LORD TRAYNER—I agree. In the ordinary case I would not be disposed to interfere with the discretion of the Lord Ordinary in determining the manner in which the proof is to be taken. I think that that is a matter very much within his discretion. But this is not a question of the mode but of the time at which and the matter concerning which the inquiry should be made. I think that where, as here, there is a plea in bar, that is the first question to be determined. If well founded, it excludes all inquiry as to the merits.

LORD MONCREIFF — I agree with your Lordships. If there is a plea in bar founded upon an alleged discharge or settlement of the subject-matter of the action, and the statements in support of it present a sufficiently strong *prima facie* case, the proper course is to send the case to trial upon that question *primo loco*. In the defenders' averments here there is a strong *prima facie* case that the pursuer's claim has been settled, and I think therefore that that question ought to be disposed of first.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary, and remitted the cause for proof upon the averments in support of the defenders' second plea-in-law, and the pursuer's answers thereto.

Counsel for the Pursuer and Respondent —Salvesen, Q.C.—D. Anderson. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Defenders and Reclaimers —W. Campbell, Q.C.—Hunter. Agent—W. B. Rankin, W.S.

Wednesday, October 24.

FIRST DIVISION.

BURRELL & SON *v.* RUSSELL & COMPANY.

(*Ante*, Dec. 23, 1898, 36 S.L.R. 250; March 26, 1900, 37 S.L.R. 641.)

Expenses — Taxation — Fees to Counsel — Fees for Proof — Hearing in Inner House.

In a case of great complexity the proof and hearing on evidence lasted in all about twelve days. A reclaiming-note was presented, the debate on which extended over nine days. The Auditor reduced the fees charged for senior and junior counsel at the proof from thirty and twenty guineas *per diem* to twenty and fifteen respectively, and at the debate on the reclaiming-note from twenty and fifteen guineas *per diem* to fifteen and ten. Objection having been taken to this reduction the Court *repelled* the objection upon the ground that there was nothing to justify interference with the decision of the Auditor.

Expenses—Taxation—Fees to Skilled Witnesses.

Objections to the reduction by the Auditor of fees paid to a certified skilled witness from £214, 10s. to £67, 7s. 6d. *repelled.*

This case is reported *ante ut supra.*

On the case being brought up for approval of the Auditor's report, the pursuers objected to the report in so far as the Auditor had disallowed certain fees to the amount in all of £487, 19s. 2d.

The fees charged for senior counsel at the proof had been reduced from thirty guineas *per diem* to twenty guineas, and the fees charged for junior counsel from twenty guineas *per diem* to fifteen guineas. For the hearing in the Inner House the fees to counsel had been reduced from twenty guineas and fifteen guineas *per diem* to fifteen guineas and ten guineas respectively.

The case was one of great complexity. The proof and hearing on evidence occupied twelve days, and the hearing in the Inner House occupied nine days.

The pursuers also objected to the reduction of a fee of £214, 10s. charged for a certified skilled witness, Mr William Hannay Campbell, naval architect, Glasgow, to £67, 7s. 6d. In the account rendered by Mr Campbell, and paid by the pursuers, he charged the sum now claimed by the pursuers for fifty-nine days employed by him in "professional services rendered to Messrs Burrell & Son in their action against Messrs Russell & Company." The professional services referred to consisted in making calculations, models, plans and sections, preparing to give evidence, and attending consultations, and Court to give evidence.

Argued for pursuers—1. Considering the great complexity and importance of the case, it would be reasonable to allow double the ordinary fees to counsel for each day of the proof and of the hearing in the Inner House. That course was justified by practice — *Tannett, Walker, & Company* v. *Hannay & Sons*, January 31, 1874, 1 R. 440; *Duke of Buccleuch* v. *Cowan and Others*, July 12, 1867, 5 Macph. 1054; *Neilson* v. *Barclay*, July 19, 1870, 8 Macph. 1011.2. The Auditor had only allowed the leading skilled witness £67 for work which had occupied him fifty-nine days. In the case of the *Duke of Buccleuch, supra*, five guineas per day had been allowed to a similar witness. The same had been allowed in the case of *Gillespie* v. *Russell*, March 2, 1855, 17 D. 532.

Argued for defenders — (1) There was a distinction in the matter of counsel's fees between proofs and jury trials, the rate allowed being higher in the latter—*Wilson* v. *North British Railway Co.*, Dec. 13, 1873, 1 R. 304; *Campbell* v. *Ord and Maddison*, Nov. 5, 1873, 1 R. 149. (2) The witness in question was not in the position of a leading expert, being merely a subordinate official. Moreover, the information which he supplied had been to a great extent obtained by him for the purposes of the contract between the parties, and not for use at the trial.

