

greater specification. But as your Lordships think that the record is sufficient as it stands I am satisfied.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the Lord Ordinary's interlocutor and allowed a proof before answer.

Counsel for the Pursuer (Reclaimer)—Macphail—Burn Murdoch. Agents—MacKenzie & Kermack, W.S.

Counsel for the Defenders (Respondents)—Constable, K.C.—Hamilton. Agents—Forrester & Davidson, W.S.

Thursday, March 18.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

MACKISON'S TRUSTEES

v. MAGISTRATES OF DUNDEE.

Master and Servant—Burgh Surveyor—Recompense—Services Outwith Scope of Employment—Claim for Extra Remuneration—No Specific Claim to Date of Action—Mora—Proof—Onus.

In an action by a burgh surveyor against his employers for payment for work done by him, which he alleged was outwith the scope of his official duties, the evidence showed that no express contract to give him extra remuneration had been made; that he was never instructed to do any work except in his capacity as burgh surveyor; that on three occasions he accepted honoraria from his employers for special services without reservation of any claims; that his period of service lasted for thirty-eight years; that with these three exceptions he did all the work remitted to him without any extra remuneration, and that he took no definite steps to make good his claims, although he knew that his employers all along denied liability.

Held that the pursuer's delay, though not an absolute bar to his claim, threw on him the *onus* of proving that the work was done by him otherwise than as burgh surveyor, and that he had failed to discharge the *onus*.

On 4th September 1906 William Mackison, civil engineer and architect, Dundee, and formerly burgh surveyor, brought an action against the Magistrates of Dundee in which he sought decree for £15,000 for work done by him outwith the scope of his duties as burgh surveyor.

Mr Mackison having died on 24th November 1906, his trustees were sisted as pursuers.

The circumstances in which the action was raised are fully set forth in the opinions (*infra*) of Lords Low and Dundas.

On 11th January 1908 the Lord Ordinary

(GUTHRIE), after a proof, the import of which sufficiently appears from his Lordship's opinion (*infra*), assoilzied the defenders.

Opinion.—“This action was instituted by the late Mr William Mackison, who was Burgh Surveyor of Police for Dundee from 1868 to 1906, and is now insisted in by his trustees. Mr Mackison died on 24th November 1906, before the proof was led. The summons concludes for a sum of £15,000. But that sum does not represent what the late pursuer estimated as the full measure of his rights. According to Condescendence XII, he was entitled to £49,601, made up of £3800 for arrears of salary as sanitary inspector and £45,801 for alleged extra work done in the burgh surveyor's department but said not to be covered by the burgh surveyor's salary, this latter sum of £45,801 representing ‘the ordinary charges made by engineers and architects for similar work.’ Although maintaining legal right to the above-mentioned sum of £49,601, the late pursuer restricted his claim in the summons to £15,000, but on what basis his son, Mr J. W. Mackison, is unable to explain. Mr Carter, C.E., with whom Mr Bennett, C.E., substantially concurred, priced the claim for extra work at £19,584, which being added to the arrears of sanitary inspector's salary makes a total now claimed to be legally due of £23,384, as against the above sum of £49,601, subject to a certain deduction from the claim for extra work, to be afterwards referred to.

“I.—Arrears of salary as Sanitary Inspector, from date of appointment on 16th July 1868 to date of summons, amounting to £3800.

“The defenders admit that the late pursuer was appointed on 16th July 1868 sanitary inspector for the United Parish of Liff and Benvie, within which the burgh of Dundee is situated; that the said appointment was never recalled; and that in some of the defenders' annual Government returns Mr Mackison was entered as one of the sanitary inspectors.

“*Prima facie*, therefore, apart from amount, the late pursuer made a good claim under this head, which it lay on the defenders to displace. In my opinion they have done so. They have proved (1) that, as in a question between the Police Commissioners and Mr Mackison, his salary for the two offices of police surveyor and sanitary inspector was fixed at £400, which salary, or an increased amount, was regularly thereafter paid to him; and (2) that no work as sanitary inspector separate from his work as burgh surveyor was ever done by Mr Mackison, the whole separate duties having been discharged with a separate staff, and separate books, in a separate office, by Mr Thomas Kinnear, who had been inspector of nuisances from 1867, and who was also appointed sanitary inspector for the same area within five months of the late pursuer's appointment, and who was regularly paid a salary therefor. The late pursuer's appointment was always treated, and was in fact, nominal. With the arrangements in 1868 between the Police

Commissioners, the defenders' predecessors, and the Board of Supervision, under which not a separate salary but the proportion of the late pursuer's total salary payable in respect of his appointment as sanitary inspector was fixed at £100 per annum, the late pursuer had no concern. If he ever knew of that arrangement he must also have known that notwithstanding thereof only £25 was entered in the burgh treasurer's books annually between 1868 and 1875 under this head, reduced after 1891 to £5 annually, which nominal sum of £5 has been regularly entered in the annual returns made to the Local Government Board since 1891 as Mr Mackison's salary as sanitary inspector. The nominal nature of Mr Mackison's appointment is demonstrated by the fact that no claim or hint of a claim under this head was ever made by him until the questions arose which led to his dismissal as burgh surveyor. The claim if it existed was liquid and instantly provable. There was no reason why Mr Mackison should not have insisted in it if it was a good claim. It is an afterthought, due probably not to Mr Mackison but to his advisers.

"II.—Claim for alleged extra work done in the Burgh Surveyor's Department, but said not to be covered by the Burgh Surveyor's salary, amounting to £45,801.

"The onus of proving this claim seems to me to rest throughout on the pursuers.

"In the pursuers' favour these points are proved—*First*, Mr Mackison worked personally and supervised his subordinates to an extent in excess of what was contemplated at the time of his appointment. During his term of office the municipal area was doubled; so was the length of the sewers; while the population was almost doubled, and the assessable rental was more than doubled. *Second*, from time to time, prior to 1894, he indicated to the Police Commissioners, the defenders' predecessors, or to committees of their number, or to individual members and officials, and, subsequently to 1894, to the defenders or to committees of their number, or to individual members and officials, the existence of a duty on the part of both bodies to remunerate him for the extra work now in question, or some of it, in addition to his salary as burgh surveyor. *Third*, both among members of the Police Commission prior to 1894, and among members of the Town Council since 1894, there has existed throughout a feeling that Mr Mackison ought to receive some extra payment in addition to his salary.

"On the other hand, there are striking considerations against the pursuers' case as stated on record, which, in my opinion, they have failed to meet:—*In the first place*, they claim for services over thirty-eight years—from 18th May 1868, when Mr Mackison was appointed Burgh Surveyor of Police for Dundee, to 19th July 1906, when his office ended—the earliest items being thus within two years of extinction by the long negative prescription. Mr Mackison was not a man of private means; his salary did not exceed £500; and the burgh of Dundee

has never been in financial difficulties. *In the second place*, no interest is claimed on the sum said to have been payable from time to time to Mr Mackison for services rendered beyond the duties covered by his salary as burgh engineer, thus resulting, if the claim now made is a good one, in a loss to his estate of at least as large a sum as that for which the defenders are said to be liable. *In the third place*, the capital sum claimed from the defenders has been arbitrarily restricted to £15,000 out of the £49,601 (including the arrears of Sanitary Inspector's salary) alleged in the summons and memorandum to be due. *In the fourth place*, while it is alleged that Mr Mackison from time to time brought the existence of the present claim for the extra work now specified, or some of it, under the notice of the defenders and their predecessors, it is admitted that he never tabled any complete priced demand, either slump or detailed, until the present action was brought. Mr J. W. Mackison deponed—'Unless it be 1871 and 1878, Mr Mackison never made a money claim against the town for these specific works that are mentioned here.' Even when the memorandum was submitted to the defenders in 1906 no prices were given. And any particular note of charges made up by Mr Mackison seems to have been on a different basis from that on which the claim is now made. For instance, his note referring to the 1878 bill amounts to £721, 8s.; and it is stated in the memorandum that if the fees there charged 'had been priced according to the ordinary professional scale, they would have been several times the amount charged.' Yet under this head Mr Carter only allows £200, after deduction of one-third for use of the office staff.

