of one genus, and that therefore the rule cannot be applicable to the general words because we cannot find one common characteristic of the enumerated causes.

I do not think that is sound, because, in the first place, the general words must be subject to some restriction, because they are expressly brought into the clause to provide for exceptions and not for a general rule. And if they were to be interpreted in their most universal sense, the specific enumeration of exceptions would be futile and the general rule would be swept away —there would be no meaning in it. The clause, in that view of it, would have been properly framed by excepting all causes of detention except the fault or negligence of the charterer. I must say also that I concur with your Lordship in finding no great difficulty in discovering a common characteristic of all the enumerated causes which is not to be found in the actual cause of the delay—the congestion of traffic in the harbour—because, although there are a great variety of causes, they resemble one another in this, that they are all accidental causes arising from the state of the weather or from the breaking down of machinery or from strikes or lock-outs or stoppages of a colliery, all of which would obstruct the ordinary and lawful working of the harbour upon the assumption that the harbour is perfectly ready to receive the ship.

It seems to me that the actual cause was different from all these, and that it is within the general intention of the contract to put the risk of such unavoidable delay upon the charterer.

LORD MACKENZIE—I am of opinion that the appellants are entitled to succeed.

There are, as was pointed out, two classes of charter-party—in the first the lay-days are stipulated to begin from the time the ship obtains a berth; in the second the lay-days run from a point of time fixed independently of the ship obtaining a berth. In the first class of cases the risk of obtaining a berth is with the ship; in the second it is with the charterer. The present charter-party falls under the second class. It is provided that "the time for loading is to commence from the first high-water after arrival in roads, and written notice of readiness given in ordinary business hours"; and that "the vessel is to be loaded in sixty-six running hours." These are the terms of the bargain, and according to them the charterer is responsible if the time is exceeded, although the delay was occasioned by no default on his part.

Unless, therefore, the charterer brings the case within one of the specified exceptions, or within the general exception of "other unavoidable cause," liability attaches to him. I have come to be of opinion that detention by cranes cannot fairly be construed as meaning failure to obtain a berth. One would expect distinct language to displace what *prima facie* on a construction of this charter-party was an obligation of the charterer, viz., to obtain a berth. If the charterer intended to protect himself from the consequences of failure to get a crane berth, I think it was for him to get the clause of exception clearly expressed.

I have less difficulty in rejecting the argument that the principle of *ejusdem generis* construction is not to be applied in construing the words "or other unavoidable cause," and in holding that these words do not refer to what might occur in the normal working of the port.

I therefore concur with your Lordships.

LORD JOHNSTON was absent.

The Court recalled the interlocutor of the Sheriff-Substitute dated 23rd July 1910; found in fact in terms of the first, second, and fourth findings in fact in said interlocutor; found in law that in those circumstances the detention of the "Abchurch" was not a detention within the exceptions enumerated in the charter-party; and decerned against the defender for the sum sued for.

Counsel for Pursuers and Appellants—Aitken, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for Defender and Respondent—Munro, K.C.—A. R. Brown. Agents—Cockburn & Meikle, W.S.

Friday, June 16.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

EARL OF CRAWFORD *v.* PATON.

Property—Exclusive Right and Use—Contract—Notes—Searcher—Public Records—Interdict — Confidentiality — Original Notes Made by Searcher Employed to Examine and Take Excerpts from Public Records.

A searcher of records who was employed to make searches in public records in order to obtain and furnish excerpts of all entries relating to persons of a certain name, made shorthand notes of the entries, and subsequently transcribed these notes and delivered these transcriptions to the person who employed him. In an action by the latter against the searcher for delivery of the shorthand notes and for interdict against communication of them to any person without the pursuer's permission, *held*, after a proof, (1) that the notes belonged to the defender, and (2) that no actual or apprehended injury to the pursuer being involved by any use the defender proposed to make of the notes, interdict ought not to be granted.

