assignation as between him and the company. The assignation had been in no way withdrawn, but was under consideration of the landlord. In these circumstances it seems to me clear that the pursuer was not in a position to give anything but a hypothetical or contingent notice intended to meet a case which might never happen, viz., the case of the assignees being finally refused by the landlord. Accordingly the notice was not a good notice under article 8, and I think the pursuer's action fails.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defender, and dismissed the action.

Counsel for the Pursuer and Respondent—Brown, K.C.—Graham Robertson. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defenders and Reclaimers—Fleming, K.C.—Lillie. Agents—Dalgleish, Dobbie, & Company, S.S.C.

Saturday, February 25.

FIRST DIVISION.

CALEDONIAN RAILWAY COMPANY *v.* CORPORATION OF GREENOCK.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* CORPORATION OF GREENOCK.

(*Reported ante*, 1917 S.C. (H.L.) 56, 54 S.L.R. 600.)

Expenses — Taxation — Fees to Counsel in Outer and Inner House—Separate Cases Taken Together — Proof Fees — Inner House Fees— Watching Fees.

Separate actions raised by A and B, railway companies, against the same defenders for damages caused by flooding were taken together without being conjoined. The cases were of considerable magnitude and complexity. At the proof in the Outer House A's evidence occupied 5½ days, B's 1½ days, and the defenders' 5½ days, both pursuers being represented by separate counsel. In the Inner House A was represented by two senior and one junior counsel, and B by one of the same senior counsel and by the same junior counsel. On objections to the Auditor's reports on the pursuers' accounts of expenses, *held* (1) that in the circumstances of the case (*a*) there was no ground for limiting either of the pursuers' counsel to a watching fee, (*b*) there was not sufficient justification for discriminating between A and B in the scale of fees allowed in the Outer or in the Inner House; and (2) that for the Inner House the appropriate fee for one junior counsel should be allowed, regard being had to the fact that he was representing separate interests, and fees fixed at 18 guineas for the first day, 15 for each subsequent day, and 7 for half-days, one-half to be charged in each account.

Observations (*per* the Lord President) upon the principle which ought to guide the Auditor in taxing fees paid to counsel; upon "normal" and "proper" fees; and upon the effects of such precedents as that of *Goodwins, Jardine, & Company* v. *Brand & Son*, 1907 S.C. 965.

Expenses—Taxation—Expert Witnesses—Investigations Previous to Trial or Proof—Consultations with Counsel as to Line of Expert Evidence—Table of Fees (*C.A.S.*, 1913, *K iv*, 1, *App. I, v*, 3 (2)).

The Table of Fees (C.A.S., 1913, K, iv, 1, App. I, v, 3 (2)) provides—"... And in cases where it is found necessary to employ professional or scientific persons such as ... engineers, land surveyors, or accountants to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such person shall be allowed as may be considered fair and reasonable. ..."

In cases which were of considerable magnitude and complexity, necessitating assistance from expert witnesses, *held* that in the circumstances a charge for consultations of expert witnesses with counsel as to the line of expert evidence, or as to the material of such evidence, was admissible under the Table of Fees, and accounts remitted to the Auditor to make such additional allowances for such consultations, if any, as he might see fit.

The Caledonian Railway Company, *pursuers*, brought an action against the Corporation of Greenock, *defenders*, to recover compensation for £5000 damage done to their property by flooding due to the operations of the defenders on the West Burn of Greenock in their Lady Alice Park. The Glasgow and South-Western Railway Company, *pursuers*, brought a similar action for £1500 damages against the Corporation of Greenock, *defenders*. The cases without being conjoined were taken together, and on 14th May 1914 the Lord Ordinary (DEWAR), after a proof, pronounced interlocutors in both cases finding the defenders liable in certain sums to the pursuers and in expenses. The defenders reclaimed, and after the case had been argued before the First Division minutes of debate were ordered to be submitted to the whole Court. On 8th July 1916 the First Division in conformity with the opinions of a majority of all the Judges pronounced interlocutors adhering, and found the defenders liable in additional expenses since 14th May 1914. The defenders appealed to the House of Lords. On 23rd July 1917 their Lordships dismissed the appeals and affirmed the interlocutors appealed from.

The proof occupied from 28th to 31st October 1913, and from 17th to 20th and from 24th to 27th February 1914, the evidence for the Caledonian Railway Company, which was taken first, occupying 5½ days, that of the Glasgow and South-Western Railway Company 1½ days, and that of the defenders 5½ days. The Auditor allowed for senior and junior counsel for the Caledonian

Railway Company 25 and 20 guineas respectively for the first day and for 17th February, and 20 and 15 guineas for the other days, and for senior and junior counsel for the Glasgow and South-Western Railway Company 12 and 9 guineas respectively for the first day (charged by pursuers at 30 and 20) and for 17th February (charged at 25 and 20), and 10 and 8 guineas for the other days (charged at 20 and 15).