"The basis of the pursuer's claim is thus stated in Condescendence 8—'In particular, the pursuer was employed by the defenders and their predecessors as their engineer in regard to the following Bills and Acts, and for the execution of the works thereby authorised, and for the other works after referred to, on the footing and agreement in every case that he was to be paid the usual professional charges, under deduction of office charges and expenses. The pursuer accepted said employment and acted as such engineer in connection with said bills and work, and did all the work in question. No part of the said work fell within the scope of the pursuer's duties as surveyor of police or sanitary inspector.' And plea 1 is as follows:—'The defenders and their predecessors having employed the pursuer to act as their Parliamentary engineer, and as their engineer, architect, and surveyor for the execution of the works authorised by their own special Acts of Parliament, and otherwise on the footing and agreement that he was to be paid, all as condescended on, are bound to pay the pursuer in respect of the work done and services thus rendered by him, and decree should be pronounced in terms of the conclusion of the summons with expenses.'

"No case of bar is made in respect of Mr Mackison having been induced, fraudu-

lently or otherwise, to perform the services in question on the faith that he would be remunerated for doing so apart from his salary. Had this been the basis of claim, I presume the amount would have been calculated on *quantum meruit*. But no materials have been put before me for an estimate on that basis. From beginning to end Mr Mackison never kept any details of the alleged extra work done by him.

“As to the mode of estimating the pursuer's claim, it was made up by Mr Mackison, and has been spoken to by his son and Mr Carter and Mr Bennett, apart from charges of supervision and maintenance, on the footing of a percentage on cost, as if Mr Mackison had been an outside engineer, subject to deduction of one-third on account of the saving to him through the employment of the town's official staff. It may be noted that although Mr Carter and Mr Bennett proceed, like the memorandum, on a percentage on cost, the percentages are very different. For instance, Mr Mackison's claim for £3000 is cut down by Mr Carter and Mr Bennett to £350. Again, as to the proper deduction on account of use of office staff, Messrs Carter and Bennet have only allowed one-third, but Mr J. W. Mackison says his father counted it at 40 per cent.

“The pursuers' case then is (a) express employment by the defenders and their predecessors to do the work in question for remuneration separate from his salary as burgh engineer; (b) such remuneration to be calculated on the same footing as if Mr Mackison had been an outside engineer; but (c) such remuneration so calculated to be subject to deduction of one-third of an outside engineer's charges on account of Mr Mackison's use of the official staff and premises.

“In my opinion the pursuers have failed to establish (a), (b), and (c) or any of them. I come to this conclusion not on a balance of evidence but in the absence of any evidence. No attempt has been made to say when—in 1868 for all future extra work, or from time to time; or how—in writing or verbally or partly both; or by whom—the defenders and their predecessors as corporate bodies, or by committees, or by individuals representing them—any such agreement or agreements were entered into. Nor has any attempt been made to define the standard according to which the parties agreed that work should be considered ordinary or extra-ordinary. It appears from the evidence of Mr J. W. Mackison that his father was ultimately guided in making the distinction which is the basis of the memorandum by the views of his law agent Mr Stewart and other advisers. See the case of *Latham*, 4 Macph. 1084.

“The pursuers' counsel stated that he did not find any part of his case of agreement on the terms of the minute dated 28th April 1868 containing his appointment; and he admitted that there was no document instructing an agreement between Mr Mackison and his employers as to extra payment for extra work, and no evidence

of any meeting between Mr Mackison and his employers at which any such agreement was entered into. The letter of 27th March 1868, founded on in Cond. 2, was not addressed to Mr Mackison or ever communicated to him. It was further admitted that the minuted instructions by the defenders to Mr Mackison for the alleged extra Parliamentary and other work did not differ substantially in their modes of expression from instructions given for ordinary work.

“In these circumstances it would be sufficient to hold that the pursuers have failed to prove the only case averred and pled by them on record.

“But it is right that I should consider and express an opinion upon the case on which in the end the pursuers relied. Their contention is that in the circumstances disclosed by the evidence, written and oral, such an agreement as they have averred must be implied in law, because the work claimed for as extra was essentially different both in kind and degree from the work which Mr Mackison was engaged to do and which was covered by his salary.

“In the case of a servant hired for certain work, who in addition does other and unrelated work, it may be possible, by that circumstance alone or by that circumstance taken along with others, to rear up an implication for separate and additional remuneration, which I suppose would be calculated on the basis, not as here, of ordinary professional charges, but of *quantum meruit*, for which, as I have said, there is no material. But in this case I am unable to discover any work in the office or on the ground, parliamentary or local, done by Mr Mackison as an engineer, an architect, or a surveyor, which had not a direct relation to his admittedly official work, and which on his appointment might not reasonably have been anticipated as likely to arise, although it may be not to the extent actually developed. The pursuers have failed to prove what they allege on record, namely, ‘no part of the said work fell within the pursuer's duties as burgh surveyor or sanitary inspector,’ or that the work in question was ‘entirely outwith his duties as surveyor of police or sanitary inspector.’ With the exception of a part of an outfall sewer at Lochee, the whole work founded on related to ground within the area of the burgh of Dundee, and it was all done by Mr Mackison's official staff without outside assistance. The esplanade and swimming baths had been the subject of previous discussions; and the Stobsmuir skating ponds were constructed in the time of Fulton, Mr Mackison's predecessor. The needs and prospects of Dundee were well known to Mr Mackison, who received his professional training there.

“The title of the general Act of 1850, under which the burgh was administered until the incorporation or adoption of the Lindsay Act in 1871 and 1882, sufficiently shows the wide range of the legislation under which Dundee was governed at the date of Mr Mackison's appointment. It runs—‘An Act to make more effectual

provision for regulating the police of towns and populous places in Scotland, and for paving, draining, cleansing, lighting, and improving the same.' Except in regard to hospitals and tramways, all the subsequent operations authorised and executed in Mr Mackison's time were foreshadowed, if not specifically dealt with, in the Act of 1850, and that Act, by section 327, authorised parliamentary applications. The Dundee Roads and Streets Act of 1865 was obtained in the time of Mr Fulton, who was police surveyor from 1853 to 1868. An advance from gas to electricity or from horse trams to electric cars did not involve either a difference in kind or an advance beyond reasonable contemplation in 1868. Mr Mackison must have known on his appointment that sooner or later (indeed, looking to the rapid development and great prosperity of Dundee in 1868, sooner rather than later) Dundee would not be behind other towns in the very schemes of burgh extension, sanitation, removal of slum property, street widening, and provision for the recreation and health of the people which form the subject of Mr Mackison's claim. These schemes were, all of them, of an ordinary municipal type, not involving the social experiments in which Glasgow has so often been in advance of other towns, nor the abnormal advance of Clydebank materially, or, it is said, of Dunfermline intellectually.

"But if the alleged extra work done by Mr Mackison cannot be differentiated in kind from the work admittedly covered by his salary, the pursuers found on the undoubted increase in the amount of work in Mr Mackison's department as sufficient basis for his claim. I say Mr Mackison's department, because it does not follow that Mr Mackison's own work was proportionately increased. The defenders admit Mr Mackison's knowledge and ability in all branches of his work, his ceaseless and disinterested devotion to duty, and the uniform success of everything he undertook. But they claim, I think rightly, that they cannot be called on to make extra payments because, as appears from the evidence, he was a slow worker, hyperscrupulous as to details, and unable in many minor matters to delegate his work to others.