The Earl of Crawford, *pursuer*, raised an action against the Rev. Henry Paton, *defender*, concluding for (1) delivery of "all notes of excerpts from the volumes of Acts and Decreets of the Court of Session and the Register of Deeds of entries relating to

persons of the name of Lindsay made by him on the instructions of and for the use of the pursuer, . . . " and (2) interdict against the defender "communicating to any person or persons without the permission of the pursuer information collected by him on the instructions of the pursuer, and relating to the entries in the said volumes of Acts and Decreets of the Court of Session and Register of Deeds."

The pursuer pleaded — "(1) The pursuer is entitled to delivery of the said notes in respect of (1st) they were made on his instructions and for his benefit in pursuance of the employment of the defender condescended on, *et separatim* (2nd) that they are necessary to the pursuer for the purposes of comparison with the said transcripts. (2) In respect of the defender retaining the said notes and using them as alleged to assist himself and others in making searches for persons other than the pursuer, an interdict should be granted as craved."

The defender pleaded, *inter alia*—"(1) No title to sue. (4) The pursuer's averments, so far as material, being unfounded in fact, the defender is entitled to absolvitor, with expenses."

The *facts* are given in the opinion of the Lord Ordinary (SKERRINGTON), who, after a proof on 26th May 1910, repelled the first plea-in-law for the defender and the pleas-in-law for the pursuer, and assoilzied the defender.

Opinion.—"In or about August 1901 the defender, who is a professional searcher of records, residing in Edinburgh, was instructed by William Alexander Lindsay, one of His Majesty's Counsel and Heralds, to make searches in as many volumes of the Acts and Decreets of the Court of Session as he could undertake for the sum of £20, with the object of supplying abstracts of all entries relative to persons of the name of Lindsay. On 3rd April 1902 the defender wrote to Mr Lindsay sending what he called his 'notes,' and stating 'the notes sent to you are transcribed from my drafts taken from the Register, as in abstracting sometimes things have to be turned round a little from the way they come into the Record.' From that time until the end of the year 1907 the defender was repeatedly employed by Mr Lindsay to furnish further abstracts of the same kind from the same register, and also from the Register of Deeds. Between 12th June 1902 and 26th April 1908 Mr Lindsay made fourteen payments to the defender, amounting in all to £476, 10s. 6d. In return for each payment the defender furnished Mr Lindsay with a fair copy in bound volumes of the required abstracts. This copy was, of course, based upon the notes which the defender had made while searching the records in the Register House. These notes were partly in Pitman's shorthand and partly in longhand with contractions peculiar to the defender. During the course of his employment the defender was never asked by Mr Lindsay to deliver up his original notes, and he deponed that if he had been asked to do so he might not have agreed to do the work on the same terms.

"It is proved that in so employing the defender Mr Lindsay was acting on the instructions and with the authority of his cousin the Earl of Crawford, the pursuer in the present action. It is not, however, proved that Mr Lindsay disclosed this fact to the defender, and the latter depones that at first he thought the search was being made for Mr Lindsay himself in connection with the Lindsay Society, which was then recently formed. It appears, however, from Mr Lindsay's letters to the defender, of 30th November 1904 and 27th September 1905, that by that time the defender knew that the abstracts were intended for and were paid for by Lord Crawford. Mr Lindsay never expressly stated to the defender that he was contracting as agent for and on behalf of Lord Crawford.

"In the leading conclusion of the summons the pursuer asks to have the defender decerned 'to deliver to the pursuer all the notes of excerpts from the volumes of the Acts and Decreets of the Court of Session and the Register of Deeds of entries relating to persons of the name of Lindsay, made by him on the instructions of and for the use of the pursuer.' Although the pursuer does not expressly plead that the notes are his property, the demand for their delivery can only proceed upon this assumption, and he explains in condescendence 4 that he 'desires the decision of the Court whether the said notes belong to the pursuer or the defender.' There is a further conclusion to have the defender interdicted from communicating to any person or persons, without the permission of the pursuer, information collected by him on the instructions of the pursuer and relating to the entries in the said volumes of Acts and Decreets of the Court of Session and Register of Deeds.' In any view of the case, this conclusion is far too wide, and could not be sustained as it stands. At the debate the pursuer's counsel founded upon this conclusion as if it were an alternative and substantive conclusion asking to have the defender interdicted from making any improper or unfair use of the notes in question, even upon the assumption that these notes were the defender's property. The conclusion says nothing about the use of the notes, which *ex hypothesi* fall to be delivered under the preceding conclusion. As I read the pleadings the two conclusions are cumulative and not alternative, and there is no conclusion applicable to the event of its being held that the notes are the defender's property. In condescendence 4 the pursuer states that he 'does not allege that the defender has made dishonourable use of the notes demanded.' In these circumstances I do not think that I am bound in the present action to attempt to define what seems to me a rather delicate question, viz., to what extent the defender is entitled to make use of these notes, assuming that they are his own property. I think it right, how-

