penditure in a particular year, because what is actually expended in any year is taken into account in ascertaining the amount of the average."

The question therefore is what is a fair percentage to allow upon tenants' capital to meet repairs and renewals?

The appellants propose a different rate upon the capital cost of different classes of machinery, the rate in each case being calculated upon the probable length of life of the particular class. I confess that that strikes me as being a somewhat cumbrous method to adopt, especially when it is remembered that in a case of this kind it is vain to attempt to arrive at an absolutely accurate result, and that all that we can hope to do is to fix, upon a consideration of the whole circumstances, an amount which will roughly approximate to the rent at which the subjects might be expected to be let, and which will not, on the one hand, place an undue burden upon the owners and occupiers by being too large, nor upon the other be prejudicial to the interests of the public by being too small. I therefore think that we should allow an overhead percentage upon the whole amount of the tenants' capital at such a rate as may fairly be expected to meet the necessary repairs and renewals of all the different classes of machinery and appliances. In speaking of a percentage upon this whole amount of the tenants' capital I do not forget that as regards what is called floating capital (which however in the present case is not of large amount) interest alone can be charged. Further, it seems to me that for interest 4½ per cent. is a rate which has frequently been recognised as reasonable.

I therefore propose that we should allow 10 per cent. upon the tenants' capital for interest and for repairs and renewals of plant and machinery, that being an amount which, after careful consideration, seems to me fairly and adequately to meet the requirements of the case.

In regard to the amount of the tenants' capital, I did not understand the figures given by the appellants to be challenged.

Of course, in view of the opinion which I have expressed in regard to the position of the copper mains, their cost, amounting to £5000, will fall to be deducted. I am further of opinion that the sum (£2246) expended upon the Provisional Order and licence cannot be regarded as tenants' capital.

LORD DUNDAS—Certain minor matters which are mentioned in the case were not pressed before us; the only serious argument was in regard to the points with which your Lordship has dealt. The case is, I think, in some aspects both a difficult and a peculiar one. But having had the advantage of perusing the opinion which your Lordship has delivered, I am content to express my full concurrence in it. I cannot usefully say more, except perhaps to add a few words with regard to the case of *Glasgow Corporation* v. *Wood*, December 20, 1906, 44 S.L.R 229, which is mentioned in the print, and was discussed during the argument. The Lands Valuation (Scotland) Amendment Act, 1902, was not referred to either before myself in the Outer House nor (as I have ascertained by inquiry) before the First Division in *Wood's* case. That case, however, did not raise any question as to the valuation of lands and heritages, but related solely to the deductions falling to be made from the figure appearing in the valuation roll, in terms of section 37 of the Poor Law Act of 1845. I apprehend, therefore, that the decision would not have been affected if the attention of the Court had been directed to the Act of 1902, although the opinions of the Judges might have been somewhat differently expressed.

The Court were of opinion that the yearly rent or value should be reduced to £1168.

Counsel for the Appellants—C. D. Murray. Agents—Gray & Handyside, S.S.C.

Counsel for the Assessor—Horne. Agents—Laing & Motherwell, W.S.

COURT OF SESSION.

Thursday, March 7.

FIRST DIVISION.

SHAW & SHAW AND OTHERS *v.* J. & T. BOYD, LIMITED.

Expenses — Taxation — Proof — Copy Correspondence for the Use of Agent.

Objection to the disallowance by the Auditor, in taxing an account of expenses between party and party, of a copy correspondence for the agent's use at a proof, *repelled.*

Expenses — Taxation — Fees to Counsel — Proof and Consultation on Eve of Proof.

In a case of some complexity arising out of the rejection of a machine for twisting cotton yarn as disconform to contract, the proof lasted three days. The Auditor reduced a fee of five guineas, charged for junior counsel for a consultation on the eve of the proof, to one of three guineas, and also reduced fees of thirty and fifteen guineas a day, charged for senior and junior counsel respectively throughout the proof, to fees of twenty and fifteen guineas for the first day, and fifteen and twelve guineas for the other two days.

Objection having been taken to these reductions the Court *repelled* the objection.

Per the Lord President (as to the fees charged for the proof)—"I think that if I had myself been acting as Auditor here I should have allowed the larger fees. I say that for the guidance of the Auditor in future."

Expenses—Taxation—Fees to Witnesses—Skilled Witnesses.

In an action arising out of the rejection of a cotton-twisting machine, in

which the proof lasted three days, two expert witnesses of Manchester were employed for six and seven days respectively in connection with the case. They had to travel to Huddersfield and Glasgow and to attend the proof. The Auditor having reduced the sums of £72, 5s. and £84 paid them to sums of £30, 5s. and £29, 8s. respectively, leaving, as stated, in addition to out-of-pocket expenses only £21 and £18, 18s., objection was taken to the reduction.

