presumed to have had knowledge of them —as, for example, the proposed inclusion of the castle in the subjects exposed for judicial sale by the creditors of Donald Campbell, fourteenth captain in 1797, though the common agent was also agent of the Duke—or were acts the superior saw no reason to object to—as, for example, the terms of the deed of entail in 1790—or they were just such acts as would be done consistently with the tenure under which the defender and his predecessors held the castle. In no view was the possession adverse to the superior's own title to the subjects in dispute. Unless it was adverse it cannot avail the defender in this case.

The result of my opinion is that the conclusion of the summons should be disposed of in the manner proposed.

The Court recalled the interlocutor of the Lord Ordinary, refused the minute of amendment, found and declared that the subjects following "*videlicet*, all and whole the castle of Dunstaffnage with the whole pertinents thereof lying within the lordship and barony of Lorne and county of Argyll" pertained and belonged heritably in property to the pursuer; *quoad ultra* assoilzied the defenders, and found no expenses due to or by either party.

Counsel for the Pursuer and Appellant —Clyde, K.C. — Macphail, K.C. — A. M. Trotter. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Defenders and Respondents—Cooper, K.C.—Scott Brown. Agents —Mitchell & Baxter, W.S.

Friday, March 1.

FIRST DIVISION.

[Sheriff Court at Orkney.

REID AND ANOTHER *v.* NORTH ISLES DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF ORKNEY.

Expenses—Sheriff Court—Employment of Counsel in Sheriff Court—Taxation as Between Agent and Client—A.S. 10*th April* 1908—*Table of Fees, cap.* 1, *sec.* 16.

The Table of Fees annexed to the Act of Sederunt of 10th April 1908 regulating fees in the Sheriff Court contains the following entry:—"The following fees to be allowed as judicial costs where the employment of counsel is sanctioned. . . ." In a Sheriff Court case counsel were employed by the defenders without sanction having been previously obtained from the Sheriff-Substitute, and though a motion for sanction was subsequently made before the Sheriff the latter was unable, owing to the case having been appealed to the Court of Session, to dispose of it. The defenders, who had on appeal been awarded expenses as between agent and client, objected to the auditor's report disallowing the expenses of the employment of counsel.

The Court *allowed* the defenders an opportunity of applying to the Sheriff for sanction of counsels' employment, but *observed* that the motion for sanction should have been made to the Judge who tried the cause, *i.e.* to the Judge of first instance, and that in future the motion, if not so made, would only be granted on its being shown (1) that the employment was right, and (2) that very good reason existed why it had not been made before.

Expenses—Sheriff Court—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*)—*Skilled Witnesses—Certification — Taxation as Between Agent and Client—A.S.* 10*th April* 1908, *General Regulations, sec.* 8 — *Table of Fees, cap.* 10, *sec.* 5 (*b*).

The General Regulations annexed to the A.S. 10th April 1908, regulating fees in the Sheriff Court provide, sec. 8—"This Table of Fees shall regulate the taxation of accounts as well between agent and client as between party and party. . . ." The Table of Fees contains the following entry—"Where it is necessary to employ skilled persons to make investigations prior to a proof or trial in order to qualify them to give evidence thereat, charges shall be allowed for the trouble and expenses of such persons, . . . provided that the judge who tries the cause shall, on a motion made either at the proof or trial, . . . or within eight days after the date of any interlocutor disposing of the case, certify such skilled persons for such charges."

In a Sheriff Court case certain skilled witnesses were employed by the defenders without certification having been obtained from the judge who tried the cause, either at the time or within eight days thereafter. The defenders, who had on appeal been awarded under the Public Authorities Protection Act 1893 expenses as between agent and client, objected to the auditor's report disallowing the expenses of their employment, their contention being that the entry in the Table of Fees above quoted was only applicable where the taxation was to be as between party and party. *Held* that the entry in the Table of Fees applied where the taxation was as between agent and client, and that accordingly the expenses of their employment could not be subsequently recovered.

Expenses—Sheriff Court—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*)—*Debate Fee—Attendance Fee—Taxation as Between Agent and Client—A.S.* 10*th April* 1908, *General Regulations, sec.* 6—*Table of Fees, cap.* 1, *secs.* 12 *and* 15.

The General Regulations annexed to the A.S. of 10th April 1908, for regulating fees in the Sheriff Court, provide,

sec. 6—"In causes of great importance or requiring much special preparation it shall be in the discretion of the Sheriff to allow for a debate a higher fee than is allowed in the Table, but not exceeding £7, 7s.; and that either by a direction in the interlocutor disposing of the cause or by a special interlocutor following on a motion by the party found entitled to expenses."