ever, to say that I do not agree with the contention which he puts forward in his statement of facts to the effect that as the notes are his own private property 'he is free to make any use that he may deem proper of them.' It would not be difficult to figure a case where notes such as those in question might be used in a manner which was clearly dishonourable and prejudicial to the employer, and I see no reason why the law should not give a remedy in such a case, just as it does where an improper use is made of private letters which are the property of the recipient. As already explained, however, the question does not in my opinion arise in the present case, and the only question on the merits is whether the defender is or is not proprietor of the notes.

"The defender has a preliminary plea to the effect that the pursuer has no title to sue, and his counsel argued that in a contract like that under consideration the ordinary rule to the effect that an undisclosed principal may come forward and enforce in his own name a contract which he has authorised has no application. The contract between Mr Lindsay and the defender was a personal one in this sense, that the defender was bound to give the benefit of his own skill and experience, but it did not constitute the relation of master and servant between the two parties. I see nothing in the nature of the contract inconsistent with the right of the pursuer to come forward as he does and prove that Mr Lindsay was really acting as his authorised agent, nor does it seem to me that the defender suffers any prejudice by this proceeding. Accordingly I repel the defender's first plea-in-law.

"As regards the property in the notes, I think it clear that they belong to the defender and not to the pursuer. The defender was under no obligation to make such notes or to preserve them when made. If it had suited his convenience he might equally well have made the abstracts in the Register House direct from the original records. The authority upon which the pursuer's counsel chiefly relied was the case of *Horsfall* (1827), 7 B. & C. 528, where it was decided that the draft of a deed belongs to the client and not to the conveyancer. That is a very different case, because unless in exceptional circumstances a conveyancer is bound to prepare a draft which shall be exactly conform to the completed instrument, and he is bound to preserve the draft for the use and benefit of the client who paid for it. I accordingly assoilzie the defender with expenses."

The pursuer reclaimed, and argued—(1) The notes were the property of the pursuer, for they were what the pursuer employed and paid the defender to make for him. At all events the notes had come into existence through the contract with the pursuer, and were covered by the payment under the contract. That being so, the pursuer was entitled to delivery, just as in the case of deeds prepared by a solicitor—*ex parte Horsfall*, 1827, 7 B. & C. 528—or the plans prepared by an architect—*Gibbon* v. *Pease*, 1905, 1 K.B. 810. The defender here was employed and paid by time, and the results of work done during that time belonged to his employer—*Rollo* v. *Thomson*, July 14, 1857, 19 D. 994. Property in the notes was quite consistent with their being unpublished—Bell's Prin., 10th ed., sec. 1357—and with their compilation from sources available to anyone—*Leslie* v. *Young & Sons*, June 7, 1894, 21 R. (H.L.) 57, 31 S.L.R. 693; *Kelly* v. *Morris*, 1866, L.R., 1 Eq. 697. If the notes were the property of the defender, he would be entitled to make copies and sell them, and that he clearly could not do—*Exchange Telegraph Company, Limited* v. *Gregory & Company*, [1896] 1 Q.B. 147; *Exchange Telegraph Company, Limited* v. *Central News, Limited*, [1897] 2 Ch. 48. (2) Even if the pursuer could not establish property in the notes he was entitled to interdict. Confidentiality was involved in the contract. Further, the duty of a person employed to collect information was to reserve the information collected during the time he was so employed exclusively for the employer, and he was not entitled to make any other use of it—*Lamb* v. *Evans*, [1893] 1 Ch. 218, at p. 226; *Liverpool Victoria Legal Friendly Society* v. *Houston*, November 2, 1900, 3 F. 42, 38 S.L.R. 25. If interdict could not be granted in terms of the summons, the pursuer was entitled to interdict against the defender communicating to any person or persons without the permission of the pursuer any notes made by the defender when collecting information on the instructions of the pursuer, and relating to the entries in the volumes of Acts and Decreets of the Court of Session and Register of Deeds referring to persons of the name of Lindsay, or copies of any such notes or statements or summaries thereof or excerpts therefrom.