The Court *repelled* the objection, *holding* that the Auditor was entitled to exercise his discretion as to the fee to be allowed in addition to the two guineas a day for actual testimony and the out-of-pocket expenses.

Per Lord President—"I think the Auditor is entitled to exercise his discretion, and, although he has cut down the fees here pretty severely, I do not propose to interfere with what he has done."

On 14th April 1905 Shaw & Shaw, cotton spinners, Britannia Mills, Huddersfield, and the individual partners thereof, raised an action against J. & T. Boyd, Limited, machine makers, Shettleston, Glasgow, in which they sued for £186, 2s. 6d. as damages for breach of contract. The pursuers agreed to purchase from the defenders a machine for twisting cotton yarn and it was duly delivered to them at their mills. The machine, however, proved unsatisfactory and was ultimately rejected. [A cross-action at the instance of Messrs Boyd for payment of £208, 9s. 1d., the balance of the price, was heard and disposed of at the same time, the defenders in it being assoilzied.] The Lord Ordinary (ARDWALL) after a proof which lasted three days awarded damages and found the pursuers entitled to expenses. The defenders reclaimed to the First Division but subsequently withdrew the reclaiming-note.

The case now appeared in the Single Bills on a Note of Objections by the pursuers to the Auditor's report on their account of expenses. [LORD ARDWALL, before whom the case was tried, was present in the Division at the hearing on the note, but did not take part in the advising.]

In his report the Auditor had (1) disallowed *in toto* the expense of a third copy of the correspondence for the use of the pursuers' agents at the proof; (2) he had reduced a fee of five guineas, charged for junior counsel for a consultation on the eve of the proof, to three guineas; and had also reduced the fees of thirty and fifteen guineas a day charged for senior and junior counsel respectively throughout the proof to fees of twenty and fifteen guineas for the first day, and fifteen and twelve guineas for the other two days; (3) he had reduced the sums of £72, 5s. and £84 paid to two skilled witnesses, Eli Hiles, engineer, and Joseph Shaw Gaunt, machinery expert, both of Manchester, to sums of £30, 5s. and £29, 8s. respectively. [These witnesses had been engaged in connection with the case six and seven days respectively, and in addition to attending the proof had had to travel to Huddersfield and Glasgow.]

Argued for pursuers—(1) The expense of a third copy correspondence was a necessary expense, for without it the agent would have been unable to follow the case properly. The process copy was for the use of and was in fact used by the Judge at the trial. (2) The Auditor was not entitled to cut down the fees sent to counsel unless they were clearly exorbitant — *Rees* v. *Henderson*, May 28, 1902, 4 F. 813, 39 S.L.R. 640. The agent was the best judge as to the proper fee to send, looking to the nature of the case. In any event they ought not to be lower than twenty-five and fifteen guineas for the first day, and twenty and fifteen for the remaining days, which were now asked for. (3) The Auditor had dealt much too strictly with the sums paid to the expert witnesses. The witness Hiles had travelled from Manchester to Huddersfield and Glasgow to inspect the machine, and had also attended the proof, and had been engaged for six days. He was entitled to ten guineas a day in addition to £9, 5s. for expenses, in all £72, 5s., the sum paid. The Auditor had only allowed him, in addition to his out-of-pocket expenses, twenty guineas. The witness Gaunt, also from Manchester, had been similarly engaged for seven days and was entitled to ten guineas a day in addition to his expenses (£10, 10s.), viz., £84. The Auditor, however, had only allowed him, in addition to his expenses, eighteen guineas. The sums allowed were much too small.

Argued for defenders—(1) It was the usual practice to allow, as against an opponent, the expense of two copies of the correspondence only. These were for the use of counsel. The agent was not entitled to a third copy. (2) The fees allowed to counsel were ample. The sum at stake was not more than £220. (3) Expert witnesses were entitled, in addition to the fee of two guineas a day for actual testimony allowed by the table of fees, to (*a*) their "out-of-pocket" expenses, and (*b*) a fee for their trouble, the amount of which was entirely in the discretion of the Auditor. Reference was made to *Ebbw Vale Steel, &c. Company, Limited* v. *Wood's Trustee*, June 2, 1898, 25 R. 925, 35 S.L.R. 759; *Burrell & Son* v. *Russell & Company*, October 24, 1900, 3 F. 12, 38 S.L.R. 8.