"I do not say that an implication of an agreement for separate payment may not conceivably arise from mere increase of amount of work, even in a case where the nature of the work is incapable of differentiation from that for which salary is paid. It is sufficient to say that no such question arises here. While the work immensely increased, Mr Mackison obtained not only ample additional staff for the actual execution of the work, but in 1875, in Mr James Thomson, a qualified surveyor, civil engineer, and architect, skilled assistance of the best quality for purposes of supervision. So far as I can see, there was no part of the work which Mr Mackison might not have delegated at any time to Mr Thomson, with safety to the work itself and with satisfaction to his employers. Employers ordering additional work may either increase the

salary of the same staff or may increase the staff, and pay the same salary to the old employees. So far as Mr Mackison was concerned the defenders seem to me to have taken the latter course. The burgh surveyor's office staff increased from 3 in 1868 to 18 in 1906. And it is clear that the staff was increased from time to time, as I think Mr Mackison was originally appointed, with a view to avoid calling in outside assistance either in connection with the ordinary or the extraordinary work of the department.

"These observations are of course directed to the case made by the pursuers of alleged implication from the circumstances of an agreement for separate employment, with a corresponding obligation to pay at usual professional rates. It will not avail the pursuers merely to prove, as I think they have done, that the circumstances may have warrantably led to the reasonable expectation on Mr Mackison's part of an increase of salary after the last increase in 1873, or of periodical honoraria. The evidence leaves on my mind a regretful impression that Mr Mackison, partly through reluctance to bring matters to an issue (bred of the consciousness that the defenders had in Mr Thomson a servant competent at any time to succeed him in every part of his work, ordinary and extraordinary) and partly through the vague impression of a legal claim undefined in quality and extent, grasped the shadow and missed the substance, which he might have obtained either in the shape of increased salary or honoraria.

"Of admissions of legal liability by the defenders I can find no trace. That other officials, like Sir Thomas Thornton, or that Provost Hunter or other individual members of the Council held that Mr Mackison had a legal claim, will not avail. Nor would evidence that all the defenders as a body, and all the other officials, thought that Mr Mackison had an equitable claim to honoraria. As to Sir Thomas Thornton, it seems clear that he thought Mr Mackison underpaid. Indeed, it is said that in connection with the 1871 Act Sir Thomas estimated Mr Mackison's services at £1000, while Mr Carter only estimates them at £500, which, deducting one-third for use of staff and premises, and giving credit for the £100 paid as honorarium, becomes £234. But in any case I cannot imagine that a man of business of the strenuous type of Sir Thomas Thornton, if he believed, as a lawyer, that Mr Mackison had a legal claim against the Town Council, would have been so remiss in his duty to the Council, a shifting body of employers, and to the ratepayers of Dundee, a shifting body of debtors, as to allow such a claim to run on from year to year without the question being brought to an issue while the whole evidence, oral and documentary, was still fresh. I go further. I cannot believe that Mr Mackison ever made it plain to Sir Thomas that he (Mr Mackison), believed he had any such legal right. No one ever associated the policy of drift with Sir Thomas Thornton.

“The pursuers have to prove their case, and their failure to do so is sufficient warrant for absolvitor. But it would not be right to ignore the formidable case made by the defenders.

“The defenders’ counter case, apart from the points already dealt with, rests on

“1. Their advertisement in 1868, and Mr Mackison’s application.

“These documents, in their references to the qualifications of an architect, engineer, and surveyor, embrace all the qualifications necessary for the execution of all the work in the pursuer’s claim. Yet, according to Mr J. W. Mackison, his father has claimed on the footing that any work involving an architectural design was outside his official duties, and falls to be charged as extra work, his view having been that his official duties were limited to paving, sewerage, and roads.

“2. The terms of the pursuer’s appointment.

“Mr Mackison succeeded Mr Fulton, who did the ordinary duties of his office, and also extra-ordinary work connected with the Act of 1865, as well as preliminary work preparatory to the application for the Act ultimately obtained in 1871. It must be held, in absence of evidence to the contrary, that Mr Fulton neither claimed nor received any extra payment (except possibly by way of honorarium) in addition to his salary, which, beginning at £250, was gradually increased to £400. In these circumstances Mr Mackison was bound, if he meant to take office on a different footing from his predecessor, to have made this plain either in his appointment or in a separate document. So far from the minute of appointment making this plain it seems to me that by it Mr Mackison put his knowledge and skill, so far as relating to all work for which his training had fitted him, and his time at the disposal of his employers. He became bound ‘to devote all his services to the business of the Commissioners’; and he was appointed ‘during the pleasure of the Commissioners of Police, with all the powers and authorities belonging to the office of surveyor, and subject to such conditions and regulations regarding his duties and the mode of performing them as may be made and prescribed by the Commissioners from time to time.’ The case would have been different if he had been asked, and, without any stipulation as to remuneration, had agreed to do, and actually had done or assisted in doing, work in another department, say that of the town treasurer. He could have refused to do such work; and if he had been referred to the terms of his appointment, which bound him to give his whole services to the business of the Commissioners, he could have successfully maintained that the word ‘business’ only meant work akin to that regularly done in his department, and for which he had special training, the business, in short, of an engineer, an architect, or a surveyor. But there was no part of the alleged extra work which he could have refused to do. If, however, he was of opinion that there was any part of

the work in this position he had ample opportunity to bring his view under the notice of his employers by refusing to do the work without a special antecedent arrangement for separate remuneration. No such antecedent arrangement was ever proposed by him. I may add that neither in the advertisement nor in the minute of appointment is there any reference to the three Acts of 1850, 1856, and 1865, within the scope of which it is said that Mr Mackison’s official duties were confined.

“3. The terms of Mr Mackison’s application for an appointment in Liverpool in 1871, and the testimonials then obtained by him from the Dundee Provost, Bailies, and a number of the chairmen of committees.

“By the testimonials dated 22nd and 23rd June 1871, and by the terms of his application, dated 13th September 1871, Mr Mackison would necessarily lead the Liverpool Town Council to believe that he had been discharging in Dundee for his salary all the duties, both ordinary and extra-ordinary, falling to his department, and that he was prepared to do the same in Liverpool. Believing as I do in Mr Mackison’s high sense of honour it is facts like these which lead me to question whether, down to near the time of his dismissal, he ever believed that he had, or ever intended to make, a legal claim against the defenders.

“4. The extra payments to Mr Mackison on 16th April 1872 and 10th May 1882.

“If the terms of Mr Mackison’s appointment left his position in regard to extra-ordinary work in his department uncertain, the question, on the pursuer’s own showing, was brought to an issue in 1872. According to the pursuers, Mr Mackison then made a claim of about £1000 for services in connection with the Dundee Police and Improvement Act of 1871, on the footing of legal right, conform to the memorandum, although there is no evidence that that memorandum was ever communicated to the Commissioners. Assume, however, in the pursuers’ favour that this communication took place, it was met by an offer on the part of the defenders’ predecessors equivalent in law and in fact to a denial of any legal right on his part. A bare refusal to pay might have merely meant that the Police Commissioners did not think Mr Mackison had in point of fact performed any extra-ordinary services. But a proposal to pay honorarium, in response to an application for payment as a legal right, necessarily implied that, while he had performed what might be called in a sense extra services, and while these deserved to be recognised, he had no legal right to payment.

