had the Lord Advocate been successful this Court would have mulcted the respondents in expenses.

LORD JUSTICE-CLERK — As your Lordships are agreed, according to the practice of the Court I have no vote in this matter, but I think it right to say that my difficulties accord with those of Lord Ormidale, so that if I had been left to decide the case alone I think that I should have reached a different conclusion from what your Lordships have done. But recognising the very special circumstances of the case and the views which your Lordships have expressed, I do not think it desirable that I should dissent from the judgment which will result from the views expressed by your Lordships. The motion will therefore be refused.

The Court refused the motion for expenses.

Counsel for H. M. Advocate—MacRobert, K.C., A.-D. Agent—Crown Agent.

For Respondent Aldred—Party.

Counsel for Respondents other than Aldred — T. G. Robertson. Agent — W. Carter Rutherford, S.S.C.

COURT OF SESSION.

Saturday, December 3.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

SNEDDON *v.* BATON COLLIERIES, LIMITED.

Expenses — Taxation — Skilled Witness — Preparations for Proof — Case Remitted to Expert by Joint Consent after Proof Allowed—C.A.S., K, iv (Table of Fees, V, 3 (2)).

The Table of Fees annexed to the C.A.S., K, iv, under head v, 3 (2), provides — "In cases where it is found necessary to employ professional or scientific persons . . . 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 persons shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall—on a motion made to him either at the trial or proof or within eight days thereafter if in Session . . . —certify that it was a fit case for such additional allowance."

After a proof had been allowed a remit was made, in respect of a joint minute by the parties to the case, to an accountant and to a mining engineer to inquire into the matters in dispute and to report. The defenders having ultimately been awarded expenses the Auditor in taxing their account disallowed a fee to a firm of accountants who had been employed to prepare for the proof. *Held* that as the parties had in effect by their joint minute abandoned the proof, the fee, which fell to be regulated by the C.A.S., K, iv, and Table of Fees, was properly *disallowed.*

Robert Sneddon, Hillhouseridge, Shotts, *pursuer*, brought an action against the Baton Collieries, Limited, *defenders*, concluding for payment of certain sums representing amounts by which he alleged he had been underpaid by defenders in respect of lordships under a lease of coal and ironstone. The lease made provision for elaborate bookkeeping by which the amounts of the lordships due to the pursuer were to be ascertained.

On 11th December 1917 the Lord Ordinary allowed the parties a proof of their averments.

On 2nd October 1918 the Lord Ordinary on the Bills, in respect of a joint minute by the parties, remitted to a chartered accountant and to a mining engineer to inquire into and report to the Court on the matters in dispute.

On 20th July 1920 the Lord Ordinary having considered the reports submitted pronounced an interlocutor in which he, *inter alia*, found the defenders entitled to expenses.

The pursuer having reclaimed to the First Division, the Court refused the reclaiming note, found the defenders entitled to additional expenses since the date of the interlocutor reclaimed against, and remitted to the Auditor to tax and report.

In taxing the defenders' account of expenses the Auditor disallowed a fee to a firm of chartered accountants whom the defenders had employed to prepare detailed statements of the output of coal, to prepare notes for counsel, and to attend meetings with counsel.

The defenders lodged objections to the Auditor's report, contending that the fee to the firm of accountants should have been allowed.

Argued for defenders—Reasonable remuneration to experts was to be allowed although the case did not go to trial. The provision in the C.A.S., K, iv, that the witnesses should be certified by the Judge was applicable only to cases that proceeded to trial and did not apply here—*Clements* v. *Magistrates of Edinburgh*, 1905, 7 F. 651, 42 S.L.R. 536; *Govan* v. *M'Killop*, 1909 S.C. 562, 46 S.L.R. 416.

Counsel for the pursuer was not called upon.