LORD PRESIDENT—In this case certain objections have been taken to the Auditor's report. The first of these is that he has not allowed the expense of a third copy of the correspondence for the use of the agent. This matter seems to be really a question of practice, and if the Auditor assures us—as his report shows—that it is the practice to allow copies for counsel, but not to allow an additional copy for the agent's use, I do not think we ought to interfere.

As to the fee of three guineas allowed to junior counsel for consultation on the eve of the proof, it seems to me that where senior counsel for the same consultation gets a fee of five guineas, his junior must be content with three.

In regard to the fees allowed to counsel for the proof, I am bound to say 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 I take it that the fee allowed by the Auditor here is such a fee. The onus of proving that it is not a proper fee lies on the party seeking to disturb the decision of the Auditor. Now there are two considerations which enter into the question of what amounts to a proper fee, viz., first, the trouble actually involved in preparation, and second, the amount at stake; and I assume that the Auditor, in arriving at the decision he has come to, has kept both of these considerations in view. The learned Judge who tried the case informs us that he considered it somewhat complicated, but even assuming it to be so, I do not think we should interfere with the Auditor unless we were of opinion that his decision was clearly wrong. I think that if I had myself been acting as Auditor here I should have allowed the larger fees. I say that for the guidance of the Auditor in future, but while that is so, I do not propose in this instance, and in a matter with which the Auditor is accustomed to deal, to substitute my judgment for his.

With reference to the fees allowed to the expert witnesses, I think such witnesses are entitled, in addition to the fee allowed for actual testimony by the table of fees, to a fee for their trouble, and also to their out-of-pocket expenses. Without such additional remuneration they would only be entitled to the fee of two guineas a day allowed by the table of fees. As to such additional remuneration, I think the Auditor is entitled to exercise his discretion, and, although he has cut down the fees given here pretty severely, I do not propose to interfere with what he has done.

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

The Court repelled the note of objections, approved of the Auditor's report, and decerned.

Counsel for Pursuers—C. D. Murray. Agents — Fyfe, Ireland, & Dangerfield, W.S.

Counsel for Defenders—W. Thomson. Agent—R. Ainslie Brown, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, March 8.

(Before Lord Ardwall, Lord Dundas, and Lord Mackenzie.)

SOUTAR *v.* KERR.

Public Health—Sale of Food and Drugs Acts—Sample for Analysis—Refusal to Supply Sample in the Same Manner as Article is being Supplied to Public—Milk—Sale of Food and Drugs Act 1875 (38 *and* 39 *Vict. c.* 63), *sec.* 17—*Sale of Food and Drugs Act* 1899 (62 *and* 63 *Vict. c.* 51), *sec.* 16.

An inspector under the Food and Drugs Act, in procuring a sample of an article being sold, *e.g.*, milk, is entitled to have the sample supplied to him from the receptacle in which it is contained in the same manner as it is being supplied to the public; and a complaint setting forth that the seller refused to do so, will be relevant as charging an offence against section 17 of the Sale of Food and Drugs Act 1875, but not as charging an offence against section 16 of the Sale of Food and Drugs Act 1899.

The Sale of Food and Drugs Act 1875 (38 and 39 Vict. cap. 63) provides (sec. 13) for any inspector charged with the execution of the Act procuring any sample of food or drugs, and, if he suspects the same to have been sold to him contrary to any provision of the Act, submitting it to be analysed. Section 17 enacts—"If any such . . . inspector . . . shall apply to purchase any article of food or any drug exposed to sale, or on sale by retail on any premises, or in any shop or stores, and shall tender the price for the quantity which he shall require for the purposes of analysis, not being more than shall be reasonably requisite, and the person exposing the same for sale shall refuse to sell the same to such . . . inspector . . . such person shall be liable to a penalty not exceeding ten pounds."

The Sale of Food and Drugs Act Amendment Act 1879 (42 and 43 Vict. cap. 30), section 5, enacts—"Any street or open place of public resort shall be held to come within the meaning of section 17 of the principal Act."

The Sale of Food and Drugs Act 1899 (62 and 63 Vict. c. 51), section 16, enacts—"Any person who wilfully obstructs or impedes any inspector . . . in the course of his duties under the Sale of Food and Drugs Acts . . . shall be liable on summary conviction for the first offence to a fine. . . . ."

John Kerr, dairyman, Hill of Beath Farm, Dunfermline, was charged in the Sheriff Court of Fife and Kinross at Dunfermline, on 10th May 1906, at the instance of John Shaw Soutar, procurator-fiscal of Court, on a complaint charging him with an offence against the Sale of Food and Drugs Act 1875, section 17, or alternatively, against the Sale of Food and Drugs Act 1899, section 16.