In a Sheriff Court case in which there had been a protracted debate before the Sheriff-Substitute and also before the Sheriff, the defenders, who had on appeal to the Court of Session been awarded under the Public Authorities Protection Act 1893 expenses as between agent and client, objected to the auditor's report in so far as he had, *inter alia*, allowed only the ordinary debate fee of four guineas in each of the lower courts, and craved their Lordships to sanction the higher debate fee of seven guineas allowed by sec. 6 of the General Regulations above quoted, or to allow them to apply to the Sheriff for sanction thereof. Alternatively, they craved leave to charge, in lieu of the debate fee, an attendance fee of ten shillings an hour.

Held that the defenders were not entitled to charge an attendance fee in lieu of the debate fee, but that they might still apply to the Sheriff for sanction, should he think fit to give it, of the higher debate fee allowed by the Act.

On 10th December 1908 Samuel Reid, merchant, Kirkwall, and another, joint owners of the smack "Howard" of Kirkwall, *pursuer*, brought an action against the North Isles District Committee of the County Council of Orkney, *defenders*, for payment of £356 odd, in respect of injuries sustained by their vessel owing as they alleged to the failure of the defenders, as the statutory undertakers of the pier at Nonster, North Ronaldshay, to supply proper moorings.

On 2nd April 1910 the Sheriff (M'LENNAN) on appeal assoilzied the defenders, and found the pursuers liable (under certain deductions) in the expenses of the action both before the Sheriff-Substitute and in appeal.

On 9th April the defenders moved the Sheriff (1) for a direction to the Auditor of Court that the expenses in the cause should be taxed as between agent and client under and in virtue of section 1 (*b*) of the Public Authorities Protection Act 1893; (2) to sanction the employment of counsel for the defenders; (3) to certify certain skilled witnesses; and (4) to find under the Table of Fees in the Sheriff Court (Act of Sederunt, 10th April 1908) that under regulation 6 the defenders were entitled to a debate fee both before the Sheriff and Sheriff-Substitute of at least the sum of £7, 7s.

On 16th April 1910 the pursuers appealed to the Court of Session.

On the same date (16th April) the Sheriff issued the following

Note.—"The case having been appealed to the Court of Session, and the interlocutor sheet not having been transmitted to the Sheriff along with the motion, it is now impossible for the Sheriff to deal with the motion at this stage. For the convenience of parties he desires to communicate his views regarding the points dealt with in the motion.

"(1) The failure to insert the words 'as between agent and client' in the award of expenses was a clerical or incidental error, which the Sheriff would have been prepared to correct under rule 84. The defenders argued for such expenses under the Public Authorities Protection Act 1893, and it was admitted by the pursuers' agent that a similar argument had been submitted to the Sheriff-Substitute. In the Sheriff's opinion the statute applies to the present case.

"(2) and (4) It is competent for the Sheriff to deal with these branches of the motion after final judgment on the merits—Act of Sederunt 10th April 1908, General Regulations VI, Table of Fees, chap. i, 16. Consequently, care should be taken when the appeal is disposed of in the Court of Session to have the process remitted back to the Sheriff. He understands this course has been taken under similar circumstances in other litigations. It seems therefore proper that he should not at present express any view on the merits on these branches of the motion.

"(3) According to the Sheriff's understanding of the Table of Fees, chap. x, note (*b*), the certifying of skilled witnesses could only be done by the Sheriff-Substitute, he being in the sense of the note 'the judge who tries the cause.' If application was made to him within eight days of his interlocutor of 5th January 1910 a fresh application to the Sheriff is unnecessary. If application was not so made, an application to Sheriff now is too late. The Sheriff observes that the present motion was lodged within eight days after the date of his interlocutor of 2nd April disposing of the case, so that if the Sheriff's understanding of the table be wrong he could deal with this branch of the motion on the case being remitted back. The judgment of the Court of Session should if possible be obtained on the construction of the note in the Table of Fees."

On 16th March 1911 the First Division affirmed (with certain variations) the Sheriff's interlocutor of 2nd April 1910, found the pursuers and appellants liable to the defenders and respondents in the expenses of the appeal, and remitted the account thereof and of the expenses found due in the Sheriff Court to the Auditor to tax as between agent and client and to report.

The Auditor having lodged his report the defenders objected thereto, in so far as he had disallowed the following items, namely—"(1) The items in connection with the employment of counsel in the Sheriff Court for the revisal and adjustment of the pleadings in the said Court, and at the Commission in Edinburgh prior to the

proof in said Court. . . . (2) The items in connection with the employment of skilled witnesses who gave evidence at the Commission in Edinburgh in connection with the Sheriff Court proof. . . . (3) The special fees for debates before the Sheriff-Substitute and the Sheriff-Principal. . . ."