The hearing in the Inner House occupied fourteen days, including two Saturdays. The Caledonian Railway Company were represented by two senior and one junior counsel, and the Glasgow and South-Western Railway Company by one of the same senior counsel and by the same junior. The Caledonian Railway Company only charged for two counsel. The Auditor allowed them for senior and junior counsel 15 and 12 guineas respectively for the first day (charged at 30 and 20), 12 and 10 guineas for the other full days (charged at 20 and 15), and 6 and 5 guineas for the Saturdays (charged at 15 and 10), and allowed the Glasgow and South-Western Railway Company, who had charged their account on the same scale as the Caledonian Railway Company had done, for senior and junior counsel 8 and 6 guineas respectively for the first day, 6 and 5 guineas for the other full days, and 3 and 2 guineas for the Saturdays.

In taxing the fees of the certified expert witnesses the Auditor reduced the charge of £576, 14s. 6d. for Mr W. A. Tait, C.E., to £282, 14s. 6d.

Both the pursuers and defenders presented notes of objection to the Auditor's report, and the Caledonian Railway Company lodged answers to the defenders' objections.

The note of objections for the Caledonian Railway Company stated, *inter alia*—"(1) *Counsel's Fees in the Inner House.*—The pursuers submit that the fees allowed by the Auditor are altogether incommensurate to the trouble involved, and are on a lower scale than the fees allowed by the Auditor to counsel for conducting the proof in the Outer House. The case was one of great magnitude and complexity. It involved the consideration not only of difficult questions of law, but a great mass of facts and the study of complicated and technical engineering questions. After a hearing occupying fourteen days, the Judges of your Lordships' Division, by interlocutor dated 19th November 1915, 'in respect of the difficulty and importance of the questions submitted for determination,' ordered minutes of debate in order that the opinion of the Judges of the whole Court might be obtained on the questions raised by the record. Both in the Outer House and the Inner House the pursuers considered it necessary to instruct three counsel throughout, but have only charged for two in their account. They submit that the fees charged were moderate in the circumstances, and should have been allowed by the Auditor in full.

"(2) *Skilled Witnesses' Fees.*— . . . Mr Tait was the leading engineering witness for the pursuers. The pursuers do not know on what principle the Auditor has taxed his account. His charges may be conveniently divided as follows :—

1. Up to the time of giving his evidence	£344	7	7
2. Research work in preparation for the continued proof .	176	13	11
3. The preparation of notes and memoranda for the use of counsel on engineering points raised by the defenders in the Inner House and at the adjustment of the minutes of debate, and time occupied in research and calculations necessary for same . .	55	13	0
	£578	14	6

Mr Tait went into all the questions raised in great detail, and checked his calculations by a model specially constructed for the purpose. The pursuers submit there is no good reason for making any deduction from the first branch of his account. The charges in branches (2) and (3) were necessarily incurred owing to the complicated nature of the case. The work involved research into cases of flooding in London and other parts of England. New engineering points were continually arising in the course of the case, even as late as at the adjustment of the minutes of debate after the hearing in the Inner House. Without the assistance of Mr Tait and the work for which the charges are made the pursuers' case could not have been competently conducted."

The note of objections for the Glasgow and South-Western Railway Company stated, *inter alia—Counsel's Fees in the Outer and Inner House.*— . . . "The pursuers submit that upon the ordinary rules of taxation as between party and party there is no precedent for the allowance of such small fees for counsel as those which have been fixed by the Auditor in the present case. The case was one of great magnitude and complexity. It involved the consideration not only of difficult questions of law but of a great mass of facts and the study of complicated and technical engineering questions. After a hearing occupying fourteen days the Judges of your Lordships Division, by interlocutor dated 19th November 1915, 'in respect of the difficulty and importance of the questions submitted for determination,' ordered minutes of debate, in order that the opinion of the Judges of the whole Court might be obtained on the questions raised by the record. The pursuers submit that in a heavy and difficult case of the kind the fees to counsel charged by the pursuers in their account are reasonable and in accordance with recent practice. The pursuers are not able to say upon what basis the Auditor has proceeded in dealing with the fees charged in their account. They submitted to him that he should append a note to his report stating on what principle he had taxed the account, but he has declined to do so. It was argued to him by the defenders at the taxation that this action was subsidiary to the action against the same defenders at the instance of the Caledonian Railway Company, and that the account fell to be taxed as if this

