 Vict., c. 69—22 Vict., c. 20—Subpœna—Production of Documents. In a petition (incidental to a suit in Chancery for perpetuating testimony) for examination of certain parties, and order on them for production of writs called for in the suit, the Court appointed the parties to appear before the Commissioner in the cause for examination, leaving all questions as to production of documents by the witnesses to come up in the usual way before the Commissioner, and then to be determined ultimately by the Court.

The petitioner, Donald Campbell, on 16th September 1865, under the Act 5 and 6 Vict., c. 69 ("an Act for perpetuating testimony in certain cases"), instituted a suit in the High Court of Chancery, calling the Attorney-General and John Campbell, the elder brother of the petitioner, and who claims as heir-male of the body of John Campbell, first Earl of Breadalbane, the honours of the Earldom of Breadalbane, and also John Alexander Gavin Campbell of Glenfalloch, and Charles William Campbell of Boreland; the object of the suit being to perpetuate testimony material for establishing the claim of the petitioner to the said honours, on the decease of his said elder brother without male issue.

On 20th March, an order was made in the suit by Vice-Chancellor Stuart, appointing John Morison Duncan, advocate, to be examiner, for the purpose of taking the examination of witnesses in Scotland in the cause, and ordering that any party in the cause requiring the attendance of any witness before the examiner, should give certain notice to the other parties to the suit.

On 28th March the Court of Chancery, on the application of the petitioner, issued a *subpœna duces tecum*, ordaining the trustees of the late Marquis of Breadalbane to appear and produce the writings called for in the suit depending in the Court of Chancery at the instance of the petitioner.

Campbell then presented a petition to the Court of Session, founding on the *subpœna*, and praying for the examination of the trustees of the late Marquis and their agents, and for an order on them to attend before Mr Duncan, the examiner appointed for taking evidence in the cause, and to produce the title-deeds and other documents presently in their custody, which were in the charter-room of Taymouth Castle at the date of the death of the late Marquis.

Watson, for the trustees of the late Marquis, objected to the petition being granted, contending that the Court ought not to do anything to prejudice the rights of other parties interested, without proper intimation to them, and proposed that the petition should be intimated to the other claimants, John Alexander Gavin Campbell of Glenfalloch and Charles William Campbell.

A. R. Clark, for Campbell of Glenfalloch, asked delay. He stated that the *subpœna* relied on by the petitioner had been obtained in absence, and was irregularly and illegally issued. He asked that the case should stand over until this was properly ascertained. He had had no notice of this petition but from the agents for the Marquis's trustees.

After some discussion the Court, on the statement that an application had been presented to obtain recal of the *subpœna*, superseded consideration of the case, leaving it to the petitioner to consider, before the discussion was resumed, whether he would intimate his petition to the other claimants.

This application for recal of the *subpœna* was accordingly made, and the Vice-Chancellor, by an order dated 27th May, restrained the petitioner from taking any proceedings before the Court of Session, or otherwise, for enforcing the *subpœna*. The petitioner appealed against this order to the Lords Justices of Appeal, and on 31st May their Lordships discharged the order of the Vice-Chancellor, and refused the motion made before him, but without prejudice to the Court of Session making any order which it might think fit as to the attendance of any person for the purpose of being examined, or as to the production of any writings or other documents.

Solicitor-General (Millar) (with him Pattison and Mair), for the petitioner, now moved the Court to proceed to the consideration of the petition, and to make such order thereon as they might think proper.

Watson for late Marquis's trustees.

Young and A. R. Clark for Glenfalloch.