“The question having thus sharply arisen. I cannot reconcile the acceptance by Mr Mackison of £100 in terms of Mr Farquharson’s letters of 17th and 19th February 1872, and the receipt of 16th April 1872, and Mr Mackison’s own entry in the account, with an adherence by him to the legal claim which he is said to have made, and with an agreement that he should be remunerated as of right for similar future services. On

the contrary, I regard this transaction as involving an abandonment of any such position, if it was ever taken up, leaving it open for Mr Mackison thereafter to represent, as he unfortunately never did, that if he had been paid an honorarium in connection with the 1871 Act, he should be similarly dealt with in relation to other similar work, and, of course, for the Town Council to reply that the increases of salary in 1873 were meant to come in place of any such payments. The subsequent payment of £50 on 10th May 1882, 'for special and extra professional services in connection with the construction of the Perth Road Tramways,' seems open to similar observations.

"5. Mr Mackison's increases of salary in 1873, making his salary £500.

"The first of these took place within a few months of the payment of the honorarium of 16th April 1872, in connection with the 1871 Police Act. It is at least suggestive of a recognition by the Police Commissioners that Mr Mackison was now doing more work than contemplated when his original salary was fixed at £400, and of a resolution that, instead of repeating the unsatisfactory, because uncertain, method of honoraria, it would be better to prevent all such questions by an increase of salary. That Mr Mackison's salary was not increased after 1873 was due, I am afraid, to the known existence of a vague claim on his part, undefined in amount and uncertain as to its ground.

"6. The fact that in the accounts of the Police Commissioners and of the defenders, made up for purposes of rating and borrowing and for Government returns, their total liability in connection with the various matters dealt with in the memorandum was calculated, in the knowledge of the late pursuer and without adverse comment by him, without reference to the existence of any of the claims now made.

"On the whole matter, I grant absolvitor, with expenses. I negative the existence of any agreement, express or implied, between the late Mr Mackison and the defenders or their predecessors, for payment to him by them or any of them, for any of the alleged extra work detailed on record and in the memorandum. I have indicated my regret that Mr Mackison did not in his own interest bring before the defenders from time to time the large amount of extra work, both in the way of personal initiation and of supervision, entailed on him by the defenders' various schemes for the benefit of Dundee (for which, with the exception of the two sums of £100 and £50, while his office staff were paid for overtime, he received no extra remuneration), with reasonable proposals for increase of salary or for honoraria. I have fully in mind the extent to which assistance was rendered to Mr Mackison from time to time, both in the way of an assistant engineer and skilled subordinates. But while I negative legal obligation on the part of the defenders, I feel strongly the difference between the claim for extra work and that made for arrears of salary as sanitary inspector, which I have held bad both in law and in

equity. In a question of fair dealing between man and man, there is much to be said for some parts of the claim for extra work; and the defenders might well consider whether the case is not one for making a substantial allowance to the pursuers in the shape of such an honorarium as I think it clear their predecessors would have given from time to time had the matter been put before them by Mr Mackison timeously in a reasonably detailed form and moderately estimated. If Mr Mackison neither found Dundee brick, nor left it marble, it was in his time, and not a little through his ability and devotion to duty, working as he did, year after year, early and late, often after office hours, and in his short holidays, that the town was brought into its present high state of municipal efficiency."

The pursuers reclaimed, and argued—The services for which remuneration was claimed were not within the scope of Mr Mackison's employment, and were performed by him on the understanding that he was to receive suitable recompense therefor. The circumstances necessary to make a relevant case of recompense for extra services at the instance of a servant were present here. The case differed from *Latham v. Edinburgh and Glasgow Railway Company*, July 18, 1866, 4 Macph. 1084, 2 S.L.R. 208, and from *Mackenzie v. Baird's Trustees*, 1907 S.C. 838, 44 S.L.R. 555.

Argued for defenders—Mr Mackison was employed throughout on the one footing, viz., that of a burgh official, and none of the duties he performed were outwith his employment. Increase of business did not necessarily imply increase of pay—*Fraser, Master and Servant* (3rd ed.), p. 47; *Bell v. Drummond*, 1790, Peake, 45; *Money v. Hannan & Ker*, November 19, 1867, 5 S.L.R. 32; *Rose v. Earl of Fife*, April 25, 1806, 5 Pat. App. 115. To entitle a pursuer in a case of this kind to an issue he must specify three things—(1) the duties for which he was originally engaged, (2) the extra duties performed by him, (3) the agreement to give remuneration for the extra duties, *per* Lord Deas in *Latham v. Edinburgh and Glasgow Railway Company*, *cit.* That test was not satisfied in the present case. When the person employed was already in the service of the employer, he was presumed in law to have rendered the services in respect of his employment. There must therefore be a clear understanding between the parties as to the extra work and extra payment therefor, otherwise there was no contract at all—*Mackenzie v. Baird's Trustees*, *cit.* Here there was no antecedent agreement. Honoraria were accepted, and though a claim was made later, it was not pressed. If Mackison meant it to be a legal claim he did not insist on it. His conduct, in short, amounted to waiver.

At advising—

LORD LOW—When the deceased Mr Mackison (whom for convenience I shall refer to as the pursuer) was appointed Surveyor of Police for the burgh of Dundee

in 1868, the Burgh Police and Improvement (Scotland) Act 1850 was in force in Dundee. In that Act there was a series of sections grouped under the general heading—"And with respect to the improvement of burghs and to the officers to be appointed by the commissioners for the purposes of burgh improvement, be it enacted as follows." The first of these sections is the 217th, and by it the commissioners of police are authorised to appoint "a person, duly qualified, to act as a local surveyor of the paving, drainage and other works authorised under the provisions of this Act," and to fix the salary of such surveyor and pay it out of the assessments. Besides the paving and maintaining of streets and the construction of sewers, there are a great variety of works which the commissioners are authorised by the statute to undertake, as, for example, the building of lock-up houses, prisons, and other places necessary for the police purposes of the Act, the provision of fire-stations, the widening of streets, the provision of a supply of water, the acquisition and laying out of pleasure grounds, the provision of public baths, and other works of a like nature. The commissioners are also authorised (sec. 327) to apply to Parliament for powers necessary to enable them to execute works which they may deem necessary for promoting the health or convenience of the inhabitants of the burgh.

The Burgh Police Act 1850 continued in force in Dundee until the passing of the Dundee Police and Improvement Act 1882, whereby the Act of 1850 was repealed as regarded Dundee, and in place thereof various clauses and provisions of the General Police Act 1862 were incorporated. The Act of 1882 appears to have substantially continued to the commissioners all the powers which they had before, and it also conferred upon them certain additional powers, perhaps the most important of which, so far as this case is concerned, was power to construct and work certain tramways. The Act also dealt with the office of the surveyor of police for the burgh. Thus by section 2 (interpretation of terms) it is provided that "'burgh engineer' and 'surveyor' are and shall be synonymous, and either name shall mean the surveyor of the commissioners." Then by section 16 it is provided that existing officers of the commissioners shall hold their offices during the periods of their appointments or until they resign or are removed, "and shall be subject to the provisions of this Act;" and finally by section 109 of the General Police Act 1862 (which is one of the incorporated sections) the commissioners are empowered to appoint a local surveyor in precisely the same terms as the 217th section of the Burgh Police Act 1850. I may also point out that by the 29th section the commissioners are empowered "to appoint at such salaries and on such terms as they shall judge meet, clerks, treasurers, collectors, surveyors, inspectors, and all other persons whose appointment is not herein other-

wise provided for, to be employed in the execution of this Act."

