

charges incurred to English solicitors in Sunderland and London in connection with the precognitions of witnesses, the Auditor allowed only the drawing fees of precognitions usual in Scotland. The pursuers maintained that the higher fees usual in England should be charged. (2) The Auditor disallowed expenses of precognoscing and bringing from England certain witnesses who were not examined in the cause. (3) The expenses of English counsel for attending the examination of havers in London were also disallowed. (4) The Auditor had restricted the time allowed to English witnesses to travel from Sunderland and Hartlepool to Edinburgh. The pursuer objected, that witnesses should not be compelled to travel by night, and that their expenses should be calculated on the footing that they travelled by day only. There was further a question specially reserved by the Auditor for disposal by the Court, viz.: Whether this was a case where the expense of a third counsel should be allowed, and if so, whether the pursuer was entitled to two senior counsel and one junior, or one senior and two junior?

GIFFORD and MACLEAN for objectors.

WATSON and SHAND in reply.

At advising—

LORD PRESIDENT—The first question is, whether for precognoscing witnesses in England (and it would apply equally to any foreign country) we are to allow charges at a higher rate than in Scotland? Now, to introduce a difference of this sort would be anomalous in the highest degree. The charges must be the same wherever the witnesses are. As to the second objection I agree with the Auditor. The third objection involves a point of some importance. I can quite understand how the examination of havers might be attended with matters of some delicacy, and in such cases I should be very sorry to prevent the employment of counsel. It does not appear, however, that there were matters of delicacy involved here, or that the learned gentleman who attended contributed much either to the administration of justice or the facilitation of the proceedings. In fact, I don't see how he could. English counsel know nothing of our incident diligences. The fourth point is one on which I should not be inclined to disturb the Auditor's decision. I have only to say that I do not see why these witnesses, who are all in the prime of life, business men, and men accustomed to make the most of their time, should not travel for a few hours by night. As to the question specially reserved by the Auditor for the disposal of the Court, the judge who tried the cause is the best person to decide. We will ask Lord Ormisdale (the judge in the cause) verbally whether in his opinion two senior counsel and one junior, or one senior and two junior were required?

LORD DEAS—I agree with your Lordship except in this, that I don't think a witness is bound to travel during the night.

LORD ARDMILLAN concurred.

Agent for Objectors—William Miller, S.S.C.

Agents for Respondents—Campbell & Smith, S.S.C.

Wednesday, July 15.

FINNIE v. M'INTOSH AND OTHERS.

Burgh—Town-Clerk—Town Council. Held that the Town-Clerk of a Burgh is the legal custodian of the books, records, documents, &c. of the

burgh, and that the Town Council may not deprive him of them against his will.

This was a petition and complaint by John Finnie, Town-Clerk of the Burgh of Fortrose, with the concurrence of the Lord Advocate, praying for an order on the respondents, members of the Fortrose Town Council, forthwith to deliver up to him certain records and documents belonging to the burgh, of the custody of which he alleged he was forcibly deprived by them at a meeting of the Town Council held on the 19th of June last. The petitioner stated that the meeting had been called by him for the purpose of considering certain accounts which had been prepared by him under the instructions of the Town Council; that these accounts gave rise to a good deal of discussion, in the course of which some of the respondents objected to them, and moved that the Council should disclaim them; that other members of Council proposed to have them submitted to an accountant; that, on the Clerk craving to make an explanation with reference to the preparation and publication of the accounts, the majority of the Council refused to hear him, and that, in the confusion which ensued, several members left the meeting, and there then ceased to be a quorum present. The petitioner alleged that the respondents—being the Provost and the members of Council who remained at the meeting—then demanded from him the books and papers in his possession connected with the burgh. "With this demand the petitioner declined to comply, and explained that he, as the town-clerk, was legal custodian of the burgh records and documents. It was then proposed by Bailie Hossack that the documents should be carried away by the burgh officer. The petitioner declined to cede the possession to the burgh officer, who refused to use any violence, although instigated to do so by several members of Council. The Provost then called on a police-officer to assist the burgh officer, but he declined to interfere; and Bailie Hossack suggested that a couple of special constables should be sworn in for the purpose. On the burgh officer again declining to use any violence, Bailie Hossack himself wrestled with the petitioner, seized hold of the books, and violently pulled them away from the petitioner, and flung them on the table, where they were taken possession of by Councillor Watson and the members of Council present. The petitioner attempted to leave the room, but was intercepted by Councillor Watson and others, by whom he was prevented from leaving until he gave up the documents and papers which were still in his possession. The petitioner was hemmed in and jostled by the members of Council and the audience, and the door was also locked or kept shut by two members of Council. He was thus forcibly compelled to deliver up the documents."