action had been conjoined therewith. If this is the basis upon which the Auditor has proceeded, the pursuers submit that it is entirely unfounded, and in any event has not been reasonably applied. The action was in point of fact not conjoined with that of the Caledonian Railway Company, and has been treated as a separate action with an entirely separate process. For convenience of procedure the proof in both actions was set down for the same day. The Caledonian Railway Company led their evidence first. It was agreed, in order to save expense and shorten the proceedings, that such evidence, so far as applicable and relevant to the case of the pursuers, should be adopted by them, and it was in point of fact so adopted by a minute adjusted and lodged in process. At the close of the evidence for the pursuers in both cases the defenders led their evidence, which was held to be the defenders' evidence in both cases. It was essential for the pursuers to have their counsel in attendance during the whole time. No motion for any limitation of the findings for expenses in favour of the pursuers (which findings are contained in the interlocutors of 14th May 1914 and 8th July 1916) was made on behalf of the defenders when the findings were pronounced, and it was therefore incompetent for the Auditor to apply any principle of limitation or modification as he has done. With regard to the fees to counsel in the Inner House, the pursuers submit that no good grounds exist for applying any principle of reduction to these. There were separate reclaiming notes by the defenders in the two actions, and both reclaiming notes were put out for discussion together. Counsel for the defenders opened the discussion on both cases, and it was essential that the pursuer's counsel should be in attendance throughout the hearing."

In their note of objections to the report on the account for the Caledonian Railway Company the defenders stated, *inter alia*—"The defenders object to the taxation by the Auditor of the account of expenses incurred by the pursuers so far as relating to the items after mentioned. The action was set down for proof on the same day as an action at the instance of the Glasgow and South-Western Railway Company against the defenders. By a joint-minute in this action it was agreed that the evidence to be led by the defenders in this action should be led concurrently with the evidence to be led by the defenders in the action against them at the instance of the Glasgow and South-Western Railway Company, and that the parties should be entitled to found on the evidence of the defenders' witnesses in cross-examination by counsel for the pursuers in said last-mentioned action as evidence in this case. By joint-minute in the action at the instance of the Glasgow and South-Western Railway Company it was, *inter alia*, agreed that the evidence, oral and documentary, in the present action should in so far as relevant and applicable to the averments on record in the action at the instance of the Glasgow and South-Western Railway be held as evidence in that action, and that the parties to that action should be entitled to refer to and to found upon the said evidence, and further, that the evidence to be led by the defenders in the action at the instance of the Glasgow and South-Western Railway should be led concurrently with the evidence to be led by the defenders in the present action in the same manner as if said last-mentioned action had been conjoined with the present action. . . . The questions of fact at issue in the two actions were to a large extent identical. No separate question of law arose in the actions. In the minutes of debate for the Glasgow and South-Western Railway Company it is stated—'The questions of fact at issue are to a large extent identical with those in the action at the instance of the Caledonian Railway Company against the same defenders. The present pursuers submit no separate argument in law.' The Auditor has allowed fees for each day of the proof to two counsel in each of the actions. In the circumstances the defenders submit that the fees allowed to counsel for the proof in the present action ought to be reduced. . . . The pursuers in the present action instructed three counsel for the hearing in the Inner House, two senior and one junior. The Glasgow and South-Western Railway Company instructed as their counsel one of these senior counsel and the same junior counsel, so that the two companies were represented at the hearing by three counsel in all. The opening speech for the Caledonian Railway Company was made by the senior counsel who was instructed in both cases. The opening speech for the Glasgow and South-Western Railway Company was made by the junior counsel who was instructed in both cases. The second speech for the Caledonian Railway Company was made by the senior counsel who was instructed by them only, and the second speech for the Glasgow and South-Western Railway Company was made by the senior counsel who was instructed in both cases. The Auditor has allowed the following fees to senior counsel for the hearing in the present case:—For the first day 15 guineas, for each succeeding day 12 guineas, except for Saturday 29th May 1915, for which he has allowed 6 guineas, and for Friday 2nd July 1915, on which date the hearing was finished after two and a half hours' discussion, for which he has allowed 6 guineas. The defenders submit that these fees ought to be reduced to 12 guineas, 10 guineas, 5 guineas, and 5 guineas respectively. The corresponding fees allowed by the Auditor to junior counsel are:—12 guineas, 10 guineas, 5 guineas, and 5 guineas. The defenders submit that these fees ought to be reduced to 6 guineas, 5 guineas, 3 guineas, and 3 guineas respectively, fees of the like amounts being allowed in the account incurred by the Glasgow and South-Western Railway Company. . . . Mr Tait was examined as a witness on 29th and 30th October 1913. His accounts as a witness in the case as submitted to the Auditor cover the period from August 1912 (five months before the action was raised) to March 1916, when the minutes of debate for the par-

ties were lodged. They include charges for advising the pursuers as to the preparation of the record and the conduct of the action through all its stages up to and including the lodging of the minutes of debate. They deal with matters upon many of which no evidence was led, and as to some of which Mr Tait's own evidence would have been merely hearsay evidence. The defenders submit that a fee of £150 is sufficient to cover the accounts in so far as they consist of charges for investigations previous to the proof to qualify Mr Tait to give evidence upon matters of fact within his own knowledge."