Counsel were heard on the note of objections in the Single Bills on 1st March 1911.

Argued for defenders—(1) *As to employment of counsel.*—Where, as here, taxation was between agent and client, an agent who had *bona fide* employed counsel was entitled to charge his client with such expense—*Hood* v. *Gordon*, March 18, 1896, 23 R. 675, *per* Lord M'Laren at p. 676, 33 S.L.R. 491. Sanction of the Judge was not necessary, but if it were so the Court had power to grant it now, or to remit to the Sheriff to give it—*M'Kercher* v. *M'Quarrie*, July 19, 1887, 14 R. 1038. Neither the Act of Sederunt regulating the fees in the Sheriff Court nor the Table of Fees annexed thereto imposed any time limit within which sanction must be obtained—Table of Fees in Sheriff Court appended to A.S., 10th April 1908, chapter i, section 16. (2) *As to skilled witnesses.*—Where, as here, taxation was between agent and client, the regulation in the Table of Fees (*cit.*), chapter x, section 5 (*b*), that such skilled witnesses must be certified by the Judge who tried the cause or within eight days of the disposal of the case, was inapplicable. That regulation was for the protection of the unsuccessful party in cases where taxation was between party and party. Where, as here, the taxation was to be as between agent and client, the defenders were entitled to such reasonable and necessary charges as an agent could fairly make against his own client. (3) *As to the debate fee.*—The defenders were entitled to the higher debate fee of £7, 7s. in each of the lower Courts allowed by section 6 of the General Regulations annexed to the Act of Sederunt (*cit.*). Alternatively they were entitled—where, as here, taxation was between agent and client—to charge in lieu thereof an attendance fee of 10s. per hour. They were therefore entitled either to a debate fee of £14, 14s., or to an attendance fee of £17, the attendance in both courts amounting to 34 hours.

Argued for pursuers—Where, as here, the employment of counsel had not been sanctioned by the Judge who tried the case, it was too late to apply for it now—*Mackenzie* v. *Blakeney*, October 16, 1879, 7 R. 51, 17 S.L.R. 5; *Wood's Trustees* v. *Wood*, May 16, 1900, 2 F. 870, 37 S.L.R. 671. The case of *M'Kercher* (*cit.*) was distinguishable, for that case was decided under a different Act, viz., the A.S., 4th December 1878, which allowed sanction to be "subsequently" obtained. In the A.S., 10th April 1908, the word "subsequently" was omitted. (2) The skilled witnesses not having been certified within the time allowed by the Table of Fees, the defenders were not entitled to charge therefor—Table of Fees, chapter x, section 5 (*b*). That table applied where taxation was allowed as between agent and client as well as when between party and party—General Regulations (*cit.*), section 8—and that being so, the defenders were in error in contending that section 5 (*b*) only applied where the taxation was as between party and party. (3) *Esto* that the Sheriff might in his discretion have allowed the higher debate fee of £7, 7s. in both courts, he had not done so, and it was now too late for him to issue the special interlocutor required by section 6. The defenders' alternative proposal to charge an attendance fee in lieu thereof was inconsistent with the Act and had no support from authority.

LORD PRESIDENT—This is a case in which a shipowner raised an action against the Northern Isles District Committee of the County Council of Orkney for damage done to a ship owing to the breaking away of the buoy at which the ship was moored, such breaking away being due, as he alleged, to the negligence of the defenders in not providing a suitable chain. The Sheriff-Substitute gave decree in favour of the pursuer. That judgment was reversed by the Sheriff-Principal upon appeal.

An appeal was then taken to your Lordships, and your Lordships upheld the judgment of the Sheriff-Principal. This judgment involved a finding of expenses in favour of the defenders and respondents, and your Lordships awarded those expenses as between agent and client, as you were bound to do by the terms of the Public Authorities Protection Act. The account has been taxed, and the note of objections raises three points in respect of the taxation.

The first point is in connection with the employment of counsel in the Sheriff Court. Counsel were not employed for the conduct of the debate, but they were employed for the adjustment of pleadings, and they were employed for the examination of certain witnesses who had to be examined on commission. No motion to sanction the employment of counsel was made before the Sheriff-Substitute, but a motion was made before the Sheriff-Principal. Unfortunately that motion only came to be made on the same day as the opposite party noted the appeal. The result was that, the process having been removed, the Sheriff-Principal had no interlocutor sheet to write upon, and accordingly he gave out a separate opinion and note for the parties, in which he said that, as he had not an interlocutor sheet to write upon, it would be necessary, if he was to deal with the motion, that the case should go back to him; he did not *hoc statu* deliver himself of any opinion upon the merits of the question as to whether counsel were properly employed or not.