The result of these statutory enactments seems to me to be that it was the duty of the burgh surveyor to act for the commissioners in carrying out any works which they were authorised to execute, in so far as his qualifications rendered him competent to do so. One kind of work which was done by the pursuer which may fairly be regarded as not falling within the scope of his duties as described in the statutes was the preparation of Parliamentary plans and estimates, because although the commissioners were authorised to apply to Parliament for powers which they deemed to be necessary, the promotion of a bill in Parliament can hardly be regarded as falling within the description of "works" authorised by the statutes. It may be that other work which was done by the pursuer was in the same position, but that is a question upon which I have not found it necessary to form an opinion, because, in the view which I take of the case I am willing to assume that much of the work to which this action relates did not fairly fall within the scope of the duties of a burgh surveyor as defined by the statutes. It cannot, however, be maintained that it was illegal or *ultra vires* for the commissioners of police to require their surveyor to do such work. It seems to me to be a mere question of contract. I think that it would have been quite competent for them to agree to pay their surveyor for such work in addition to his salary, or to bargain with him that he should do the work for his salary.

In this case the claim is, in the condescendence, laid upon express contract. In Condescendence 8 the pursuer avers in regard to all the work for which he claims remuneration as being beyond the scope of his duties as burgh surveyor, that he was employed by the defenders "on the footing and agreement in every case that he was to be paid the usual professional charges, under deduction of office charges and expenses." That is a perfectly relevant averment, and if it had been proved the only question would have been as to the amount to which the pursuer was entitled. But the averment has not been proved. It is now admitted that there was no agreement in regard to the remuneration of the pursuer. It is contended, however, that he is nevertheless entitled to succeed. The argument was to the following effect:—(1) The work, or some of it, in respect of which remuneration is claimed was outside of the duties which the pursuer was bound to perform in return for his salary; (2) he did that work on the instructions of the defenders, or their predecessors; and that being so (3) it was an implied condition of the pursuer's employment that he should receive reasonable remuneration for his services.

Now, in the first place, I think that the inference from the documentary evidence is that when the Commissioners of Police appointed the pursuer to be their surveyor

they intended that he should do any engineering, surveying, or architectural work in the burgh which they had power to undertake, and which they considered necessary to enable them to discharge the duties incumbent upon them as Commissioners.

The pursuer's predecessor as surveyor was a Mr Fulton, who resigned in March 1868, and at a meeting of the Commissioners, which was held on the 18th of that month, a resolution was adopted in regard to the duties which should be laid upon Mr Fulton's successor. In the first place, it was resolved that "the person to be appointed in room of Mr Fulton should do all the duties performed by Mr Fulton." Now, in Mr Fulton's time the Commissioners had obtained a private Act of Parliament transferring to them a number of statute labour roads and two Provisional Orders in regard to the widening of streets, and Mr Fulton appears to have done such preliminary engineering or surveying work as was required, and to have prepared the Parliamentary plans and estimates. No doubt the work of that kind which Mr Fulton did was small when compared with the Parliamentary work which the pursuer was subsequently called upon to do, but the fact remains that Mr Fulton had done all the work of the kind which was required during his term of office.

The resolution then continued—"That he" (Mr Fulton's successor) "should also be qualified to be valuator for the burgh under the Valuation Act and make up the roll of electors, all as now performed by the present valuator, and also to perform the duties of town architect, if these or either of these duties be devolved upon him at any time hereafter, and that he be bound to discharge these duties of valuator and town architect, or either of them, when called upon by the Commissioners to do so, without any additional salary, but he being to get any additional assistance necessary for the discharge of such duties, and to be subject to the control and resolutions of the Board from time to time, and to hold office during their pleasure."

I may here say, in connection with the part of the resolution referring to additional assistance, that as the work laid upon the pursuer increased the number of his assistants was also largely increased. When he was appointed the staff in his office numbered only three, whereas when his employment was terminated in 1906 it numbered eighteen.

Following upon the resolution which I have quoted the Commissioners advertised for a surveyor. The terms of the advertisement were these:—"The surveyor will have to superintend the paving, building, and sanitary departments, including cleansing, sewerage, and drainage, and the charge of streets and buildings, &c. He must also be qualified as an architect, and capable to survey and value property, and generally to do the duties required."

In answer to that advertisement the pursuer applied for the appointment, and in an outline of his professional practice,

which accompanied his application, he represented that he was fully qualified as a civil engineer, surveyor, and architect, and that he had had experience of practically all the different kinds of work which he was afterwards required to do.

At a meeting of the Commissioners held upon 24th April 1868, Mr Mackison was elected surveyor during the pleasure of the Commissioners and "with all the powers and authorities belonging to the office of surveyor, and subject to such conditions and regulations regarding his duties and the mode of performing them as may be made and prescribed by the Commissioners from time to time." The salary was fixed at £400 a-year (it was however subsequently raised to £500), and it was further resolved that the pursuer "shall devote all his services to the business of the Commissioners."

These documents, although they do not contain an express stipulation that the pursuer should do any work of a kind for which he was qualified which the Commissioners might require him to do, appear to me to come very near to doing so, because he was to be qualified to do engineering, surveying, and architectural work, he was to be subject to the control of the Commissioners, and to such conditions and regulations in regard to his duties as they might from time to time prescribe, and he was to give his whole time to their service.

It is to be observed that while special remuneration is claimed for a great mass and variety of work as not falling within the scope of the pursuer's duties, there is no statement in the record as to what in his view the precise scope of his duties was. Apparently, however, the footing upon which the claim is made is that nothing fell within the pursuer's official duties except work connected with paving, sewers, and perhaps roads. I gather that that is so both from the fact that apparently all other kinds of work are included in this action, and from the averments in *Condescendence 11* that the salary was at first apportioned under these three heads (paving, sewers, and roads), and latterly under the first two heads only. It appears, however, from the evidence that that apportionment was made merely as a matter of convenience in keeping the burgh accounts, and that what was called the "paving" account was really a general account in which were entered a number of charges which had in fact nothing to do with paving. In any view, it seems to me to be plain that the pursuer could not maintain that his official work was confined to paving and sewers, because, although as I have already pointed out the statutes authorising the appointment of a surveyor specify paving and drainage as work falling to be done by him, they add "other works authorised."

The next important fact to be kept in view is that the Commissioners never employed the pursuer or instructed him to do any work except in the capacity of burgh surveyor. The invariable course of procedure was that when the Commissioners made up their mind to carry out any work

they recorded a resolution to that effect in the minute of meeting, and remitted to "the surveyor" to carry out the work. The remit was made in precisely the same terms whether the work to be done was work admittedly falling upon the surveyor, or works of construction which are now said not to have fallen within the scope of his duties, or the preparation of parliamentary plans, or whatever the work might be.

Further, the pursuer never objected when instructed to do any particular piece of work that it did not fall within the scope of his duties, nor did he ever suggest before doing the work that he would expect to receive special remuneration, nor, except on one occasion, to which I shall refer presently, did he ever after the work was done make a definite and specific claim for remuneration. He, however, upon three occasions received payments from the Commissioners in addition to his salary, and it is important to see what precisely the nature of these payments was.

The first time that the pursuer suggested that he was entitled to additional remuneration was in regard to parliamentary plans which he had prepared for a Bill which the Commissioners promoted in Parliament in 1870-71, which is described as the Dundee Police and Improvement Bill 1871. When precisely or in what form the question was raised does not appear, but I find that upon 6th February 1872 the Finance Committee authorised the treasurer to pay certain accounts, and the minute of the meeting bears that "with reference to Mr Mackison's services they agreed to offer him an honorarium of 100 guineas, with his petty expenses of £25, 9s. 10d. in addition." It also appears that the pursuer at first refused to accept that sum as an honorarium, but that he ultimately accepted it and granted a receipt therefor (dated 16th April 1872) "as being in acknowledgment of extra services in connection with the Dundee Police and Improvement Bill 1871." I am unable to see any substantial distinction between a sum paid in "acknowledgment" of services, and a sum paid as an "honorarium" in respect of services; and it is certain that, by whatever name it was called, the Commissioners regarded the payment as being a voluntary payment on their part, and the pursuer knew that they so regarded it.