In their objections to the report on the account for the Glasgow and South-Western Railway the defenders also stated, *inter alia*—"The defenders submit that only a watching fee of 10 guineas per day should be allowed in the account of expenses incurred by the pursuers in the present action for the first four days of the proof during which the evidence for the Caledonian Railway Company in the action at their instance against the defenders was being led. . . . The Auditor has allowed fees for each day of the hearing to two counsel in each of the cases. In the event of higher fees being allowed in the account of expenses incurred by the Caledonian Railway Company than those suggested by the defenders in their note of objections to the Auditor's report upon that account, the defenders submit that the fees allowed by the Auditor in the account of expenses incurred by the pursuers of the present action ought to be further reduced."

The following authorities were cited by counsel:—For the pursuers—*Goodwins, Jardine, & Company, Limited* v. *Brand & Son*, 1907 S.C. 965, 44 S.L.R. 553 and 788; *Boyd & Forrest* v. *Glasgow and South-Western Railway Company*, 1911 S.C. 1050, 48 S.L.R. 876; *Caledonian Railway Company* v. *Glenboig Union Fireclay Company, Limited*, 1912 S.C. 511, 49 S.L.R. 412; *Earl of Kintore* v. *Pirie*, 1903, 11 S.L.T. 216; *Hurst, Nelson, & Company, Limited* v. *Spencer, Whatley, Limited*, 1913 S.C. 101, 50 S.L.R. 52; *Bannatyne, Kirkwood, France, & Company*, 1907 S.C. 705, 44 S.L.R. 553; *Smellie* v. *Caledonian Railway Company*, 1916 S.C. 930, 53 S.L.R. 692. For the defenders—*Hurst, Nelson, & Company, Limited* v. *Spencer, Whatley, Limited*; *Burrell & Son* v. *Russell & Company*, 1900, 3 F. 12, 38 S.L.R. 8; *Shaw & Shaw* v. *J. & T. Boyd, Limited*, 1907 S.C. 646, 44 S.L.R. 460; *A B* v. *C D*, 1894, 22 R. 186, 32 S.L.R. 148.

At advising—

LORD PRESIDENT—This long and difficult litigation, which was the subject of a reference to the Whole Court and of an appeal to the House of Lords, comes before us again in four notes of objections to the Auditor's reports on the two pursuers' accounts of expenses. The objections are concerned (1) with the fees allowed on taxation to the pursuers' counsel, and (2) with the allowances to expert witnesses.

So far as counsels' fees are concerned the objections *hinc inde* may be summarised as follows, viz.—

First, as regards the proof and hearing in the Outer House.

1. *Caledonian Railway's Case.*

The defenders attack the fees allowed to the Caledonian Railway's counsel for a preliminary consultation, for the twelve days of the proof, and for the two days of the hearing in the Outer House, as being too large.

2. *Glasgow and South-Western Railway's Case.*

(*a*) The defenders attack the fees allowed to the Glasgow and South-Western Railway's counsel for the first four days of the proof, and maintain that only a watching fee should be allowed.

(*b*) The Glasgow and South-Western Railway in turn attacks the fees allowed to its counsel for the twelve days of the proof (including the first four days) and for the two days of the hearing as being two small. These fees as allowed are on a lower scale than those allowed in the case of the Caledonian Railway.

Second, as regards the hearing in the Inner House.

1. *Caledonian Railway's Case.*

(*a*) The defenders attack the fees allowed to the Caledonian Railway's counsel for the fourteen days occupied as being too large.

(*b*) The Caledonian Railway in turn attacks these fees as being to small.

2. *Glasgow and South-Western Railway's Case.*

(*a*) The Glasgow and South-Western Railway attacks the fees allowed to its counsel for this hearing—which are on a lower scale than those allowed in the case of the Caledonian Railway—as being too small.

(*b*) The defenders in turn maintain that if the fees allowed in the case of the Caledonian Railway are sustained, the fees allowed to counsel for the Glasgow and South-Western Railway should be reduced.

