

Cases have to be continued in quite unavoidable circumstances. The case may take longer than was expected, or the Lord Ordinary's other work may prevent him giving continuous sittings, and sometimes he may not have time for the hearing immediately at the conclusion of the evidence for the same reason. Now when a case is complicated and much depends on the facts, it would be putting more than it is possible to put upon the human memory to expect that counsel could in such circumstances properly debate the case without the notes of evidence.

It is, therefore, really a question of circumstances in each case, and I think it would be quite improper to lay down that a certain number of days must elapse before which it was impossible to get the notes and after which it was. We think that that can be judged of in each case, and as the Auditor was originally of opinion in this case that it ought to have been allowed, we propose to sustain the objection and allow the charge.

But we propose to say this as a general rule—the profession will take note of it, and we shall communicate it to the Lords Ordinary—in future where the litigant wishes the Lord Ordinary's notes of evidence, and proposes to charge their cost, if he is successful, against the opponent, he must get the Lord Ordinary's leave to that effect. Of course he could never get the notes of evidence at all without the Lord Ordinary's leave; but he must intimate, in asking for them, that he proposes to charge the cost of them against an opponent; and then, if the Lord Ordinary chooses to allow it upon that footing, well and good. If he simply asks for them without that intimation, then it will be held that he asks for them simply for his own convenience and must pay for what he gets.

That is the judgment of the Court.

LORD JOHNSTON was absent.

The Court sustained the objection.

Counsel for the Pursuer—Garson. Agent
—William Douglas, S.S.C.

Counsel for the Defender—Paton. Agents
—Gill & Pringle, W.S.

Saturday, February 10.

FIRST DIVISION.

(SINGLE BILLS.)

CALEDONIAN RAILWAY COMPANY
v. GLENBOIG UNION FIRECLAY
COMPANY, LIMITED.

(*Ante*, in the Court of Session, July 15, 1910, 47 S.L.R. 823, 1910 S.C. 951; and in the House of Lords, April 28, 1911, 48 S.L.R. 526.)

Expenses—Taxation—Fees to Counsel in Outer and Inner House—Fees to Skilled Witnesses.

In a difficult and complicated case as to whether fireclay was or was not a mineral in the sense of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), and in which the successful party had been awarded expenses, the unsuccessful party objected to the Auditor's taxation of these expenses in respect that the fees allowed to senior and junior counsel in the Outer and in the Inner House, and to the skilled witnesses, were too high.

The Court *repelled* the objections and *approved* of the Auditor's report.

[The Case is reported *ante ut supra*.]

The Caledonian Railway Company brought an action of suspension and interdict against the Glenboig Union Fireclay Company, Limited, in which they craved the Court to interdict the respondents from working certain beds or seams of fireclay underneath the complainers' railway in the parish of Old Monkland, Lanarkshire, the question at issue being whether the fireclay worked by the respondents was or was not a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

On 28th November 1908 the Lord Ordinary (SKERRINGTON) *refused* the prayer of the note and found the complainers liable in expenses.

The complainers reclaimed to the First Division, who on 15th July 1910 *adhered* to his Lordship's interlocutor, and found the complainers liable in additional expenses.

The complainers appealed to the House of Lords, who on 28th April 1911 *dismissed* the appeal with costs.

The Auditor having lodged his report, the complainers objected thereto in so far as he had allowed the following fees to senior and junior counsel respectively for the second, third, and fourth days of the proof, *viz.*, for the second and third days, twenty guineas and fifteen guineas; and for the fourth day (which was a short one) fifteen guineas and twelve guineas. In place thereof they submitted that the Auditor should have allowed, for the second and third day, fees of fifteen guineas and ten guineas to senior and junior counsel respectively, and for the fourth day ten guineas and seven guineas respectively.

They also objected to the fees allowed for the second day of the hearing on evidence, *viz.*, to senior counsel a fee of fifteen guineas, and a fee of ten guineas to his junior. In place thereof they submitted that fees of ten and seven guineas respectively would have been appropriate.

The complainers further objected to the fees allowed for the hearing in the Inner House, *viz.*, for the first day a fee of twenty-five guineas to senior counsel, and a fee of twenty guineas to his junior; and for the second day, fees of fifteen guineas and ten guineas respectively. They submitted that fees of fifteen guineas and ten guineas respectively for the first day, and ten guineas and seven guineas respectively for the second day, would have been suit-

able. [A further objection to a fee of seven guineas to senior counsel for the third day, and a fee of four guineas to his junior (the time occupied being only three hours) was not pressed].

