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

(JOHNSTON), after sixteen days' proof and hearing on evidence, pronounced an interlocutor making findings and sustaining certain of the pursuers' pleas-in-law. After twelve days' hearing, the Second Division, on 10th November 1910, adhered to the Lord Ordinary's interlocutor except *quoad* one of the pursuers' pleas, found the defenders liable in expenses since the date of the closing of the record, and remitted to the Auditor to tax and report to Lord Cullen, to whom the cause was remitted, with power to decern for the taxed amount of the expenses. The Auditor having reported, the defenders presented a note of objections to his report.

The objections were (1) against the allowance of fees to three counsel at the proof and hearing on evidence in the Outer House; (2) against the allowance of fees to three counsel at the hearing in the Inner House; (3) against the amount of the fees allowed for the hearing in the Inner House.

(1) The fees allowed in the Outer House were—

1909						
Feb. 23.	Paid Counsel's fee and clerk,	*Consultation,*	(1)	£6	13	6
	Do.		(2)	4	9	0
	Do.		(3)	4	9	0
Mar. 13.	Do.	*Proof,*	(1)	27	11	3
	Do.		(2)	22	1	0
	Do.		(3)	16	10	9
15.	Do.		(1)	22	1	0
	Do.		(2)	16	10	9
	Do.		(3)	10	17	6
17.	Do.		(1)	22	1	0
	Do.		(2)	16	10	9
	Do.		(3)	10	17	6
18.	Do.		(1)	22	1	0
	Do.		(2)	16	10	9
	Do.		(3)	10	17	6
May 29.	Do.		(1)	27	11	3
	Do.		(2)	16	10	9
	Do.		(3)	13	4	7
June 1.	Do.		(1)	22	1	0
	Do.		(2)	16	10	9
	Do.		(3)	10	17	6
2.	Do.		(1)	22	1	0
	Do.		(2)	16	10	9
	Do.		(3)	10	17	6
3.	Do.		(1)	22	1	0
	Do.		(2)	16	10	9
	Do.		(3)	10	17	6
Nov. 8.	Do.		(1)	27	11	3
	Do.		(2)	16	10	9
	Do.		(3)	13	4	7
9.	Do.		(1)	22	1	0
	Do.		(2)	13	4	7
	Do.		(3)	10	17	6
11.	Do.		(1)	22	1	0
	Do.		(2)	16	10	9
	Do.		(3)	10	17	6
12.	Do.	Half	(1)	13	4	7
	Do.	day.	(2)	8	15	6
	Do.		(3)	6	13	6
29.	Do.	*Hearing on*	(1)	16	10	9
	Do.	*Evidence,*	(2)	10	17	6
	Do.	*Pursuers' Speech*	(3)	7	14	6
30.	Do.		(1)	16	10	9
	Do.		(2)	10	17	6
	Do.		(3)	7	14	6
Dec. 6.	Do.	*Defenders'*	(1)	2	7	0
	Do.	*Speech,*	(2)	2	7	0
	Do.		(3)	13	4	7
7.	Do.	Half	(1)	2	7	0
	Do.	day.	(2)	2	7	0
			(3)	8	15	6
				£719	2	8

(2) and (3) The fees allowed in the Inner House were—

1910.						
June 10.	Paid fee to Counsel and clerk,		(1)	£27	11	3
	Do.	do.	(2)	22	1	0
	Do.	do.	(3)	16	10	6
14.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	16	10	9
	Do.	do.	(3)	10	17	6
15.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	16	10	9
	Do.	do.	(3)	10	17	6
16.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	16	10	9
	Do.	do.	(3)	10	17	6
27.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	13	4	7
	Do.	do.	(3)	13	4	7
28.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	13	4	7
	Do.	do.	(3)	13	4	7
29.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	13	4	7
	Do.	do.	(3)	13	4	7
30.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	13	4	7
	Do.	do.	(3)	13	4	7
July 4.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	13	4	7
	Do.	do.	(3)	13	4	7
5.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	8	15	6
	Do.	do.	(3)	8	15	6
11.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	8	15	6
	Do.	do.	(3)	8	15	6
12.	Do.	do.	(1)	22	1	0
	Do.	do.	(2)	8	15	6
	Do.	do.	(3)	8	15	6
				£575	17	4

On 18th March 1911 the Lord Ordinary repelled the defenders' objections, and decerned against them for the taxed amount of the expenses, and on 23rd March he granted leave to reclaim.

Argued for the defenders (reclaimers)—(1) This was not a case in which three counsel should be allowed for the proof. When a case consisted of separate branches, fees to three counsel were allowed on the principle of sub-division of labour—*Padwick* v. *Stewart*, March 4, 1874, 1 R. 697, 11 S.L.R. 318. There could be no sub-division of labour here. Fees to three counsel had been allowed on this principle in *Ogston & Tennant, Limited* v. "*The Daily Record*," 1910, 2 S.L.T. 230, and 1911, 1 S.L.T. 421. (2) Fees to three counsel were not allowed in the Inner House. There was no precedent for what the Auditor had done. The Court would only hear two counsel on either side. (3) The fees in the Inner House were larger than had ever been allowed before. They were clearly entitled to have them reduced on the present system of fees. The practice was to allow smaller fees in the Inner House than in the Outer House. Here they were of equal amount—*Goodwins, Jardine & Company, Limited* v. *Brand & Son*, 1907 S.C. 965, 44 S.L.R. 788; *Burrell & Son* v. *Russell & Company*, October 24, 1900, 3 F. 12, 38 S.L.R. 8.