This complicated array of objections may be conveniently disposed of under two heads—(1) Is the discrimination which the Auditor has made as between the Caledonian Railway's case and that of the Glasgow and South-Western Railway—against the latter—justified by the circumstances of the litigation? and (2) Are there grounds on which the amounts of any of the fees taxed by the Auditor and now attacked ought to be interfered with?

The first question relates to a matter which does not fall within the peculiar discretion of the Auditor, and this Court is probably more familiar with the circumstances of the case than he can be. Those circumstances were very special. The cases brought by the two railway companies were on all fours only as regards the ascertainment of the run-off from the watershed of the burn during the flood and of the capacity of the culvert at the paddling pond. These were large and important topics, and both pursuers had to be prepared to deal with them. But the complicated problems presented by the course followed by the flood waters from the paddling pond downwards raised questions which might at many points have produced serious divergence between the two cases according as

the evidence came out, and according to the view which might be taken with regard to its effect, while both the damage suffered and the proximate causes of such damage were entirely different in the case of the two companies. The arrangement to take the two cases together as far as that was possible without conjoining them was a most proper one, and eased the burden in any case for whoever turned out to be the unsuccessful party. But the circumstances are not such as would be in any way appropriate for limiting either of the pursuers to a watching fee (as the defenders contend ought to have been done) in respect of any part of the time occupied. Nor do they afford in my opinion sufficient justification for any discrimination between the two companies in the scale of fees allowed to their counsel either in the Outer or in the Inner House.

The second question is as to the proper fees to be allowed to the pursuers' counsel. This is of course a matter peculiarly within the Auditor's province.

Proof Fees—Caledonian Railway's Case.—For a case of such dimensions and complexity as this was the fees allowed by the Auditor in the case of the Caledonian Railway for the preliminary consultation, proof, and hearing in the Outer House are certainly not excessive in amount, and the attack made upon them by the defenders fails. The Caledonian Railway does not object to these fees as insufficient.

Proof Fees.—Glasgow and South-Western Railway's Case.—As regards the case of the Glasgow and South-Western Railway, it follows from what has been said that the scale which ought to be applied to their counsels' fees for the proof must not be lower than that which the Auditor has applied in the case of the Caledonian Railway. But the Glasgow and South-Western Railway maintained that fees on a still higher scale should have been allowed, and claimed that such higher scale should be applied in their case even if it cannot be applied in the Caledonian Railway's case in the absence of objections by them. I have seen the Auditor in reference to the various questions raised in these objections, and it appears that in taxing the fees paid to counsel throughout the accounts he felt himself somewhat strictly confined by the scale adopted in *Goodwins, Jardine* v. *Brand*, 1907 S.C. 965. The fees he allowed for the proof in the Caledonian Railway's case are conformable to that scale. While the observations I intend making in the sequel as to the effects of such precedents as that of *Goodwins Jardine* may be of use to the Auditor in exercising his discretion in future, I think that in this case there are two sufficient reasons for declining to allow the Glasgow and South-Western Railway's counsel fees for the proof on a higher scale than that which the Auditor adopted in taxing the similar fees of the Caledonian Railway's counsel. The first is that the pursuers of one of these highly comparable litigations do not challenge the adequacy of the fees allowed to their counsel. The second is that in the circumstances the cases of the two pursuers cannot fairly be considered in isolation. Distinct and different as those cases were, the two sets of counsel engaged in them necessarily acted to a certain extent in co-operation, and while if either of the cases had stood alone it may well be that a higher scale than that of *Goodwins Jardine* might have been appropriate, the fact that they were to a certain extent complementary seems to afford sufficient justification for the moderation which the Auditor observed in the Caledonian Railway's case, and the same moderation should be observed in the Glasgow and South-Western Railway's case.

Inner House Fees—Both Companies.—The result is that the only remaining dispute about the fees paid to counsel is limited to those allowed for the hearing in the Inner House. Both companies attack the adequacy of those fees, and the critical objections are those made by the Caledonian Railway against the inadequacy of the fees allowed to their counsel, for—whatever may be considered to be appropriate in their case—there is no reason for treating the Glasgow and South-Western Railway differently.