The pursuer received another payment of £60 from the Commissioners in 1873, which the receipt bears to be "in full for my trouble and expense in visiting towns in England and France for the purposes of procuring information in regard to cattle markets and slaughter-houses." It appears that the pursuer's expenses of the visits referred to in the receipt amounted to some forty odd pounds, and that the Commissioners paid him £60, the excess over the expenses obviously being a gratuity. Indeed I do not think the nature of this payment is disputed or that anything is founded upon it.

A third additional payment of £50 was made to the pursuer on 10th May 1882.

The receipt which he granted bears that the payment was made "for special and extra professional services in connection with the construction of the Perth Road tramways, as per minute of meeting of the tramways committee of date 11th July 1878.

That payment related to work done in constructing a certain tramway which a private company had been empowered to construct by an Act of Parliament which they obtained in 1872. By the Act, however, the Commissioners of Police were authorised to take over from the company the construction of the line, and they exercised that power. It is averred in Cond. 8 that the £50 were paid to the pursuer "on account of his fees for this work," and that "he declined at the time to accept the £50 as in full payment." In my opinion the evidence shows that the payment was a voluntary payment and was of the nature of an honorarium. There is indeed an entry in the tramways account of the Commissioners which at first sight appears to support the pursuer's contention that the £50 was a payment of fees due to him. The account, under the head of "engineering and inspection," runs thus—

"Services of burgh surveyor and his staff—
 Proportion of salaries, brought from paying, p. 67 £202 0 0

William Mackison, professional services (outsdg.) 50 0 0"

That, so far, certainly looks very like an acknowledgement that the pursuer, in addition to his services *qua* surveyor, had rendered services *qua* engineer for which he was entitled to remuneration. The next entry in the account however seems to me to show that that was not the case. The entry is—

"James Thomson, professional services (outsdg.) £25 0 0"

Now, James Thomson was employed in the burgh surveyor's office, and it is admitted that whatever may be said in regard to the pursuer's right to additional remuneration for the work to which this action relates, that work, in so far as it was done by the staff in the surveyor's office, formed part of the duties which they were engaged to perform. There therefore could be no suggestion, and never was any suggestion, that Thomson was entitled to remuneration for his services beyond his salary. The £25 therefore which is entered in the account as being for professional services rendered by Thomson represented a voluntary payment which the Commissioners had authorised to be made to him. That indeed is not disputed, and everything points to the £50 paid to the pursuer being in the same position. The receipt granted by Thomson for the £25 was in precisely the same terms as that granted by the pursuer for the £50. The minute of 16th July 1878 referred to in the receipts was a minute of meeting of the Tramways and Turnpike Roads Committee at which a number of payments were authorised, and among others to "William Mackison, surveyor, £50," and to "James Thomson, assistant surveyor, £25," the two payments being

referred to in precisely the same terms. It is noticeable, however, that Thomson's receipt is dated 15th August 1878, while the pursuer's receipt was not granted until 10th May 1882, and I assume (for I do not think there is any evidence on the point) that the cause of delay of payment to the pursuer was that he objected (as he did when in 1872 the previous payment of the 100 guineas was made to him) both to the amount and to the terms upon which the payment was offered to him.

I have said that upon one occasion the pursuer rendered an account bringing out a specific sum as being claimed by him. That was in 1881, and the matter first appears in the minute of meeting of the Tramways and Turnpike Roads Committee of 30th May in that year. In that minute, under the heading—"Engineer's and other Charges attending the construction of Tramways," it is stated, "The convener was asked to consider and report," *inter alia*, "as to the amount to be charged against the Tramway Company and the amount to be allowed to the surveyor." The words there "the amount to be allowed" are somewhat inappropriate if the account was that of a professional man whom the defenders had employed, and to whom they were bound to pay the usual professional fees. They are more suggestive of a money allowance which it was in the discretion of the committee to give or to withhold, or at all events, to fix at such an amount as they might think right.

The next minute of meeting of the committee is dated 6th December 1881, and bears that the convener reported upon the matters remitted to him upon 30th May, "and the committee resolved to consider the matter against next meeting." The pursuer states in the memorandum which forms the basis of his claim in this action that the report of the convener was to the effect "that in his opinion, and also in the opinion of the clerk, the fees rendered by Mr Mackison in connection with this matter were fair and reasonable." The convener's report may have been to that effect, but except the statement in the memorandum there is no evidence that it was so. There is no written evidence on the subject; the convener is dead, and the only member of the committee who was a witness in the case says nothing upon the subject. If the report of the convener was in the terms stated in the memorandum, it was, as I shall show presently, never acted upon. Further, the fees charged might be fair and reasonable so far as amount was concerned, but it did not follow that the pursuer was entitled to enforce payment of them. That raised another question altogether.

The minute of 6th December, after the passage which I have quoted, proceeds—"The surveyor's notes are annexed to this minute, and the convener was authorised to get some further information." What is there called "notes" was the pursuer's account. That is rather a curious way of describing an account for professional services rendered, and seems to me to be

somewhat analogous to the expression in the previous part of the minute "amount to be allowed," because the word "notes" is rather suggestive of material for enabling the committee to judge what amount should be allowed than of an account bringing out the amount which they were bound to pay.

The account itself, if the amounts brought out in it are compared with the charges made in this action for the same work, rather points in the same direction. For example, the first part of the account details work done in preparing parliamentary plans and estimates and getting up evidence. In this action the fees charged for that work amount to £929, and that sum is said to represent remuneration for the work upon the ordinary scale of professional fees. In the account, however, the amount brought out is only £75, which, even assuming that the £929 was an excessive charge, must have appeared to the pursuer to be merely a nominal fee. Indeed the sum of £75 bears very much the same relation to what is now said to be the proper fee, as the honorarium of 100 guineas previously paid to the pursuer bears to the fee now charged—between one and two thousand pounds—for the work in acknowledgment of which the 100 guineas were paid and accepted.

After the minute of 6th December 1881 no mention of the account appears in any of the documents until 3rd November 1884, which is the date of a minute of meeting of the Tramways Committee. The minute bears that the committee had before them the minute of 6th December 1881 "on the subject of engineer's and other charges attending the construction of the tramways," and the result was that the committee "remitted the matter to the convener" and certain other gentlemen "to consider and report."

That is the last that is heard of the account. The sub-committee to whom the matter was remitted never reported, nor so far as appears did they ever even consider the account. What was the reason of the sub-committee's failure to carry out the remit does not appear. Mr Hunter, the only member of the committee who was a witness, and who says that he was all along of opinion that the pursuer was entitled to additional payment, can give no explanation. Further, the pursuer himself seems to have been content to allow the matter to fall asleep. There is no evidence that he ever asked the convener or members of the sub-committee to deal with the matter, and for the best part of twenty years after the remit was made he continued to do all the work which was remitted to him (although a great part is now said to have been outside the scope of his duties) without formal protest, without any intimation that he was doing the work upon the understanding that he would receive special remuneration, and without making any specific claim for such remuneration. No doubt he all along let it be known, apparently in conversation with different members of the council, that he considered that he was entitled to large sums in payment of extra

work which he had done, but beyond vague hints of that kind he did not try to put the alleged claim into a definite shape until 1903, when he commenced to make up a statement which was ultimately completed in 1906.