Argued for the defender (respondent)—(1) The property in the notes was not in the pursuer. The defender contracted to search the records and make and furnish extracts. That had been done and the contract thereby implemented. The notes in the defender's possession were not a copy of the excerpts supplied in implement of the contract. The defender was not paid by time but by slump sums, and that distinguished the case from cases like *Lamb* v. *Evans* (*cit. sup.*). If the defender were employed by time, that involved that he was the servant of the person employing him, *i.e.*, Mr Lindsay, and the pursuer could not sue, for the right of an undisclosed principal to sue on a contract to which he was not a party would not be extended to such a case—*Keighley, Maxsted, & Company* v. *Durant*, [1901] A.C. 240, at p. 256, *per* Lord Davey. The cases of *ex parte Horsfall* (*cit. sup.*) and *Gibbon* v. *Pease* (*cit. sup.*) had no bearing, because there the pursuer claimed what was specially charged and paid for, while here the judgment covered only the excerpts which had been delivered. (2) Interdict ought not to be granted. Confidentiality could not attach to excerpts made from a public

record. No doubt it might be a breach of the good faith involved for the defender to place the whole information at the disposal of some one else at small cost—*Morison* v. *Moat*, 1851, 9 Hare 241. The use that the defender proposed to make of the notes was, however, quite different from that and would not affect the pursuer in any way, and interdict would not be granted unless a wrong was actually being done or reasonably apprehended—*Hood* v. *Traill, &c.*, December 18, 1884, 12 R. 362, 22 S.L.R. 227; *King* v. *Hamilton*, January 17, 1844, 6 D. 399. In any case interdict against the publication of literary property depended on circumstances — *Cadell & Davies* v. *Stewart*, 1804, M., App. Lit. Prop. No. 4; *White* v. *Dickson*, July 5, 1881, 8 R. 896, 18 S.L.R. 651—and the circumstances did not justify it here.

At advising—

LORD DUNDAS—This is a peculiar and rather interesting case. The material facts lie within brief compass. The defender, a professional searcher of records, was instructed in 1901 by Mr W. A. Lindsay, K.C., one of the English heralds, to make searches in the Acts and Decreets of the Court of Session,—and the scope of search was subsequently extended to the Register of Deeds,—in order to obtain and furnish excerpts of all entries relating to persons of the name of Lindsay. The defender accordingly searched these records, his labours lasting until 1908. He did not at the outset know (what was the fact) that his employer was really Lord Crawford (the pursuer); but he was made aware of this at least as early as November 1904. The terms of the contract are embodied in correspondence, which is produced. It is not shown that it was a time contract, and no sum or scale of remuneration was specifically arranged; but the defender was paid what he asked, and it is admitted that his charges were "perfectly reasonable." The total payments amounted to £476, 10s. 6d. The defender worked at the records in the Register House. He did not make his final transcript directly from them; but, for greater convenience, made notes (which are produced) of the various entries, partly in Pitman's shorthand and partly in longhand with certain contractions of his own; and these notes he subsequently caused to be transcribed in longhand and bound in a series of volumes (also produced), which were duly furnished to Mr Lindsay for the pursuer. Witnesses were adduced on both sides to speak about custom or practice of searchers as regards retaining or delivering up notes made by them in the course of searching; but the result of their evidence seems to be purely negative. I gather, as indeed one would expect, that there is no custom or practice in the matter. It does not appear that a demand for delivery of such notes has ever been made by an employer, with one exception, spoken to by Mr M'Leod, who in that instance complied voluntarily with the request in preference to risking the discontinuance of his client's employment. No single case is proved (still less a custom) of such a demand being resisted, successfully or otherwise, by a searcher.