Now the whole matter is regulated by the Act of Sederunt of 10th April 1908, dealing with the fees in Sheriff Courts, and the passage which deals with the employment of counsel is section 16 of

cap. I of the Table of Fees annexed, which says this — "The following fees to be allowed as judicial costs where the employment of counsel is sanctioned." Previous to the Act of Sederunt of 1908 the matter was regulated by the earlier Act of Sederunt, 4th December 1878, which used these rather different words as to counsel's fees—"When the employment is authorised or subsequently sanctioned." Under that earlier Act it had been decided, before 1908, in the case of *M'Kercher* v. *M'Quarrie* (1887, 14 R. 1038), that the motion for sanction might be made at any time; and, as a matter of fact, in the case which settled the point the motion was made after the account had been taxed, and after the case had been taken away from the Sheriff Court to the Court of Session and the judgment had been adhered to on appeal, and the case had come back again.

The respondents, who ask that these expenses should be allowed, submitted a two-fold argument. They argued, first of all, that the sanction might be given at any time, and therefore might be given by your Lordships, and that your Lordships should now give it. I am not prepared to hold that that argument is wrong, because the words in the Act are perfectly general. But at the same time I wish it to be understood for the instruction of the profession that I do not think we should look with any favour upon the idea of putting off this motion until the case came before the Supreme Court, or even, as was done here, putting off the motion until the case came before the Sheriff-Principal.

I think such a motion should properly be made to the judge who tries the cause, that is to say, the judge who conducts the case. I say this for the instruction of the profession, because I am thinking of the ordinary case where counsel are employed in the conduct of the proof. This case is somewhat peculiar, because it is comparatively rare that there is an examination of witnesses on commission, and that the examination is of such a nature that counsel ought to be employed. But in the ordinary case I wish it to be understood that the proper person before whom to make the motion is the judge of first instance. Although I do not think it is incompetent for the employment of counsel to be sanctioned afterwards, I think it should only be so sanctioned if the party show not only that the employment was right but also that there were very good reasons why the motion was not made before.

However, in this case, I think, in view of the standing decisions, one cannot wonder that the motion was not made until the case came before the Sheriff; and inasmuch as the Sheriff never applied his mind to it, I think it would be going too far to hold that the time had now gone by when the matter could be taken up. Therefore I think we should practically remit this matter to the Sheriff-Principal. Counsel for the respondents submitted another argument of a more general character, which I shall take up with the next point, because it covers both that point and the point with which I have just been dealing.

The next point is as to the allowance for skilled witnesses. Now the allowance for skilled witnesses is dealt with in cap. 10 of the Table of Fees, in sub-section (*b*) of which it is said—"Where it is necessary to employ skilled persons to make investigations prior to a proof or trial in order to qualify them to give evidence thereat, charges shall be allowed for the trouble and expenses of such persons, of such amount as shall appear fair and reasonable, provided that the judge who tries the cause shall, on a motion made either at the proof or trial, or when leave is asked to abandon the case, or within eight days after the date of any interlocutor disposing of the case, certify such skilled persons for such charges."

Now it is admitted that no certification was got from the judge who tried the case, namely, the Sheriff-Substitute, either at the time or within the eight days, and therefore it is too late, unless, as was argued, it is a provision that does not apply to the taxation of accounts as between agent and client, but only applies as between party and party. I am of opinion that this is a provision which applies whether the taxation is between agent and client or between party and party, and I think that that is really made perfectly clear by section 8 of the General Regulations which are at the beginning of the Act of Sederunt. It says that "This table of fees shall regulate the taxation of accounts, as well between agent and client as between party and party." I am of opinion that that disposes of that argument.

The only other matter is that of a special debate fee. The maximum debate fee is four guineas before the Sheriff-Substitute and four guineas before the Sheriff-Principal, and that fee was allowed here. But there is in article 6 of the General Regulations a provision to the effect that "In causes of great importance or requiring much special preparation it shall be in the discretion of the Sheriff to allow for a debate a higher fee than is allowed in the table, but not exceeding seven guineas, and that either by a direction in the interlocutor disposing of the cause or by a special interlocutor following on a motion by the party found entitled to expenses."

That special motion was made at the same time as that for a certificate for sanction of the employment of counsel, and it was not disposed of for the reason that I have already mentioned. I think the same view applies, and it is necessary therefore that the cause should go back to the Sheriff in order that he may record this allowance in a special interlocutor if so advised.