Even when he did finally make up a statement of his claim the pursuer appears not to have done so on his own initiative, but because he was informed that if he had a claim he ought to lodge it in order that the defenders might know precisely what it was, and might be in a position to deal with it. The facts seem to be these. In 1900 Mr Hunter was Lord Provost, and he and Sir Thomas Thornton, who was then town clerk, pressed upon the Town Council the desirability of taking up and disposing of the question of the pursuer's alleged claim. Accordingly the matter was brought up at a meeting of the Town Council on 1st February 1900. There does not seem to be any minute of the meeting, but certain newspaper reports are produced. The meeting was apparently not a very harmonious one, and I do not know what the precise result was, but it is reported that the town clerk—Sir Thomas Thornton—referred to the account lodged by the pursuer in 1881 and remitted to a committee in 1884, and said that he "had a distinct recollection of subsequently warning the convener that Mr Mackison's claims should be disposed of during his life, lest at his death his executors should make an enormous claim against the Council. However, the committee really seemed to think that they should do nothing."

On 8th February 1900 the matter was discussed at a meeting of the Lord Provost's Committee. The minute bears that—"After discussion the committee were unanimously of opinion that, before the council could consider as to any allowance or honorarium to Mr Mackison, all his alleged charges and claims should be withdrawn and abandoned. The clerk was instructed to intimate accordingly."

That resolution was brought before a meeting of the Town Council on 1st March 1900, but was not adopted or approved, but consideration of "the alleged charges and claims" was deferred. The next reference to the question is in a minute of the Works Committee, dated 11th August 1902, when "the committee instructed the burgh engineer to bring up a state of his alleged claims against the Police Commissioners and the Council forthwith." The pursuer apparently did nothing in the way of carrying out that instruction, and at a meeting of the Town Council held on 2nd January 1903 it was unanimously resolved—"That the burgh engineer be instructed forthwith to state any claim he considers he has against the Town Council in any of its capacities, so that the same may be finally dealt with."

That resolution was duly intimated to the pursuer, who then set about the preparation of his statement, which, as I have already said, was not completed until 1906. The statement gave the details of all the work for which the pursuer claimed

remuneration from the time of his appointment in 1868, but it did not contain any charges. The pursuer, however, explained that he was willing to have the amount settled by a reference to a neutral engineer, or by a friendly action in Court.

The statement, or memorandum as it was called, was considered at a special meeting of the Town Council on 26th March 1906, at which a resolution was passed by a majority to the effect—(1) that the Council "repudiate all liability to pay any remuneration in respect of such alleged overwork," and (2) that while they were "ready and willing to pay to the burgh engineer all sums, if any, which may be due, they are not in a position, owing to the method adopted in framing said memorandum, to make an offer of any sum by way of compromise, and can, accordingly, only settle any claim arising out of said memorandum under decree of Court."

In April 1906 the pursuer was required to do certain parliamentary work in connection with a provisional order which the defenders were promoting, but he declined to do the work without special remuneration. The pursuer was then suspended from the office of burgh surveyor for a time, and in July 1906 he was removed from the office "in view of his advanced years and other circumstances." The present action was then brought, and the summons concludes for payment of a sum of £15,000. That, however, did not represent the full amount to which the pursuer maintained that he was entitled. When the action was brought the pursuer completed the memorandum by filling in the charges, calculated, he alleged, according to the ordinary scale of professional remuneration for the work. These charges amounted to £45,801, subject to a substantial deduction for office and staff which were supplied by the defenders. If that sum was in the pursuer's view a debt due to him by the defenders, I have difficulty in seeing why he should have restricted his claim to such a comparatively small amount. The amount in the memorandum is no doubt excessive, but Mr Carter and Mr Bennett, engineers of experience and standing, who gave evidence for the pursuer, estimated that reasonable remuneration for the work detailed in the memorandum would be from £29,000 to £30,000, under deduction of staff and office expenses.

Besides the documentary evidence with which I have mainly been dealing, there is a large amount of oral evidence upon which it is necessary to say a few words. A number of gentlemen who were members of the Town Council at various times during the pursuer's tenure of office, were examined as witnesses on both sides. Those who gave evidence for the pursuer said that they had always been of opinion that he was entitled to special remuneration for such work as the preparation of parliamentary plans and the construction of tramways, which they did not regard as being properly within his ordinary duties as burgh engineer. They all admit, however, that there was never any actual

agreement with the pursuer, and their evidence really comes to this, that there was a general understanding or impression that the pursuer had an equitable claim for remuneration for work of the kind to which I have referred.

Perhaps the most important witness for the pursuer is Mr Hunter, who was a member of the Town Council from 1879 to 1902, and Lord Provost from 1887 to 1889 and from 1899 to 1902. Mr Hunter is very emphatic that his "impression" always was that the pursuer was to be paid for all work outside his duties as surveyor, and he goes so far as to say that in his opinion all the work specified in the memorandum is of that description. He admits, however, that no rate of remuneration was ever fixed. Now, I need hardly say that I do not make the slightest suggestion against Mr Hunter's honesty as a witness, but I think that in reading his evidence (which is that most favourable to the pursuer) two facts must be kept in mind. The first is that Mr Hunter was a member of the sub-committee to which the pursuer's account was remitted in 1884, and if he held as strong views then as he does now in regard to the pursuer's right to remuneration for the work with which the account dealt, why did he not insist upon the sub-committee taking the matter up and disposing of it. The second fact is that Mr Hunter was Lord Provost in 1900 and signed the minute of the Lord Provost's Committee of 8th February in that year, which states that the committee were unanimously of opinion that before the Town Council could consider as to any allowance or honorarium to the pursuer all his alleged claims and charges should be withdrawn and abandoned. Now, I cannot resist the inference that when Lord Provost Hunter and his committee passed that resolution unanimously their view was that the pursuer had no absolute right to extra remuneration, but that he might in fairness be entitled to an honorarium or voluntary allowance. That, however, is just what the defenders' witnesses say was the position of matters.

It is a very striking feature of the case that while, according to the pursuer's contention, he was during the whole period of his service earning from year to year very considerable sums as remuneration for extra official work done by him, he should never have taken any definite steps to compel payment of what was due to him, although he knew that his employers were all along denying liability, but should have allowed his claims to accumulate, undefined and unsettled, for some thirty-eight years, and until, according to his estimate, they reached the enormous sum of £45,000.

That is undoubtedly a material element to be considered in dealing with this case. The delay which occurred cannot indeed be pleaded as an absolute bar to the pursuer's claim, but it throws the burden of proving the claim entirely upon him. In the case of *CD v. AB* (12 R. (H.L.) 36), where it was contended that an action of declarator of nullity of marriage was barred by long silence and delay on the pursuer's part,

Lord Chancellor Selborne stated the law in terms which seem to me to be entirely applicable to the present case. He said, "Where there is a controversy of fact, delay in bringing forward the case increases, in proportion to the length of that delay, the burden of proof which is thrown upon the plaintiff."

It seems to me that if the defenders are liable at all it must be on the ground of contract. I know of no other legal category to which their liability, if they be liable, could be referred. Now, admittedly no express contract has been proved, and the question therefore is, whether the pursuer has adduced facts and circumstances which imply a contract to give him special remuneration for the work in question, or some of it? The only fact, so far as I can see, which could be founded on as leading to such an implication, is that some of the work, and notably the preparation of parliamentary plans and estimates, is not work of a kind for the performance of which commissioners of police were by the statutes authorised to appoint a surveyor. But that, in my opinion, is not enough. It is here that the long delay tells against the pursuer. If the claim had been brought timeously—for example, if after he was first employed to prepare parliamentary plans and estimates the pursuer had brought an action against the defenders for remuneration—the fact that the work did not properly fall within the scope of a burgh surveyor's duties might have raised a presumption which would have been sufficient to shift the onus and lay upon the defenders the burden of proving that the pursuer had agreed to do the work as surveyor, and without remuneration other than his salary. But when it appears that the pursuer has for nearly forty years done all the work remitted to him without additional remuneration, except two or three voluntary payments, no such presumption arises. Indeed the presumption seems to me to be rather the other way, because when for so long a period a particular course of dealing has gone on between the parties, the presumption rather is that such course of dealing was in accordance with their respective rights.