Objection was also taken by the complainers to the following fees allowed by the Auditor to skilled witnesses, viz.—

1. James Hamilton, C E., Glasgow	-	£18	10	0
2. Joseph Dickinson, Manchester	-	23	3	0
3. Professor Gregory, Glasgow	-	163	3	6
4. Professor Kendall, Leeds	-	88	5	0
5. R. R. Tatlock, Glasgow	-	52	12	0
6. Dr Fawsitt, Glasgow	-	68	16	0
7. Dr Mellor, Stoke-on-Trent	-	85	19	6
8. W. Wade, Burslem	-	38	16	9

in respect of the number of days which the Auditor had allowed to these witnesses to prepare themselves for giving evidence, and the rate per day (viz., 6 gns.), and in the case of Professor Gregory also in respect of the sum (included in the above figure) allowed for his time occupied in consulting authorities in London. In place thereof they submitted that the witnesses ought not to have been allowed more than two days each for preparation, and that the rate should not have exceeded two guineas per day in addition to time occupied by travelling and attendance at Court.

Argued for respondents—Where, as here, the question was really one of taxation, the Court would not readily interfere with the Auditor's discretion, which had in this case been carefully exercised. The fees allowed were not excessive, for the case was both difficult and complicated, and involved an extensive acquaintance with its geological and mineralogical aspects. A knowledge of these conditions was vital, as each case now depended on its own facts—*North British Railway Company v. Budhill Coal and Sandstone Company*, 1910 S.C. (H.L.) 1, 47 S.L.R. 23. In the somewhat similar case of *Boyd & Forrest v. Glasgow and South-Western Railway Company*, 1911 S.C. 1050, 48 S.L.R. 876, larger fees had been allowed both for the proof and for the hearing on evidence and to three counsel. The fees allowed to the skilled witnesses had been fixed after careful consideration by the Auditor, who had taxed off £576 from the fees as originally charged. The value of these witnesses' testimony was in no way to be measured by the length of their evidence in Court, as much time and research had been expended by them in preparation.

At advising—

The opinion of the Court (the LORD PRESIDENT and LORDS KINNEAR, JOHNSTON, and MACKENZIE) was delivered by

LORD PRESIDENT—We have consulted with the Auditor upon this matter of the objections to his report on the question of the fees in this case.

The question of counsel's fees must, within certain limits, always be a question of degree, and they must be considered, not necessarily with a view merely to the day for which the fee is allowed, but with a view to remuneration upon the case as a whole. Now after seeing the Auditor

we have come to be of opinion that he has directed his attention to what I may call the particularity of the present case, and that it would be inadvisable to disturb the figures at which he has arrived for the remuneration of counsel.

Then so far as the witness fees are concerned, it was a case where we think that the fee objected to for the witness going to London to the British Museum was unavoidable. The question that was being mooted was not merely the state of scientific knowledge, but the state of scientific knowledge at a certain date. No man could be expected to be familiar with that, as part of what I may call his general professional information, and therefore it was a matter which necessitated special preparation. And inasmuch as it was admitted that the books required are—so far as this country is concerned—only in the British Museum, and as the British Museum could not come here, it was necessary for the gentleman to go to the British Museum.

Therefore we do not propose to disturb the Auditor's report.

The Court repelled the objections and approved of the Auditor's report.

Counsel for Complainers—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Respondents—Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, February 22.

FIRST DIVISION.

RODGER AND OTHERS v. SCHOOL BOARD OF PAISLEY.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—“Out of and in the Course of the Employment”—School Janitor Falling through Faintness and Striking Head on Pavement while Taking a Message.

A school janitor, while in the course of his employment taking a message from the headmaster to another headmaster, fainted in the street owing to the heat of the day, and fell backwards, striking his head on the stone pavement. He eventually died from the effects of the accident.

Held that the injury by accident did not arise out of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1906.

Mrs Annie Rodger, widow of William Rodger, and Alexander Rodger, Hugh Rodger, and Annie Rodger, children of William Rodger, appellants, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the School Board of the burgh of Paisley, respondents, and being dissatisfied with the determination of the Sheriff-Substitute