I ask myself what is the principle which ought to guide the Auditor in taxing fees paid to counsel at whatever stage in a litigation. In *Shaw* v. *Boyd* (1907 S.C. 646) Lord Dunedin said that "although there does not seem to be any normal fee in the sense of a fee fixed by the Court, yet there must be in practice a recognised and more or less normal fee as between party and party," and went on to point out that whether the "normal" fee is the "proper" fee in a particular case depends on the difficulty and magnitude of the litigation and on the importance of the stake at issue. The decision in *Goodwins Jardine* did not interfere with the fees allowed by the Auditor for the hearing in the Inner House, but it is obvious that the "proper" fee (either in the Outer or in the Inner House) in one case of magnitude and difficulty by no means necessarily affords a reliable measure of the "proper" fee in another. The principle underlying the many decisions which have been pronounced on this subject is that neither the "normal" fee nor the "proper" fee is ascertainable by any arbitrary valuation or by reference to any abstract standards, but in accordance with the general practice of agents in instructing counsel. To state the principle more particularly, both the "normal" fee in an ordinary case and the "proper" fee in a big and difficult one is just such a fee as a practising law agent finds sufficient in order to command the services of competent counsel in cases of a similar character. I say "of competent counsel," because, as Lord President M'Neill pointed out in *Cooper* v. *North British Railway* (1863, 2 M. 346), the employment of counsel whose eminence in the profession may lead them to "make it a rule not to undertake [long and engrossing] cases in time of session except on such conditions as will compensate them for the loss of time," ought not to be allowed to throw an extra burden on the unsuccessful party, however valuable

the services of such counsel may be to their own clients. Now it is the peculiar function of the Auditor to interpret the course of professional practice among law agents with respect to the fees they send to "competent counsel," and the fact that he is himself a member of the agents' branch of the profession, and in touch with its practice, is the real reason why the Court is so chary of interfering with his interpretation. The delicate and responsible character of the Auditor's duty in this matter is thus clearly shown. In *Cooke* v. *Falconer* (1851, 13 D. 843) Lord Fullerton remarked that it is not the Auditor's business "to establish an average for fees beyond which everything is to be struck off." In Lord Cowan's opinion in the *Esk Pollution Case*, delivered in 1867 (5 M. 1054, at p. 1056), his Lordship borrowed from the Auditor's report a description of what Lord Dunedin in 1907 called the "normal" fee in the words "the usual rate of counsels' fees in ordinary cases." In that case, by the way, the "proper" fee was thought—in view of the length and complexity of the case—to be twice the "normal." Again, in *Neilson* v. *Barclay* (8 M. 1011), a tedious patent case, the "proper" fee was held on similar grounds, comparatively applied, to be half as much again as the "normal." In *Campbell* v. *Ord* (1873, 1 R. 149, at p. 155) the opinion was expressed that "unless it is clear that the agent has gone beyond bounds and exceeded the usual scale of remuneration the Court will not sanction any interference." And in *Tough's Trustees* v. *Dumbarton Water Commissioners* (1874, 1 R. 879, at p. 881) Lord President Inglis said that "the agent is in the first instance the best judge of what fees should be sent to counsel." It is unnecessary to recapitulate the cases subsequent to *Goodwins Jardine* which were examined at the debate. They illustrate the elasticity of a "proper" fee. It follows that the standards of "normality" and "propriety" are not rigid but plastic in the Auditor's hands, according to the practice for the time of agents instructing counsel—a practice which varies of course with the nature of the particular case in hand. The custom which seems to have been followed fifty years ago of allowing for jury trials what were actually called "maximum" fees, and of refusing fees of like amount for proofs unless in exceptional circumstances, may well have become attenuated under changed conditions of practice. The custom was supposed to be justified by the continuous and late sittings which were then thought necessary in jury cases (see Auditor's Report in *Wilson v. North British Railway*, 1873, 1 R. 304, at p. 305). It is obvious that a long-established practice in the Auditor's office may tend to become a rule of thumb, and the strict observance of some decision of this Court in a particular case may erroneously be supposed to set up an inflexible general rule. In this way the "normal" fee or the "proper" fee habitually allowed on taxation may get out of relation with current professional practice. If this occurs, it is for the Auditor, while unfailing in his observance of moderation, to depart from the rule of thumb or to correct the too general application of a particular decision, and so to bring both the "normal" and the "proper" fee into harmony with the practice of the profession. It is always open to the parties to object; but the Auditor's discretion, if exercised on those principles, will not be lightly interfered with.

In the present case, which was one of quite exceptional length and difficulty, and on which (though not strictly a test case) a number of claims by persons other than the pursuers depended, the "proper" fee for the Inner House might possibly have been fixed by the Auditor on a rather higher scale than that followed in *Goodwins Jardine* if he had not thought his interpretation of professional practice to be limited by the decision in that case. In using the expression "a rather higher scale" I have in mind the special feature of this case—already alluded to—that the two sets of counsel necessarily acted more or less in co-operation, and that the situation is not therefore just the same as if the two litigations had been separately conducted. I think it is right that he should have the opportunity of reconsidering these fees in the light of the observations just made.