LORD PRESIDENT—The objection taken in this case is to the disallowance of a fee to a firm of chartered accountants who were consulted by the defenders in the action. Mr Robertson endeavoured to bring himself within the principle of the case of *Clements* v. *Corporation of Edinburgh*, (1905) 7 F. 651. In that case the parties had come to a complete settlement of the litigation, as part of which it was agreed that one of the parties should accept liability to the other party for the expenses incurred by the latter; and a question arose on the taxation of those expenses with regard to charges somewhat similar to those which are the

subject of objection in this case. It was decided in the other Division that the Table of Fees, which limits the charge for expert assistance, did not apply in the circumstances of that settlement. But the situation presented by the present case is essentially different. What happened is that after a proof had been allowed and parties had commenced to make their preparations for that proof they came together and agreed, not that the case should be settled with expenses to one of them, but that the procedure which the Court had ordered, viz., by way of proof, should be abandoned by joint consent and a remit to an accountant substituted for it. In short, the parties mutually agreed to have no proof, and consequently to scrap their preparations for it, and to substitute procedure by way of remit. Remit to an expert dispensed with expert assistance; and it seems to me impossible in these circumstances that Mr Robertson's clients should be held entitled to claim charges which were only justifiable upon the footing that procedure by proof before the Court had been adhered to. If they consented to that method of trying the case being abandoned and another method being substituted for it—for which other method the expenses incurred with a view to the first method could not be utilised — they cannot ask to be treated in the same way as they might have been entitled to be treated if the first method had been adhered to. I do not think therefore that the case of *Clements* has any application. The result is to leave the matter regulated by the Act of Sederunt, and the Act of Sederunt does not warrant the claim which the defenders make.

LORD CULLEN—I concur.

LORD ASHMORE—I concur.

LORD MACKENZIE and LORD SKERRINGTON were absent.

The Court approved the Auditor's report.

Counsel for the Pursuer and Reclaimer—Jamieson. Agents — Drummond & Reid, W.S.

Counsel for the Defenders and Respondents — Graham Robertson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, January 31.

SECOND DIVISION.

[Dean of Guild Court of Glasgow.

DEANS *v.* WOOLFSON.

Property—Common Property—Pro indiviso Proprietors — Rebuilding of Common Stair — Necessary Operation — Right of Co-proprietor to Object—Liability to Contribute.

Two separate buildings in a burgh adjoined a small piece of ground in which the proprietors of the buildings had each an equal *pro indiviso* right of property. An external common stair giving access to the buildings had been built on the ground in 1812, but was burned down in 1919. The proprietor of one of the buildings presented a petition to the Dean of Guild for a decree of lining to rebuild the common stair, in which he averred that he was willing to adjust the new stair so as to suit the other proprietor's building, and denied that he intended to charge his co-owner, who objected to the lining, with one-half of the cost of the rebuilding of the stair. The Dean of Guild granted decree. In an appeal the Court *affirmed* the interlocutor of the Dean of Guild, *holding* that the rebuilding of the stair was a necessary operation not to be stopped by the opposition of the joint owner.

Opinion of Lord Rutherfurd in *Brock* v. *Hamilton*, (1852) 19 D. 701, at 703, *approved.*

Opinion reserved (*per* Lord Sands) as to the liability of the other proprietor to contribute if he found no use for the stair.

John Kirkwood Deans, boot and shoe factor, Glasgow, *petitioner*, presented a petition in the Dean of Guild Court of Glasgow for authority to rebuild a common stair, to which petition objections were lodged by Philip Woolfson, warehouseman, Glasgow, *objector.*

The following narrative is taken from the note of the Dean of Guild *infra*:—"In this case the petitioner avers that he is proprietor of certain subjects at 157 Trongate, Glasgow, and that the respondent Mr Woolfson is proprietor of subjects lying to the west thereof; that the buildings of both petitioner and objector were sometime ago injured or destroyed by fire; that in particular there was injured or destroyed by fire a common stair or staircase on the portion of the subjects coloured dark red on the plan produced; and that the petitioner proposes to rebuild the said stair or staircase, and asks authority to do so. The objector Mr Woolfson avers that the common stair and entry were destroyed by fire about October 1919; that the ground on which the destroyed staircase stood (and on which the staircase now proposed by the petitioner is to be put up) belongs to the objector to the extent of one-half *pro indiviso*; that there is no obligation in the titles by which the petitioner or objector can compel each other to build; and that no lining can be granted affecting the said common ground unless on the application of all the owners thereof, and that the objector refuses to concur in such an application or to give his consent."

The objector and petitioner averred, *inter alia*—"(Objn. 5) Believed and averred that from a perusal of the titles a common stair and entry were erected between 1812 and 1821 and were used by the predecessors of both the petitioner and the objector as such. Further, averred that the said stair and entry were destroyed by fire about October 1919, and that while the ground belongs jointly to the objector to the extent of one-half *pro indiviso*, there is no obligation in the titles by which the petitioner or objector can