The principal conclusion of the summons is that the defender be ordained " . . . [*quotes*] . . ." It appears from the condescendence and the arguments of counsel that this conclusion is based on the theory that the notes in question are the pursuer's property. There seems to be very little substance in the dispute. Lord Crawford frankly depones—"I am desirous of having a decision as to where the property of notes so made is; I have no other object. . . . It is purely the question of principle that I want to have decided." The defender, on the other hand, says—"The reason why I am defending this action is simply this, that it is an unprecedented demand altogether, and I did not agree to give up the notes." Even if the pursuer succeded in getting delivery of the notes, that would not, I apprehend, prevent the defender, so far as the question of property is concerned, from making and retaining a copy of them. But the apparent slenderness of the interests involved does not absolve us from the necessity of deciding the case.

On the evidence before us, I think the pursuer's demand fails. It was urged by his counsel that the notes were made as a incident (whether necessary or not) of the contract, with a view to its fulfilment, and would not have been made but for the contract; that they were thus included in the payments made, and are therefore the pursuer's property. *Prima facie*, I think, the notes belonged to the defender, who wrote them on his own paper; and it is for the pursuer to prove the contrary. The defender was under no obligation, so far as I see, to make any "notes" at all, and if, having made such, he had chosen to destroy them, I do not see how the pursuer could have had a claim of damages against him on that account. It would, of course, have been competent to the parties to make it an express term of the agreement between them that all notes as well as proper transcripts of entries should be delivered up to the pursuer, in which case the present dispute could not have arisen; but they did not do this, and I do not think such an obligation is implied. On a fair construction of the correspondence it seems to me that the defender did all that he contracted to do by making the searches and furnishing a complete transcript of the entries. Nor do I think that, in the absence of express stipulation, the pursuer can properly be said to have paid for these notes. The analogy of the draft of a deed was pressed upon us, and I shall have to revert to it later. It is not, to my mind, a complete one. The preparation of a deed by a solicitor—in which a draft is in most cases an essential factor—is a matter often involving a high degree of confidentiality, and always of a private or at least personal character. The defender's task was merely to pick out certain entries from the pages of public records. Further, I am not prepared to hold that payment is in all cases a badge of property. As to this I might cite another analogy—not, I think, wholly

inapposite, though probably also incomplete—from the solicitor's craft, viz., that of the press copies which law agents habitually keep in their letter-books of all letters they write for their clients. It might not unfairly be said that the fee paid to the solicitor for writing a letter covers inferentially the cost of making the copy as an item in the professional performance of the client's business; yet the Court would not, I apprehend, order a solicitor to hand over to a client (as being his property) those pages of his letter-books which concerned the client's affairs. The point, indeed, seems to have been so decided in England (*Wheatcroft*, 1877, 6 Ch. Div. 97). On the grounds now summarised, I think these notes are the defender's property; and this part of the case must be decided, as the Lord Ordinary has decided it, upon its own facts, adversely to the pursuer.