LORD PRESIDENT — We have had the advantage of a very full argument, but I must say that, having regard to the known practice and to the authorities cited, I see no ground for disturbing the result arrived at by the Auditor. The fees allowed are somewhat higher than those allowed generally or at all for proofs, and the fees sanctioned in cases of trial by jury are hardly analogous, but even if they were, they would not sustain or justify an interference with the decision of the Auditor.

I should suppose that among other things the Auditor considered that when counsel has once prepared himself in a case to which he is to give exclusive attention, his daily duties are somewhat lighter than if he had to prepare in a number of fresh cases every day. We must keep in view that the Auditor is a man of experience; that he is well acquainted with the practice and decisions of the Court. It seems to me that it would be a serious thing to increase the fees allowed by the Auditor, as by so doing we might be understood to fix a minimum, or at all events an ordinary standard of fees.

The same remarks apply to Mr Campbell's account. The way in which it is made up is unusual, full time being charged for things which do not look as if they would occupy whole days. But there are really no materials before us which enable us to consider that question.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court repelled the objections.

Counsel for the Pursuers—Salvesen, Q.C. —Clyde. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders—Ure, Q.C.—Younger. Agents—J. & J. Ross, W.S.

Thursday, October 25.

SECOND DIVISION.

HARGRAVE'S TRUSTEES *v.* SCHOFIELD.

Succession—Direction to Trustees to Retain Subject of Vested Right—Vesting—Repugnancy.

A testator directed his trustees to divide his estate equally among his nephews and nieces *nominatim*, the children of A and of B or their lawful issue, share and share alike, by roots, the share of any who might predecease the testator to accrue to the survivors. He further directed them, during the lifetime of B, to retain in their hands the capital of the shares belonging to B's children, and to pay to them the revenues thereof only.

Held (*diss.* Lord Young) that, as the fee of their respective shares of the estate had vested in B's children *a morte testatoris*, and there were no ulterior trust purposes to protect, the direction to the trustees to retain during B's lifetime was ineffectual, and that B's children were entitled to immediate payment of their shares.

Miller's Trustees v. *Miller*, December 19, 1890, 18 R. 301, *followed*.

Joseph James Hargrave, who died domiciled in Scotland on 22nd February 1894, left a will dated 31st July 1893 and made in Montreal, whereby he conveyed his whole estate to certain trustees for the purposes therein specified.

By the fourth purpose of his will the truster directed his trustees "to invest all the said residue of my said estate in interest-bearing securities, and to pay the revenues thereof to my stepmother Margaret Alcock Hargrave of Rutland Square in Edinburgh aforesaid, and my uncle Lockhart Mactavish of Otago in New Zealand, during their joint lives, share and share alike, and from and after the death of either to pay the whole of said revenues to the survivor during his or her lifetime. Upon the death of the survivor of my said stepmother and uncle, my said trustees shall divide my said estate equally between my nephews and nieces hereinafter named, to wit, Flora Mactavish Ogston, Mary Ogston, Francis Hargrave Ogston, and Walter Henry Ogston, children of Alexander Ogston, doctor of medicine of Aberdeen, Scotland, Lockhart Alexander Schofield, James Schofield, Frederick Joseph Schofield, Margaret Florence Schofield, Letitia Schofield, and Mary Schofield, children of Frederick Schofield, late of Brockville, Ontario, or their lawful issue, share and share alike, by roots, the share of any predeceasing me to accrue to the survivors. But I direct that during the lifetime of the said Frederick Schofield, my said trustees shall retain in their hands the capital of the shares belonging to the said Lockhart Alexander Schofield, James Schofield, Frederick Joseph Schofield, Margaret Florence Schofield, Letitia Schofield, and Mary Schofield, and shall pay to them the revenues thereof only."

The truster was survived by the said Mrs Hargrave and Lockhart Mactavish, and by the nephews and nieces mentioned in the said will, children of the said Alexander Ogston and Frederick Schofield.

Lockhart Mactavish died on 15th February 1899, and Mrs Hargrave on 5th June 1899, at which date the residue of the estate fell to be divided in terms of the will. Frederick Schofield was still alive.

A question having arisen as to the right of the children of Frederick Schofield to obtain immediate payment of the shares of residue destined to them, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees under the truster Joseph James Hargrave's will; (2) five of the children of Frederick Schofield, and the trust assignees of the remaining child.

The first parties contended that under the provisions of the said will they were not entitled to hand over the capital of said shares to the second parties until the death