In their answers the respondents denied the accuracy of the petitioner's statement as to the circumstances under which they obtained possession of the books and documents, which, they admitted, were in their custody, and gave the following account of the matter:—"After numerous ineffectual attempts to get the business of the meeting orderly conducted, and after many vain attempts to induce the petitioner to resume his duties as clerk, the Provost became quite satisfied that no farther business could be done; and he held that the motion to submit the accounts, books, and papers to a neutral professional accountant had been substantially agreed to, no amendment having been proposed. It was getting dark, and the Provost proceeded to

close the meeting; and he directed the town-officer to take charge of the books and papers on the table, that they might be laid before the accountant. The petitioner again interposed, declared that he was the custodian of the whole books and papers of the burgh, and he refused to part with them, or to allow them to be submitted to any accountant. This led to another angry altercation, in the course of which some of the members of Council took up some of the books and papers lying on the table, and handed them to the Provost for custody. This was violently resisted by the petitioner, who threatened personal violence, and attempted forcibly to wrest the books from some of the members of Council, who were collecting them. Beyond this, however, there was no violence of any kind, but there was a great deal of angry altercation." They admitted that the books and documents were in the custody of Mr Watson, a member of Council, and offered to give the petitioner such access to them as he might require.

The SOLICITOR-GENERAL and STRACHAN for petitioner.

GIFFORD in reply.

At advising—

LORD PRESIDENT—This is one of those disagreeable cases in which it is preferable not to make many observations, more especially as it does not admit of any doubt. There was a meeting of the Magistrates and Town Council, held in the ordinary meeting place, on the 19th June. This meeting was held for the examination of certain accounts which had been prepared by the town-clerk. He says he brought with him to the meeting the principal and draft minute-books of the Council, and other records and documents which might be required in examining and considering the accounts. Now, as to what followed I take the statements of the respondents, without meaning to suggest that they are in any way preferable to the petitioner's; but, as the parties are not at one as to their statements, it is sufficient to justify the conclusion at which I have arrived, to take the respondents' alone. (*Reads from answers.*) It matters very little what the books and papers were. It must be assumed, as was indeed conceded, that they were in the lawful custody of the town-clerk for the time being. They were then forcibly taken from him, and it appears to me that in such a case, independently of the relationship which existed between the petitioners and the respondents, that the maxim applies—*spoliata anteo munia restituenda*. But when I look at that relationship, the proceedings appear to me to be wholly unjustifiable. These gentlemen must have known, or at least ought to have known, that the town-clerk, as a public officer, has the custody of the burgh records and papers entirely independent of the Town Council, except in so far as might be necessary to give access thereto for all proper purposes. The custody is with the town-clerk and no one else, and he is responsible to the burgh and to this Court for that custody. No man but he is entitled to interfere, directly or indirectly, with these books. We must, therefore, pronounce an interlocutor ordaining them forthwith to be delivered to him.

LORD DEAS—As to the question of *legal right*, I have no doubt. The town-clerk is the proper custodian of the records of the burgh, including documents such as those stated in this inventory, and admitted to have been in his possession when, as your Lordship has stated, they were forcibly taken from him. Now, I don't think the Town Council

had right to do that. They had no power by law to take the books and documents from him, even if they had used no violence. If they wished to get possession of them for the purpose of laying them before an accountant, they should have made an order to that effect. The accountant would then have gone to the town-clerk and got them in return for a formal receipt, or at least the town-clerk, if he did not wish to part with them, would have allowed him access to them. This would relieve the town-clerk from all responsibility. The respondents' counsel say that this petition is unnecessary. That might be so if the respondents offered to return the books. But they don't do that. On the contrary, they plead that they are entitled to withhold them, and all that the town-clerk can ask in the meantime is access. I concur with your Lordship that the responsibility for the burgh records and documents lies with the town-clerk; and that the Town Council cannot relieve him of the responsibility. Suppose the Record of Sasines or the Record of Deeds, under the old system, was not in his possession, it could not be answered by him that he had parted with it on the orders of the Town Council. The respondents were not entitled to take these books or documents, and we must make an order for their return.

LORD ARDMILLAN—We are not here considering the question whether the Town Council was entitled to lay these books before an accountant. The question whether, if ordered by the Town Council to transmit them to an accountant, or give access to them for examination, the town-clerk could refuse to do so, is not now before us. They have, in effect, dismissed the petitioner as town-clerk by making Councillor Watson custodian. I agree with your Lordships that they had no power to do what they have done. They took these books and documents by force, and I cannot sustain their proceedings. Before all things, the spoliated records must be returned.

Interlocutor ordaining the respondents forthwith to deliver to the petitioner the whole of the records and documents of the custody of which he was deprived by them, and finding them liable in expenses.

Agent for Petitioner—Hugh Watt, S.S.C.

Agents for Respondents—J. & R. Macandrew, W.S.

TEIND COURT.

Wednesday, July 15.

HERDMAN (MINISTER OF RATTRAY),
PETITIONER.

Teinds—Glebe Lands (Scotland) Act, 1866, sect. 17

—*Procedure.* The Court granted authority to feu a portion of a glebe under the Glebe Lands (Scotland) Act, 1866. Two conterminous proprietors intimated, in terms of sect. 17 of the Act, their willingness to purchase said portion. The Court remitted to the Lord Ordinary to inquire and report what was the largest price to be obtained from either of the competing conterminous proprietors.

The Court having granted authority to feu certain portions of this glebe (numbered in the petition as lots 2, 3, and 4), under the Glebe Lands (Scotland) Act, 1866, certain conterminous heritors intimated, in terms of the 17th section of the Sta-