Counsel for the pursuers was asked to reply on the question of the Inner House fees only. He argued—Fees to three counsel should be allowed in the Inner

House. If the pursuers were entitled to have three counsel in the Outer House, according to well-established practice they were entitled to have them in the Inner House. The case was one of great complexity, and the preparation for the debate involved much labour and research. The expense of three counsel had often been allowed in the Inner House in difficult cases—*Christie* v. *Thomson*, March 16, 1859, 21 D. 751; *Lord Blantyre* v. *Dunn*, February 15, 1848, 10 D. 706; *Craigie* v. *Marshall*, June 8, 1850, 12 D. 983. Moreover, this was a case in which the principle of subdivision of labour applied. The question as to the amount of the Inner House fees raised no principle, and was a matter that should be left to the discretion of the Auditor. There was no principle against allowing same fees in the Inner House as in the Outer House. The cases of *Tannett, Walker, & Company* v. *Hannay & Sons*, January 31, 1874, 1 R. 440, 11 S.L.R. 286, and *Duke of Buccleuch* v. *Cowan*, July 17, 1867, 5 Macph. 1054, 4 S.L.R. 190.

LORD JUSTICE-CLERK—The Court is always unwilling to interfere with the discretion of the Auditor of Court, who devotes his whole attention to questions of expenses and has great experience in such matters, unless we are satisfied that he has made a plain and flagrant mistake.

In this case the Auditor has exercised his discretion, and has found that certain fees were appropriate. The question then came before the Lord Ordinary, who saw no sufficient ground for interfering with the Auditor. I find myself in the same position. I think that this was a case in which it was proper to employ three counsel. The Auditor is a very good judge of that matter. He heard the parties, and in the circumstances decided that fees for three counsel ought to be allowed. I do not think that the Auditor's action is at all inconsistent with any of the cases quoted to us. It is perfectly plain, moreover, that while three counsel may be required for the proof, it may not be necessary to employ three counsel in the Inner House. But if a case be a very difficult one, containing a great amount of detail and involving a long debate, the Auditor may in the exercise of his discretion allow fees for three counsel in the Inner House. I see no reason for thinking that the Auditor's discretion was unwisely exercised in the present case, which was undoubtedly a very difficult one. Charges of fraud were made—not criminal fraud, but fraud in the sense of misleading, as often occurs in such cases—and the decision was laid on that ground.

The only remaining question is whether the fees in the Inner House should be as large as the Auditor has allowed. That is a matter for his discretion, and I have not seen anything in any of the cases quoted which would indicate that the Inner House fees in this case should not have been allowed.

LORD DUNDAS—I am of the same opinion. As regards the Outer House, I am clear that this is a case where fees to three counsel should be allowed. The proof was very voluminous, and involved difficult questions both of fact and law. The only matter upon which I have had any difficulty is with regard to the Inner House. The employment of three counsel does not stand on quite the same footing there as in the Outer House. It is the practice of the Court to hear two counsel only on each side. One of the three counsel must therefore remain silent. Moreover, there is not the same necessity, nor indeed opportunity, for collaboration and mutual assistance in the Inner House as there is during the strain and stress of a proof. Further, if a party has had three counsel in the Outer House and desires not to drop any of them in the Inner House, it is a feasible course (I do not put it higher) to arrange that one of the three counsel who is not to address the Division be remunerated by a merely complimentary retaining fee (which would of course be recoverable, in the event of success, against the other party) upon the footing that he need not attend the discussion. But it appears that there are sufficient precedents to justify the allowance of fees to three counsel in the Inner House in a case like this, particularly the case of the *Earl of Kintore* v. *Pirie & Sons, Limited*, 11 S.L.T. 216. The amounts allowed are perhaps on the generous side, but that is not a matter in which the Court is likely to interfere with what the Auditor has done, unless it should appear that he was obviously wrong.

LORD SALVESEN—I am of the same opinion. I think that this is a typical case for the allowance of fees to three counsel at the proof. The case was one of magnitude and complexity, and raised questions of great difficulty both in fact and in law. I therefore think that the Auditor was well warranted in the course he has adopted in regard to the Outer House expenses.

I take a somewhat different view from my brother Lord Dundas as regards the expenses of the debate in the Inner House, because, in my opinion, 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. The idea that one of the counsel should be given a nominal retaining fee in order to keep him in the case and to prevent the opposite side from instructing him, is not one that commends itself to my mind. I think that he should be allowed the ordinary fees given in the Inner House in such cases.