Allowances to Expert Witnesses—Both Companies.—The position with regard to allowances to expert witnesses is that both pursuers object to the amounts to which the Auditor has restricted the allowances claimed as inadequate. The table of fees limits such allowances to what is "fair and reasonable" for the "trouble and expense" of such experts in making "investigations previous to the proof in order to qualify them to give evidence thereat." The figures arrived at by the Auditor are the results of a careful and detailed examination of the claims in the light of this restricted provision in the table. It is, no doubt, difficult to dissever trouble and expense incurred by an expert adviser in relation to the advisability of instituting proceedings, from trouble and expense incurred with a view to giving evidence in support of the case. The latter alone is chargeable, and this is a matter on which the Auditor's considered judgment is entitled to the greatest weight. I understand from the Auditor that it is not the practice in his office to allow under any circumstances for consultation with counsel as to the line of expert evidence or as to the material of such evidence. Probably in most of the cases in which experts are examined this is quite right, but in a case like the present I see no reason why a charge for such consultation if given should not be admitted as between party and party. But this is the only particular in which, as it appears to me, any modification of the Auditor's taxation is permissible under the table of fees. The allowance is made to an expert only *qua* witness. This excludes all charges for assistance given to counsel in Court both during the proof and at the hearing, whether in the Outer or in the Inner House. Assistance of this kind in cases which involve technical questions can be most useful, not to counsel only, but through

them to the Court, and it may be that if the table of fees became subject to revision the inclusion of some provision for an allowance in respect of such assistance should be considered. Again, investigations made during the proof, but after the expert witness has left the box, may afford invaluable guidance in the examination of other witnesses or in the cross-examination of experts adduced by the opposite party. But such investigations are not recognised as affording permissible ground for an allowance under the table of fees.

On the whole matter I think (1) that the defender's objections to the accounts of the railway companies as taxed should be refused; (2) that the objections of the Glasgow and South-Western Railway should be sustained to the effect of finding the Glasgow and South-Western Railway entitled to fees for counsel in the Outer House on the same scale as those allowed by the Auditor in the case of the Caledonian Railway, and also to fees in the Inner House on the same scale as those which may be allowed by the Auditor in the case of the Caledonian Railway; (3) that the objections of both railway companies to the taxed allowances made by the Auditor to expert witnesses should be refused, except in so far as the Auditor may find reason to allow for their trouble and expense in consultation with counsel as to the line or material of their intended evidence; and (4) that *quoad ultra* further consideration of the objections of the railway companies should be superseded, and the accounts sent back to the Auditor along with the objections so far as not refused in order that — in the light of the views above expressed — the Auditor may (*a*) apply the same scale of fees to the counsel of both companies in the Outer and in the Inner House, (*b*) reconsider the scale of fees allowed in the Inner House, and (*c*) make such additional allowance, if any, as he may see fit for consultation between the expert witnesses and counsel with regard to the line or the material of their intended evidence.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

On 26th November the Court pronounced in the action at the instance of the Caledonian Railway Company the following interlocutor — ". . . Repel the defenders' objections; also repel the pursuers' objections to the taxed allowances made by the Auditor to expert witnesses, except in so far as the Auditor may find reason to allow for their trouble and expense in consultation with counsel as to the line or material of their intended evidence: *Quoad ultra* supersede consideration of the pursuers' objections, and of new remit the pursuers' account to the Auditor along with the objections so far as not refused in order that in view of the opinions expressed by the Court the Auditor may (*a*) apply the same scale of fees to the pursuers' counsel in the Outer and in the Inner House, (*b*) reconsider the scale of fees allowed in the Inner House, and (*c*) make such additional allowance, if any, as he may see fit, for consultation between the experts and counsel with regard to the line or the material of their intended evidence, and to report."

The interlocutor pronounced by the Court in the action at the instance of the Glasgow and South-Western Railway Company differed from the above only in sustaining the pursuers' objections to the effect of finding them entitled to fees for counsel in the Outer House on the same scale as those allowed by the Auditor in the case of the Caledonian Railway Company, and also to fees in the Inner House on the same scale as those which might be allowed by the Auditor in the case of the Caledonian Railway Company.

In taxing the pursuers' accounts in obedience to the remit, the Auditor allowed to counsel in the Inner House 20 guineas to senior and 15 guineas to junior for the first day, and 15 guineas to senior and 12 guineas to junior for each of the subsequent days, and made an additional allowance of 10 guineas to each expert witness for preparing for and attending a consultation with counsel with regard to the line or the material of their intended evidence.

