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

the ground that the verdict was contrary to evidence, refused.

This was a hearing on a rule with a view to a new trial. The pursuers were Messrs W. D. Young & Co., iron and wire fence manufacturers in Edinburgh, and the defender Mr W. H. Gillespie of Torbanehill. The following issues were adjusted for trial:—

"Whether, at various times, betwixt 16th April 1861 and 1st July 1864, the pursuers, on the employment of the defender, made the furnishings and performed the work specified in the five accounts, numbers 6, 7, 8, 9, and 10 of process, or any part thereof: and whether the defender is indebted and resting-owing to the pursuers the sum of £142, 9s. 7d. sterling, being the amount of said five accounts after deducting £140 paid to account thereof, and the sum of £13, 18s. 3d. sterling, being the interest due thereon on 31st December 1865, or any part of said sums, with interest on £142, 9s. 7d. from 31st December 1865? Or,

"1. Whether the pursuers failed to completely make and fit up the conservatory, specified in the account No. 7 of process, in a workmanlike manner?

"2. Whether, in consequence of the operations, and through the fault of the pursuers, in connection with the said conservatory, the defender has suffered loss, injury, and damage to the extent of £70, or part thereof?"

After the issues were adjusted, the defender paid all the pursuers' accounts, except one, for a conservatory erected at Stirling, for which £70 was charged. The only question before the jury had therefore reference to this charge. The trial took place on 8th and 9th April last, when the jury returned a verdict for the pursuers under the principal issue for £70 and interest. They also found for the pursuers on the first counter-issue, and for the defender on the second, assessing the damages at £12. The defender moved for a rule on the pursuers, to show cause why the verdict should not be set aside, as contrary to evidence, and a new trial granted.

A rule was granted.

Pattison and Asher for defender.

Gifford and Burnet for pursuers.

The Court discharged the rule.

The Lord President—In this case there are three issues. The two counter-issues embody the defences of Mr Gillespie. In regard to the first counter-issue, I think it very clear that it cannot be said that the pursuers failed to complete the conservatory, because it is plain from the correspondence in evidence that it was the defender who prevented them from completing it. Then, as to the second counter-issue, the pursuers have all along, in the correspondence and on the record, admitted their liability to repair the damage done by one of their men to the stonework of the house, and the jury have allowed a full sum according to the evidence on that head. But other imperfections in the work are alleged, some of which are remediable and others not. As to those which are remediable, it is the defender's own fault that they have not been remedied, and the jury have included in the £12 a sufficient sum to defray the expense of doing so. I include among the remediable imperfections the straightening of the astragals. But two things are said to be irremediable—the flatness of the roof and a want of parallelism in the erection. The flatness of the roof, however, could not be avoided, because the incline could not have been different in the place, which was prescribed by the defender himself. There is more delicacy about the want of parallelism, but that is always a matter of degree, and the question whether the deviation was sufficient to justify the rejection of the whole work was one peculiarly for the jury, with whose opinion I see no reason to interfere.

The other judges concurred.

Rule discharged, with expenses.

Agents for Pursuers—Macnaughton & Findlay, W.S.

Agent for Defender—Henry Buchan, S.S.C.

Wednesday, June 12.

ROBERTSON *v.* SWAN & SON.

Jury Trial—New Trial. Motion for new trial, on the ground that the verdict was against evidence, refused.

In this case, in which Thomas Robertson, flesher in Ardrossan, was pursuer, and John Swan & Son, cattle salesmen, Edinburgh, were defenders, the following issue was tried by Lord Barcaple and a jury in April last:—

"Whether, on or about the 11th August 1865, the defenders sold to the pursuer eight bullocks upon an agreement that they were to be delivered and paid for on 28th August 1865, and to be kept by the defenders in the meantime at their own risk; whether, while the said bullocks were being so kept by the defenders, they became infected with the cattle plague, or other serious disease, whereof one of them died while still in the defenders' custody and at their risk; whether on the 28th August the defenders, in the knowledge of the said facts, which they concealed from the pursuer, applied for and received from him payment of the sum of £100 sterling as the price, or part of the price, of the said eight bullocks; and whether the defenders are indebted and rest-owing to the pursuer the sum of £100, or any part thereof, with interest from 28th August 1865?"

The jury unanimously returned a verdict for the pursuer. The defenders obtained a rule on the pursuer to show cause why the verdict of the jury should not be set aside, as against evidence, and a hearing on the rule took place.

Watson and Burnet for pursuer.

A. R. Clark and Macdonald for defenders.

The Court unanimously discharged the rule.

Lord Curriehill said, that having heard this case fully argued by counsel on both sides, and having since carefully read over the evidence, he thought it came to be a case in which the difference depended on contradictory evidence and on the balancing of testimony. If he had been on the jury he confessed he would have had very little difficulty in making up his mind, but he was not on the jury, and the pursuer had got the verdict. It was peculiarly the province of the jury to see the witnesses as well as hear them, and to balance and weigh the credibility of the witnesses on both sides. The jury had come to a unanimous verdict, and he thought this was peculiarly a case in which the Court should not usurp the functions of a jury; and the conclusion he had come to was, that they should let the verdict stand.

Lord Deas was of the same opinion.