The only other point that was raised was in regard to the amount of the fees which the Auditor has allowed in the Inner House. On this matter I can see no ground for holding that the Auditor has exercised his discretion unwisely. It is true that no case was cited to us in which the Auditor had allowed and the Court sustained so large a fee as had been allowed in this case to senior counsel for the first day's hearing, but in the case of the *Earl of Kintore* v. *Pirie*, 1903, 11 S.L.T. 216, the

fees allowed in the Inner House were on the whole larger than the fees in the present case. The tendency has been to exaggerate the difference between fees in the Outer House and in the Inner House. In certain cases which involve such preparation as the present case, counsel's labours in preparing for the debate in the Inner House are to my mind not less arduous than in preparing for a proof. At the same time the practice is sanctioned by long usage, and in the ordinary case is founded upon just reasons, but when dealing with exceptional cases, like the present, the Auditor might well come to the conclusion that he should allow the same fee for the first day's hearing in the Inner House as was allowed for the first day's proof, and I do not consider that we should interfere with what he has done.

LORD ARDWALL was absent.

The Court adhered.

Counsel for Pursuers (Respondents)—MacRobert. Agents—Pringle & Clay, W.S.

Counsel for Defenders (Reclaimers)—D.-F. Dickson, K.C.—Macmillan. Agents—John C. Brodie & Sons, W.S.

Tuesday, June 27.

SECOND DIVISION.

TAIT (SOMERVELL'S TRUSTEE) *v.* SOMERVELL AND OTHERS.

(See *ante* June 10, 1909, 46 S.L.R. 761, 1909 S.C. 1125; February 6, 1907, 44 S.L.R. 386, 1907 S.C. 528; and July 2, 1904, 41 S.L.R. 716, 6 F. 926.)

Agent and Client—Interest—Professional Charges.

In the winding-up of a sequestrated estate the Court *allowed* interest at 5 per cent. on the professional charges of agents who had made a judicial demand for payment, of those whose accounts charging interest at that date had been accepted and passed by the commissioners, and of those who had intimated in writing to the trustee on claiming payment that interest also was claimed—interest to run from the date of such demand, passing, or intimation respectively—but *refused* interest on professional charges where no judicial demand for payment had been made, nor any intimation given in writing that interest would be claimed from the date of the demand.

Blair's Trustees v. *Payne, &c.*, November 8, 1884, 12 R. 104, 22 S.L.R. 54, *followed.*

On 16th March 1909 John Scott Tait, C.A., Edinburgh, trustee on the sequestrated estates of James Somervell of Sorn, presented a petition for approval of a scheme of ranking and division of the purchase price of the estate of Sorn, which had previously been disentailed and sold by the trustee. On 10th June 1909 the Second Division pronounced an interlocutor, *inter alia*, approving of the scheme of ranking and division, and ordaining the petitioner to lodge the sum of £6808, 1s. 3d. on deposit-receipt in his name as trustee to meet the whole outstanding outlays and expenses of the sequestration. The Edinburgh Life Assurance Company, one of the heritable creditors, was ranked, *inter alia*, on any balance of the said sum of £6808, 1s. 3d. which might remain after meeting the said outlays and expenses.

On 31st May 1911 the Accountant of Court reported that the expenses chargeable against the said sum of £6808, 1s. 3d. amounted to £5154, 4s. 1d., leaving a balance of £1653, 17s. 2d.

The Accountant reported—"The question whether interest is payable on the agents' accounts, *i.e.*, not only on their outlays but also on their professional charges, has been raised. The Accountant found that interest on their accounts had been claimed by Mr More's—a former trustee—agents down to 16th November 1906, and had been included in the claim by Mr More's representatives, which was admitted by the commissioners by minute dated 11th March 1907, their claim for further interest being reserved; also that Mr Duke's (a prior trustee) agents had raised an action for payment of their accounts against Mr More as trustee. That action was interrupted by Mr More's death. A judicial demand for payment had thus been made. Other agents to whom accounts are due also claim interest. For three only of the accounts now being dealt with has decree been obtained, viz., that for Mr More's discharge, the curator *ad litem's* expenses, and the tutor *ad litem's* expenses in the disentail of Sorn. The law on the question is not definite. The ruling case is *Blair's Trustees* v. *Payne and Others*, 1884, 12 R. 104. Interest was not allowed on the agents' professional charges in that case, the accounts not having been rendered; but it was observed by Lord Craighill that 'whether from the date of rendering an account' interest would run is an open question,' and he further observed that it was 'a question of circumstances.' In this case the accounts, some of which date back to 1900, were all rendered, but none of the trustees had sufficient funds to pay them. All the agents might have taken action and obtained decree, but this would have meant further expense. They therefore awaited the sale of the entailed estates. The rents of Sorn were applied in meeting the charges thereon, the balance as regards the rents falling under the Edinburgh Life Office's Security being paid over to that office. The rents of the remainder of Sorn were exhausted by the charges. The question is an important one, as the interest comes to a large sum. On the whole accounts in the sequestration it exceeds £1000. As regards Sorn, it comes to £370, 0s. 4d. On the outlays alone it amounts to £118, 5s. 4d. In view of the fact that this is an insolvent estate, the Accountant is doubtful whether interest should be allowed