

Thursday, March 19.

FIRST DIVISION.

M'CALLUM TRUSTEES *v.* M'NAB.

Expenses—Skilled Witnesses—Preliminary Investigation—Jury Trial—A. S. 10th July 1844. Successful party entitled to recover the expense of bringing down from London a civil engineer, who had special knowledge of the ground concerning which the dispute arose, and whose evidence was of great service in the cause. Expenses of preliminary investigation disallowed, the condition of A. S., 10th July 1844, not having been complied with.

This was a question arising on an objection to the auditor's report. There was a question in the case as to the sufficiency of water on a certain estate. The trial took place before the Lord Ordinary, without a jury, and among other witnesses Mr Bruce, C.E., was examined. It appeared that Mr Bruce was well acquainted with the ground in question, having been employed to survey it some time previously. Two days before the trial, Mr Bruce left for London, to attend a Parliamentary Commission, but finding that his engagements allowed it, he returned to Edinburgh and gave evidence at the trial. The party calling him as a witness was ultimately successful, and the question now arose whether the expense of bringing Mr Bruce from London was recoverable from the successful party.

The Lord Ordinary stated that he was much influenced in forming his judgment by Mr Bruce's evidence.

Another question arose as to the expense of £3, 3s., charged for preliminary investigations, it being objected to this charge that the requisite certificate by the presiding Judge was not produced in terms of the A. S., 10th July 1844.

HALL for Complainers.

W. M. THOMSON for Respondents.

At advising—

LORD PRESIDENT—I am not disposed to deal with this witness as in the ordinary position of an expert, whose place can always be supplied, because although one expert may have been employed by the party, another may be found to supply his place. I think Mr Bruce was in a different position. He was in the position of having special knowledge of the subject from previous employment in surveying the ground, and in bringing that special knowledge to bear at the trial there cannot be much doubt that the citation of a witness of that kind, already possessed of the requisite knowledge, and his presence at the trial, is a source of much less expense than calling one or two indifferent experts so to visit the premises for the first time. I think it was of consequence to the ends of justice that Mr Bruce should be present at this trial. He was more of the nature of a witness in the cause than a mere expert. If he had been necessarily absent in London at the time of citation, the ordinary rule that the party bringing him from London, would, if successful, have been entitled to the necessary expense. The only speciality here is that he went to London to attend the Parliamentary Commission, and found that he could come back to attend the trial. It would be rather too strict to hold that to be a sufficient reason for disallowing a charge which in the ordinary case would be allowed. We may presume that it was reasonable and proper, if

not absolutely necessary, that the witness should go to London, and, therefore, the charges on this head must be allowed.

But there is a charge of £3, 3s., for preliminary investigation. In the ordinary case, apart from the Act of Sederunt, 10th July 1844, that is not a charge that can be made against the opposite party, and, therefore, if the Act of Sederunt does not apply, there is no warrant for such a charge. If the Act of Sederunt does apply, then the condition under which it allows such a charge has not been purified, and, therefore the £3, 3s., must be disallowed.

LORD CURRIEHILL—I am of the same opinion, although on the second point I have a little hesitation.

LORD DEAS—I concur. I am disposed to rest on the statement of the Lord Ordinary, that Mr Bruce was a necessary witness, and, moreover, I quite go along with the ground stated for his being a necessary witness. I think there is no doubt that he was so, for although a great number of ordinary persons from Oban might be called to speak as to the means of getting water, that was not to be compared with the evidence of a skilled witness. Would any proprietor act on the evidence of inexperienced persons, without having a survey by an engineer. I am clear that Mr Bruce having gone to London to attend a Parliamentary Commission, the expense of bringing him down lies on the unsuccessful party, and the expense is much less than if a skilled witness had been got on purpose to make this investigation. My only difficulty is as to the £3, 3s. On that matter I don't differ, but I would not be understood as laying down a general rule that in all cases a man of skill is bound to give parties the full benefit of the knowledge he has acquired without any consideration at all. Suppose a mining engineer has got valuable knowledge as to the strata in a certain district, it may be a matter for consideration whether he is not entitled to stipulate for remuneration, and whether that would not be a good charge against the other party. In this particular case I concur that the £3, 3s. ought not to be allowed.

LORD ARDMILLAN—I am of the same opinion. As to the first point I have no doubt. It was out of the question for the parties to rely on such evidence merely as was to be obtained at Oban. As to the second point I have some difficulty. Under the Act of Sederunt of 1844, if this were a jury trial, then the certificate not being obtained in due time, the claim for preliminary investigation by Mr Bruce could not be allowed. But this being a trial before the Lord Ordinary without a jury, it may be that the Act of Sederunt does not apply. As a general rule I am not prepared to say that a skilled witness is bound to unfold all the stores of his mind without charging for preliminary investigation. In the present case, however, I think the charge should be disallowed.

Agents for Complainers—Neilson & Cowan, W.S.
Agent for Respondent—Wm. Burness, S.S.C.

Thursday, March 19.

SECOND DIVISION.

RUSSELL (REEKIE'S TRUSTEE) *v.* DANIEL
& GREEN.

Bankrupt—Section 62—Bankrupt Act—Oath—Security—Assignment. Circumstances in which