The Auditor having again reported, the defenders again lodged notes of objections in each case to the fees allowed to junior counsel in the Inner House, on the ground that both the pursuers having been represented by the same junior counsel the result of the Auditor's second taxation was to charge defenders twice for the same junior counsel, and to allow him fees greater in the aggregate than the fees allowed to either of his seniors. They submitted that the fees to junior counsel should not exceed in each action those allowed by the Auditor at the first taxation of the account for the Caledonian Railway Company.

Counsel were heard on the objections and reports in the Single Bills.

At advising—

LORD PRESIDENT — The only question remaining on the taxation of these accounts relates to the fees of junior counsel in the Inner House. In carrying out the judgment pronounced on 26th November last (which directed that the same scale of fees to counsel should be applied in the case of each pursuer) the Auditor has allowed fees for two separate juniors. While in the Outer House the two pursuers were represented during at anyrate a considerable part of the proof by separate senior and junior counsel, when the case came into the Inner House they supported the Lord Ordinary's judgment by one junior counsel and two seniors. All three held instructions from the Caledonian Railway Company; one of the seniors and the junior held instructions from the Glasgow and South-Western Railway Company. This circumstance was a reflection of the specialty in the conditions affecting the taxation of the accounts in this case which was emphasised in my former opinion. The specialty consists in this, that while the cases of the two pursuers were distinct and different from

each other, their circumstances (together with the fact that for convenience they were heard together) necessarily brought about a certain amount of co-operation between the sets of counsel. In short, "the situation is not just the same as if the two litigations had been separately conducted."

It was not intended by the directions we gave to the Auditor to foreclose any question as to whether each pursuer should be allowed fees as for a separate junior of their own in the Inner House, or whether they should each be allowed one-half of whatever might be a proper fee for one junior counsel representing both of them, for the point is one which might become very material in considering the total amount of the Inner House fees as that total would be affected by treating both companies alike. It was quite properly pointed out by the pursuers that this question was not made the subject of an express reservation when we repelled the defenders' objections to the pursuers' accounts by the interlocutor of 26th November last. While such a reservation would have prevented any possibility of misunderstanding, I do not think—having referred to the terms of the objections—there is anything to prevent us from dealing with the matter now.

The fact that one counsel is separately instructed by two separate parties to a litigation of course presents no bar to the allowance to each party of a separate full fee. But the specialities already alluded to make it hardly fair to apply that method of taxing the Inner House fees for junior counsel in the present case. Having regard to the circumstances, I think that justice will be done by allowing the appropriate fees of only one junior counsel in the Inner House to be divided equally between the two pursuers. In fixing the amount of those fees regard must be had to the fact that he had the duty of representing separate interests. On the other hand, it has also to be kept in view that the hearing extended over so long a period as fourteen continuous sederunt days. I have consulted with the Auditor on the subject, and I think the appropriate fees in the special circumstances of this case are as follows:—18 guineas for the first day and 15 guineas for each subsequent day, except the two Saturdays, for each of which 7 guineas should be allowed. This comes to 197 guineas in all, of which one-half—or 98½ guineas—should be allowed to each pursuer instead of 132 guineas to the Caledonian Railway Company and 65 guineas to the Glasgow and South-Western Railway Company, as allowed on first taxation. Taking senior and junior counsel together, the result is to increase the Inner House fees above the amount allowed on first taxation by 8½ guineas in the case of the Caledonian Railway Company and by 154½ guineas in the case of the Glasgow and South-Western Railway Company.

LORD MACKENZIE—I concur.

The LORD PRESIDENT intimated that LORD SKERRINGTON, who was absent at advising, concurred.

LORD CULLEN did not hear the case.

The Court on 25th February pronounced in each case an interlocutor in the following terms (*mutatis mutandis*):—

> "... Having considered the objections to said second report for the defenders ... and heard counsel thereon, Sustain the said objections ... to the effect of allowing junior counsel who argued both this case and the relative case at the instance of the Caledonian Railway Company only one fee in the Inner House for both cases, one-half of said fee to be charged in each account; find that the fees for said junior counsel should be stated as follows—18 guineas for the first day, 15 guineas for the second and subsequent days except half days, for which allow a fee of 7 guineas; and said findings having been given effect to, and pursuers' account having accordingly been adjusted ... of consent decern against the defenders for payment to the pursuers of the said sum ...; find no expenses due to or by either party in connection with the objections to the Auditor's reports."

Counsel for the Pursuers the Caledonian Railway Company—Hon. W. Watson, K.C. —Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Pursuers the Glasgow and South-Western Railway Company—Macmillan, K.C.—Jamieson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders — Dean of Faculty (Constable, K.C.)—Keith. Agents —Cumming & Duff, W.S.