The respondent made a counter proposition that instead of having a debate fee he should be allowed to have an attendance fee, because the duration of this debate was so long that he would get more by an attendance fee of seven shillings per hour than by a debate fee of seven guineas. That is a perfectly inadmissible proposi-

tion. To allow a person to get round the debate fee by simply protracting the debate and charging for attendance would obviously be to drive a coach and four through the Act of Sederunt, and therefore I do not think that proposition can be entertained.

LORD JOHNSTON—I agree. This case is of importance simply because of its bearing upon the Public Authorities Protection Act, and raises the question whether a public authority is to be dealt with, in the audit of its account of judicial expenses as between agent and client, where so awarded by virtue of the provisions of that Act, without regard to the rules and scale fees of the court in which it has been engaged in litigation. I agree with your Lordship that while the defenders are to get their expenses as between agent and client, these expenses should be taxed with reference to the rules of the courts in which these expenses have been incurred.

LORD MACKENZIE—I am of the same opinion.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Repel the second of said objections, and with regard to the first and third of said objections remit the cause to the Sheriff in order that the defenders may, with regard to the first objection, have an opportunity to apply to the Sheriff for his sanction under the Table of Fees in the Sheriff Court, chapter I, head 16, and with regard to the third objection may, under the Act of Sederunt of 10th April 1908, section VI, move the Sheriff for an allowance of a higher debate fee than the Table of Fees allows: *Quoad ultra* continue the cause: Find no expenses due to or by either party in connection with this discussion."

Counsel for Pursuers (Appellants)—Munro, K.C.—J. A. T. Robertson. Agents—Hossack & Hamilton, W.S.

Counsel for Defenders (Respondents)—Cooper, K.C.—R. S. Brown. Agent—James Gibson, S.S.C.

REGISTRATION APPEAL COURT.

Monday, March 4.

(Before Lord Dundas, Lord Mackenzie, and Lord Skerrington).

O'CONNELL *v.* BLACKLOCK.

Election Law — Lodger Franchise — Occupancy of Room of Requisite Value—Contractual Right to Occupy Room.

A member of a Roman Catholic Order claimed the lodger franchise in respect of the occupancy of a bedroom, of the requisite annual value, in an institution belonging to the Order, where he was employed as an assistant teacher. The claimant was entitled to no remuneration for his services and paid no rent for his room, and there was no evidence of any contract, express or implied, under which he occupied the room.

Held that the claimant was not entitled to be enrolled as a lodger.

Doyle v. *Craig*, 1911 S.C. 493, 48 S.L.R. 109, *distinguished.*

At a Registration Court for the burgh of Dumfries, held at Dumfries on Friday, 6th October 1911, John O'Connell, B.A., teacher, St Joseph's College, Craig's Road, Dumfries, claimed to have his name inserted in the register of voters for the burgh of Dumfries as occupier and sole tenant of lodgings described as a "bedroom" situated in St Joseph's College aforesaid. This claim was objected to by Mr Jonathan Edwards Blacklock, solicitor, Dumfries, a qualified voter, on the following grounds — That claimant was a member of an Order, each of whom had proprietary rights in the possessions (including the subjects claimed upon) belonging to the Order; that he was also the servant of the Order and under the orders of the headmaster of St Joseph's College, Robert Devine, and also of Thomas Peter M'Cann, Provincial Superior of the association known as the Marist Brothers, or of any one set over him by the rules or regulations of the Order, who could transfer him to another room in the college which he might have to share with others, though at present he had a room to himself—or might remove him from Dumfries altogether; that he had no contract for remuneration, serving his Order without fee or reward, said Order providing him with board and clothing for which he paid nothing in return; and generally that no provisions had been enacted by statute for instituting a franchise in such a case.

The Sheriff (FLEMING) rejected the claim.

The following *facts* were set forth in the Special Case stated by the Sheriff on appeal—"The claimant is a member of the Order or Association known as the Marist Brothers. The Marist Brothers are a voluntary association of men who devote themselves to the education of boys and young men.

"Members of the association on their admission submit themselves to the rules of the Order and the directions of their superiors in the Order, and out of the common funds of the Order are provided with board, lodging, clothing, and everything necessary for their suitable maintenance. They receive no other remuneration. Great Britain and Ireland form a province of the Order, and the governance of the Order within that province is in the hands of a General Council, of which the claimant may be a member, and, subject to that Council, of the Provincial Superior, who is at present the Reverend Thomas Peter M'Cann. The Provincial Superior determines the work to be performed by each member and his place of residence, and may at any time in his own discretion, subject to appeal to the General Council, vary such work or place of residence. The claimant about three years ago was directed