I doubt whether any principle or rule of general application is here involved, unless the obvious and trite one that a man is bound to perform his part of a contract according to its expressed terms and reasonable implication. At all events, I confess that beyond this I am not prepared to formulate a universal principle which should govern this case and all other cognate or analogous ones. The pursuer's counsel relied on the English case of *ex parte Horsfall* (1827, 7 B. and C. 528, 31 Rev. Rep. 266), which I find is also reported 1 Man. and Ry. 306, and L.J. (O.S.) 6 K.B. 48. All the reports are extremely brief, and none of them is very satisfactory. In 7 B. and C. 528, the rubric bears that "an attorney upon receiving the amount of his bill is bound to deliver up to his client not only original deeds, etc., belonging to him, but also the drafts and copies"; and the narrative states that the attorney "delivered up all the deeds and original documents, but claimed a right to retain the drafts and copies which his client had paid for." From other reports I gather that the attorney's practical answer to the demand was an allegation of a custom or practice of attorneys to retain drafts under such circumstances; and the Master, to whom the Court referred the point, certified that this was the practice. The judgment of the Court of King's Bench seems to have proceeded upon the admitted fact that the attorney had been paid for the drafts in question. Lord Tenterden, C.J., merely said—"It may be convenient in some cases to leave drafts and copies of deeds or other documents in the hands of an attorney, but the client is the proper person to judge of that. He who pays for the drafts, etc., by law has a right to the possession of them." I assume that *Horsfall's* case was rightly decided upon the facts before the Court. But it is difficult to gather exactly what these were; the case at best affords an analogy—an incomplete one to my mind, as already pointed out—to the present; and I am not clear that the Court intended to lay down a principle of universal application to the effect that a solicitor is under all circumstances and at all times bound to deliver to his client the draft of any deed he has prepared for him and been paid for. However this may be, I am certainly not aware of any authority in our own law for so sweeping a proposition. I think one can easily imagine circumstances in which the Court would order a solicitor to deliver up a draft to his client, and others in which the result might be different; it would always, I think, depend, as a question of degree and of convenience, upon the particular facts and circumstances before the Court. We were also referred to *Gibbon* v. *Pease*, [1905] 1 K.B. 810. In that case an architect had been employed by a building owner to carry out some alterations on houses. He prepared plans and superintended the execution of the work, which was completed, and his agreed remuneration at an inclusive percentage on the outlay was paid. The building owner then demanded the plans, which the architect refused to hand over. In an action for the recovery of the plans, the English Court of Appeal held that an alleged custom entitling architects to property in such plans after completion of the work (if it existed) was unreasonable and afforded no answer to the action. The decision, which of course is not binding upon us, appears to have been a sound one. Reason and good sense support the view that such plans belong to the house owner, who might require them in the future in order to know the position of the drains, flues, and the like. But it would not, to my mind, by any means follow that an architect would necessarily be obliged to hand over all drawings, or sketches, or designs which he might have prepared in the execution of the contract, even though these were inferentially paid for by the agreed percentage upon outlay. I observe that Cozens-Hardy, L.J. (now M.R.), in delivering his judgment in *Gibbon* v. *Pease*, said—"The principle which governs this case cannot, in my opinion, be distinguished from that which governed the decision of the Court in the solicitor's case, *ex parte Horsfall*, to which I referred in the course of the argument. In that case, as in this, there was a contract for the performance of certain work. There were things which were necessary for the completion of the actual deed of conveyance, which was what the parties bargained for, and though a custom was set up by the solicitor of a right on his part to retain drafts and copies of deeds and documents the originals of which he was admittedly bound to deliver up, the Court decided that the client who had paid for them had a right to the possession of them." As already stated, I venture to doubt whether there is truly any universal "principle" which governs all such cases; I have difficulty in regarding *ex parte Horsfall* as an authority even in England for that proposition; and in the present case I do not think that upon a reasonable construction of the contract Lord Crawford paid for the notes now in dispute. Many other cases, more or less analogous to the present, might be figured, as tending to negative the view that all documents made or prepared in the performance of a contract for some finished

work or service, and in that sense is inferentially included in the agreed-on price or payment, can be legally demanded by the payer as his property. I may perhaps cite one such instance—the painting of a portrait for a fixed sum of money. I think it is out of the question to suppose that the artist would be bound to deliver up in return for the price, not only the finished portrait, but also all sketches or drawings he had made in order to enable him to produce a satisfactory result. It would be idle to pursue these topics further. This part of the case seems to me, as I have said, to be adverse to the pursuer upon its own facts; and I have only enlarged upon the matter because the subject is interesting, and in order to illustrate why it appears to me to be one which does not lend itself to a decision on "purely the question of principle," such as Lord Crawford apparently desires to obtain.