The Lord President said that the petition was presented under the Act 22 Vic., c. 20, which was a very beneficial statute, and intended to facilitate the obtaining of evidence in suits carried on in one part of the kingdom when the witnesses reside in a different part of it. The machinery for this purpose was simple enough. It provided that where, in a suit in dependence before any competent Court in Her Majesty's dominions, such Court has authorised the obtaining testimony out of its jurisdiction and within the jurisdiction of another Court, within the British empire, it shall be lawful for the last-mentioned Court to order the examination before the person appointed as Commissioner of any witness or witnesses within its jurisdiction, &c. Now, under this petition it was stated that the petitioner had instituted a suit in Chancery for perpetuating testimony, and that in that suit he obtained an order, on March 21, appointing Mr John Morison Duncan, advocate, to be examiner to take the evidence of witnesses in Scotland. It was certainly competent for the petitioner to come and ask this Court to appoint that any witnesses in Scotland should attend before Mr Duncan and be examined. But there was introduced into the petition a writ called a *subpœna duces tecum*, with which, it appeared to his Lordship, we had nothing to do in Scotland. But the petitioner seemed to attach some mysterious importance to it, and the respondent also seemed to think himself aggrieved by it in some incomprehensible way.—His Lordship then narrated the proceedings which had taken place in the Court of Chancery for setting aside this *subpœna*, and which resulted in the judgment of the Lords Justices, of 4th June, refusing the motion to set it aside, and finding that the application of it was entirely a matter for the discretion of the Court of Session.—The parties came back, and both seemed satisfied that this *subpœna* should never have appeared in the petition at all. His Lordship read the petition, therefore, as if the *subpœna* had never been in it. It was a writ which could have any effect only within the jurisdiction of the Court of Chancery, and could have no effect at all *extra territorium*. The question then was, What order should now be pronounced? The Court was asked to order the examination of the Earl of Dalhousie and four others; and further, as to at least three of these parties, the trustees of the late Marquis of Breadalbane, that they do "produce and exhibit the writings, documents, &c., above mentioned." These writings are contained only in the writ of *subpœna*. What might be the right of the petitioner to these it was not for the Court to determine. It was out of the question to order the parties to produce them now *per aversionem*. The parties should be ordered to appear before the examiner; and if, in the course of the examination, the production of these documents should appear necessary, and if the petitioner should be found to have interest, the question which had been discussed would then be properly raised before the examiner. Whether he had any power to determine it at all, his Lordship did not now say. But the ultimate determination of the question was for this Court. His Lordship had no doubt as to the construction of the statute. "It shall be lawful," says the statute, "for such Judge to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just," &c. It may be that this Court would have a very delicate duty to perform. His Lordship did not anticipate the opinion which he would have as to the question if it should be properly raised; but the Act gave the determination of it to this Court, and he gave that opinion now for the guidance of parties.

Lord Curriehill and Deas concurred.

Lord Ardmillan—This petition is of a singular, if not an unprecedented character, and a question is raised which is certainly of great practical importance. It is not necessary for me to repeat the circumstances under which it has been presented,

as these have been already sufficiently explained. The petitioner craves from this Court an order for the examination before Mr Duncan, as examiner, appointed by the Court of Chancery, of the trustees of the late Marquis of Breadalbane, and the agents for the trust; and also an order on these trustees to "produce and exhibit the writings and documents" mentioned in the petition, including the titles to the Breadalbane estates.

The application is made under the provisions of the Act 22 Victoria, cap. 20; and the suit in the Court of Chancery, in the course of which this proceeding has been taken, was instituted under the Act 5 and 6 Vict., cap. 69.

I understand that no objection is taken to the prayer of the petition, in so far as regards the examination as witnesses of the trustees and the other gentlemen mentioned. But the prayer for an order of this Court, commanding the production and exhibition of the writings mentioned, is strenuously opposed both by the trustees of the late Marquis and by the Earl of Breadalbane.

I am of opinion that the order for examination of these witnesses may be competently and legitimately granted; but I concur with your Lordships in refusing at present any order for production and exhibition of writings.

Apart from the consideration of the two statutes mentioned, I think it quite clear that this petitioner could not, by action of exhibition or any other form of Scottish suit, compel these trustees to produce and exhibit the writs called for. It was not maintained at the bar that the petitioner could have enforced production or exhibition without availing himself of the provisions of these two statutes. Now, I am of opinion that these statutes do not, either separately or in combination, support this demand.