The second conclusion of the summons is for interdict against the defender "from communicating to any person or persons, without the permission of the pursuer, information collected by him on the instructions of the pursuer, and relating to the entries in the said volumes of Acts and Decreets of the Court of Session and Register of Deeds." It would, I think, have been impossible in any view to grant interdict in such vague and comprehensive terms. The pursuer's counsel, without tendering a formal amendment of his summons, explained for our guidance that what he really desired — if his first conclusion should be negatived—was an interdict against the defender "communicating to any person or persons, without the permission of the pursuer, any notes made by the defender when collecting information on the instructions of the pursuer relating to the entries in the volumes of the Acts and Decreets of the Court of Session and Register of Deeds referring to persons of the name of Lindsay, or copies of any such notes, or abstracts or summaries thereof, or excerpts therefrom." I doubt whether this demand is really a modification of the original one, and it seems to be open to the same criticism. But I need not discuss that, as I am clearly of opinion that we ought not to grant interdict either in the one form or in the other. The Lord Ordinary treated the second conclusion as being subordinate or ancillary to the first, and not — as the pursuer's counsel maintained — a substantive alternative proceeding on the assumption that the property of the notes was in the defender and not in the pursuer. Assuming the pursuer's view on this point to be correct, I think he is not entitled to interdict. There may, no doubt, be circumstances where the proprietor of a document can be restrained from making illegitimate use of it. An illustration is furnished by the old case about the poet Burns' letters to "Clarinda"—*Cadell & Davies* v. *Stewart*, 1804, Mor. Dict., "Literary Property," Appendix, Part 1, No. 4. But such cases usually involve the element of confidentiality, which it is difficult to associate with extracts from public records. I think the conclusive answer to the pursuer's second conclusion is that he has neither averred nor proved any ground for it at all. The condescendence is bare of any sufficient averment; and the Von Beidermann episode, referred to in the proof, falls far short of what is required in such a case. Interdict is not a remedy to be had for the asking; it involves penal consequences in case of breach; and it will only be given upon clear averment and proof of actual or definitely apprehended invasion of a legal right. Both are here entirely absent. The second conclusion, therefore, like the first, must in my judgment fail.

The defender has a preliminary plea on record of "no title to sue." If my views on the merits of the case are well founded, there is no occasion to consider it. But I think the Lord Ordinary rightly repelled the plea, for the reasons he has assigned.

Upon the whole matter, I am for adhering to the interlocutor reclaimed against.

LORD SALVESEN—The matter in dispute here seems scarcely to be of sufficient importance to justify an action in the Court of Session, but as a question of property is raised it is necessary to give it careful consideration. The case made for the pursuer and embodied in his first plea-in-law is that the notes of which delivery is sought were made on his instructions and for his benefit in pursuance of his employment of the defender; and it was also argued that the defender was paid by time and that all the work done during the time charged for belongs to the pursuer. This latter argument was based on passages occurring in two letters dated 24th and 29th January 1906 interchanged between Mr W. A. Lindsay (who acted for the pursuer) and the defender. Our attention was directed to the full terms of the letter of 24th January, and I am satisfied that the passages in question do not relate to the employment which the pursuer instructed, but to a separate piece of work which the defender did for Mr Lindsay. So far as the contract between the pursuer and the defender is concerned, I have reached the conclusion that the defender performed his part of it when he completed his examination of the various volumes of public records and forwarded an abstract of all the entries which occurred in them relating to persons of the name of Lindsay. He was under no obligation to make any notes with a view to transcribing the entries which he supplied, and I cannot see that he would have committed any breach of contract if he destroyed these notes when they had served their purpose. If he had minuted his entries from the public records as he proceeded with his search and had afterwards made a copy for his own use of the entries so minuted, I do not see how the pursuer could have claimed the property of that copy; and it makes no difference that the shorthand notes were made by the defender for his convenience before he furnished the pursuer with a full copy of the entries that he desired. If it had

been necessary in order to fulfil his contract that the defender should have made these notes the pursuer might perhaps have claimed delivery on the footing that they were part of the work which he had employed the defender to do and for which he had paid him, but this is not so. Moreover, it is not to be left out of view that according to the bulk of the evidence searchers who are employed in similar work are never asked to deliver up the notes that they have made and preserved for their own use to the person who employs them. Had the pursuer desired this it would have been easy for him to have stipulated at the outset either that the defender was not to make any notes of the entries which he was employed to search for and transcribe, or that he should deliver them up to the pursuer when the work was completed without keeping a copy. He did not do so, but left the matter to stand upon a simple contract of employment which the defender has implemented according to its terms. I accordingly agree with the Lord Ordinary in thinking that the pursuer has not established any right of property in the notes entitling him to the delivery which he seeks, and that the case is distinguishable from that of *Horsfall* (*cit.*) on the grounds adduced by Lord Dundas.

The summons, however, contains a conclusion for interdict against the defender communicating to any persons without the pursuer's permission information collected by him on the instructions of the pursuer and relating to entries of persons of the name of Lindsay in the volumes which he was employed to search. Construing this conclusion in the light of the record I think it is based on the property of the notes being in the pursuer, and is directed against the defender communicating any information which he had acquired in the course of his search and retained in his memory. It is thus supplementary to the first conclusion and not alternative. At the hearing before us, however, the pursuer's counsel stated that he would be willing that the interdict should be confined to the case of the defender communicating the notes to any person on the assumption that the property of the notes remained in him. So taking it, however, I think there are neither averments nor evidence before us which would justify our putting the defender under an interdict. The only use that he appears to have made of the notes was to facilitate certain researches which he was asked to make by a German baron who traced his descent on his mother's side to a certain David Lindsay, and apparently this is the thing to which the pursuer objects. I do not think that that is an improper use for the defender to make of the notes; nor do I see that the pursuer has any legitimate interest in preventing it. I can quite understand the view presented by the pursuer's counsel that this compilation of entries made by the defender on the pursuer's instructions and at his expense, and which the defender would have been very unlikely to make of his own accord, is one which the defender would not be entitled to sell to a third party without the pursuer's permission. I can also figure cases where he might be restrained from using the notes in such a manner as to prejudice his employer; but no case of that kind is attempted to be made; and the Court is not in the habit of granting the remedy of interdict unless where a wrong has been done or is appre hended. In this connection it must be borne in mind that all the entries which were furnished to the pursuer were made from documents which are accessible to any member of the public. It would have been a different matter if the defender had been employed to make abstracts of private documents supplied to him by the pursuer, in which case the employment would have been of the highest confidentiality. Here there is no element of that kind; and while it may well be that the pursuer could restrain the publication by the defender of this compilation of entries, I cannot see any ground for denying him the right to use information which he has acquired in the course of his business with a view merely to facilitating work which he may be employed to do for other clients. I am therefore for adhering to the Lord Ordinary's judgment on this part of the case also.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Pursuer and Reclaimer—Cooper, K.C.—Moncrieff. Agents—Lindsay & Wallace, W.S.

Counsel for Defender and Respondent—Macphail, K.C.—Chree. Agents—M. MacGregor & Co., W.S.

Tuesday, June 20.

SECOND DIVISION.

BOYD & FORREST *v.* GLASGOW AND SOUTH WESTERN RAILWAY COMPANY.

(Reported *ante*, 48 S.L.R. 157, 1911 S.C. 33.)

Expenses—Taxation—Fees to Three Counsel both in Outer House and Inner House—Amount of Inner House Fees.

On a note of objections to the Auditor's taxation of a successful party's account, the Court, in view of the fact that the case involved difficult questions both of fact and law, *approved* of the allowance by the Auditor of fees to three counsel both in the Outer House and the Inner House, and *refused* to interfere with the Auditor's discretion in allowing fees of more than the normal amount in the Inner House.

Opinion (*per* Lord Salvesen) that where fees to three counsel have been allowed in the Outer House, they ought also to be allowed when the case comes before the Inner House on a reclaiming note.

This case is reported *ante ut supra*.

On 20th January 1910 the Lord Ordinary