The Act 22 Victoria, cap. 20, is an Act to provide for "taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals," and more particularly obtaining the testimony of witnesses outwith such jurisdiction. There is a power given to this Court, as well as other courts out of the jurisdiction of the Court before which the suit is pending, to command production of writings. In this, however, this Court is to proceed, "as may appear reasonable and just." This Court is to judge, in like manner as in a cause depending, and is to pronounce an order according to judicial discretion. I think that the order to be pronounced must be such as this Court thinks reasonable and just according to the laws and practice of Scotland. The granting of the order is, in my view, a judicial, not a ministerial act.

If, therefore, the Act of 22 Victoria had alone been founded on, this petitioner could not demand production or exhibition of these titles. He could not succeed in an action of exhibition; he has no title on which he could demand exhibition; and our law would not open the charter room at Taymouth Castle to a person in this position. I do not understand this to have been disputed.

But it is said that the Act 5 and 6 Victoria, chapter 69, along with a *subpœna duces tecum*, obtained in a proceeding under that Act, gives him the right to make this demand. I am quite unable to arrive at that conclusion.

The Act 5 and 6 Victoria is an English Statute, passed for a special purpose; and its provisions relate to proceedings in the Court of Chancery. The enforcement of production of title-deeds in Scotland is not within the scope of that statute. The evil, or peril, for which a remedy is provided by the Act 5 and 6 Victoria is the loss of "testimony," and the object of the Act is to prevent that evil and peril by affording facilities for "perpetuating testimony." The examination of aged witnesses, whose evidence may be lost by death, is legitimately within the scope of this Act. But title-deeds in a charter-room are not within the description of testimony, and the testimony of witnesses is plainly what the Act contemplates. There is no reason to apprehend, and no ground is stated or suggested for supposing, that these titles are otherwise than safe. They are in the lawful custody of trustees in Scotland, from whom this petitioner could not compel production or exhibition by direct action or procedure here.

In these circumstances the petitioner, having obtained from the Court of Chancery a *subpœna duces tecum*, presents this application, calling on us to enforce the *subpœna* by an order for production and exhibition of the Breadalbane titles.

I cannot venture to speak with any confidence of the nature and effect of the English writ of *subpœna duces tecum*. But so far as I can understand it, I believe it to be an authoritative form of notice to produce. It is not, properly speaking, a judgment. It is not granted *causa cognita* and after judicial consideration of the demand for production. It is obtained *ex parte*, and issued ministerially; and all rights and pleas against production of the documents enumerated in the writ are held to be reserved. The party served with the writ must be prepared to produce, if law requires it, but the service of the writ does not determine the legality of the call for production, or the obligation to produce. There are many English decisions in the reports, sustaining pleas against production, and refusing to enforce the call. In short, the period for judicial consideration of the right to demand, and the duty to make, production, is, not when the *subpœna* is issued, but when the party served therewith states his refusal to produce. Our procedure by commission and diligence against havers is different, for the specification is considered before the commission is granted. Now, if we were to make an order for production of these titles merely in enforcement of this *subpœna*, and without the exercise of our own judicial discretion, we should be seriously disturbing the possession and custody of these important titles, without the question of the right to enforce, and the obligation to make, production having been judicially considered either in England or in Scotland. If the writ, issued in England ministerially, is to be enforced in Scotland ministerially, the custodiers of these titles would be deprived of the protection which the law affords.

I concur in the opinion that in this matter we should grant an order, as craved, for the examination of these gentlemen as witnesses, and at present grant no further order.

Agents for Petitioner—J. & W. C. Murray, W.S.
Agents for Trustees—Davidson & Syme, W.S.
Agents for Glenfalloch—Adam, Kirk, & Robertson, W.S.

Tuesday, June 11.

YOUNG & CO. *v.* GILLESPIE.
(*Ante*, vol. iii, p. 369.)

Jury Trial—New Trial. Motion for new trial, on