It seems to me to be established by the documentary evidence which I have gone over in so much detail, that from the time of the pursuer's appointment the defenders intended that he should do all burgh work in which engineering and surveying knowledge and skill were required; that they all along instructed him to do such work as surveyor; that the pursuer knew that that was the case; and that in the circumstances he must be held to have acquiesced. My reasons for saying that the pursuer must be held to have acquiesced are these—The first work for which the pursuer claims remuneration was the parliamentary work in connection with the Dundee Police and Improvement Bill 1871. He now claims a very large sum in respect of that work, but in 1872 he accepted a voluntary payment from the defenders of 100 guineas. The next work of the same kind for which

the pursuer claims remuneration is in connection with the Dundee Tramways and Roads and Police Bill 1877-78, but here again he accepted in 1882 a voluntary payment of £50. Plainly the acceptance of these payments bars the pursuer from claiming any further remuneration in respect of the same work, but I think that it has also an important bearing upon the whole case. The fact that the defenders declined to give the pursuer any remuneration for the work beyond the trifling gratuities which he ultimately accepted, certificated him, if he did not know before, that their position was that he was bound to do all work remitted to him as burgh engineer without additional or special remuneration. By accepting the payments of 100 guineas and £50 he tacitly accepted that position as regarded the Bills of 1871 and 1878, and if thereafter he intended to claim special remuneration for work which he regarded as being outside of his duties as burgh surveyor, I think that he was bound, when such work was remitted to him, to inform the defenders that if he was to do the work it must be upon the footing of being remunerated as if he had been an independent engineer. But the pursuer never did anything of the sort, but continued to the end to do all work which was remitted to him, without intimation before doing it that he must receive special remuneration, and without any claim for remuneration after the work was done beyond vague and indefinite statements to the effect that he was entitled to remuneration.

The pursuer's counsel founded strongly upon what happened in regard to the account which the pursuer rendered in 1881. He contended that the fact that the account was considered instead of being at once rejected was equivalent to a recognition by the defenders of the pursuer's right to claim some remuneration. I have already stated the circumstances in regard to that account, and I do not think that they support that argument. My impression is that the idea of paying the account was never seriously entertained, although the defenders might have been willing to give the pursuer an honorarium as they did upon other occasions. Further, the fact to which I have already alluded, that the pursuer allowed the account to be shelved, without any effort to get the committee to consider it, came very near to a waiver of his claim.

The result is, that although it is impossible not to have some sympathy with the pursuer, who was a devoted and laborious municipal servant, I have come to the conclusion that he has failed to prove his case, and that the Lord Ordinary was right in *assoilzieing* the defenders.

LORD ARDWALL—I also have come to the conclusion that the pursuer is not entitled to succeed in this action. I adopt the ground of that conclusion stated by Lord Low, whose opinion I have had the privilege of perusing.

LORD DUNDAS—I entirely agree with the

opinion delivered by my brother Lord Low, and it is, perhaps, superfluous to say more. But the case is one of great importance to the parties, and has been the subject of anxious argument at the bar and careful consideration by the Court. I venture, therefore, to express, even at some length, the views I independently formed in regard to it, and which lead me to the same conclusion which your Lordships have reached.

The late Mr Mackison became surveyor of police to the Dundee Commissioners in 1868, and continued in that office and (after 1894) as burgh surveyor to the Town Council until 1906. During this long period he certainly did a great deal of work; but it must be kept in view that (leaving out of consideration the honoraria afterwards referred to) his salary was more than once raised and his office staff enlarged from time to time as the bulk of business increased. The evidence shows that he was a most conscientious man and an unsparing worker, though he was slow and dilatory, and not endowed with the faculty of getting through a mass of affairs easily and quickly. It may be that he was inadequately remunerated for the work he did; it may also be that, if he had gone about the matter in a different fashion his employers would have thought right to make substantial pecuniary recognition of his services from time to time; but he chose in the end to table, as matter of legal right, a claim which (even as now arbitrarily restricted) amounts to something like thirty years' salary. The claim, presented as it is after a lapse of something like thirty-eight years, is obviously made under circumstances *prima facie* gravely adverse to its success. Taking matters as we find them, we must decide this case upon the footing that Mr Mackison's claim is pressed as matter of legal right and obligation; and, so viewing it, I am of opinion that it altogether fails.

I shall state as concisely as I can my principal reasons for this opinion. In the first place, one observes that the terms of Mr Mackison's appointment were very comprehensive. The Commissioners' minute of 24th April 1868 (which was communicated to him) bears that he was appointed "during the pleasure of the Commissioners of Police, with all the powers and authorities belonging to the office of surveyor, and subject to such conditions and regulations regarding his duties and the mode of performing them as may be made and prescribed by the Commissioners from time to time. . . . It was further resolved that Mr Mackison shall devote all his services to the business of the Commissioners." The earlier minute of the Police Committee on 17th March 1868 shows that the Commissioners intended the new surveyor to "do all the duties performed by Mr Fulton," his predecessor—and it is in evidence that Mr Fulton had done, without any question as to extra remuneration, *inter alia*, such Parliamentary work (though it was not great in volume) as the Commissioners had had occasion for; to perform the duties of valuator and town architect,

if required, without additional salary; and "to be subject to the control and regulations of the Board from time to time, and to hold office during their pleasure." Accordingly in the advertisement (24th March 1868) it was, *inter alia*, expressed that the new surveyor "must also be qualified as an architect and capable to survey and value property and generally to do the duties required." Mr Mackison's application for the post emphasises with regard to his "fitness to discharge the requisite duties," his training and qualifications as a civil engineer, surveyor and architect, including the surveying of parliamentary plans, and his intimate association "with all description of town's works." Looking, then, to the terms of the advertisement, application, and appointment, it seems to me quite clear that Mr Mackison's duties as surveyor were not limited, or understood by him to be limited, to mere routine work in connection with the paving, building, and sanitation of the town. In my view most of the work now charged for falls plainly within the scope of the duties prescribed to and undertaken by Mr Mackison on his appointment, and I am not prepared to say that any of it falls clearly outside that scope. But assuming that some branches of the work done, *e.g.*, parliamentary work, and particularly such work in connection with tramways, could not fairly be included among the duties understood and agreed to in 1868, the result of the case would not, I think, be different. If the work falling under these heads was periodically and systematically remitted to Mr Mackison as surveyor, and was done by him without any sufficient assertion (or even reservation) of a claim for extra remuneration—and this is, to my mind, the true gist of the evidence—he could not I apprehend, at the end of all, turn round and demand such remuneration. I greatly doubt (to say no more) whether Mr Mackison had any idea that, under the terms of his employment, he was entitled to payment over and above his salary for any of the work he was doing, or thought until quite recent years of making or pressing such a claim.

Certain contemporaneous writings under his own hand seem to me to be of importance as indicating his views as to the scope of his employment. In 1871, three years after his appointment to Dundee—by which time he had had considerable work to do in connection with parliamentary promotion—Mr Mackison became a candidate for the post of burgh engineer to the Corporation of Liverpool. In his letter of application he set forth his "very extensive practice in all the departments of my profession," including, *inter alia*, the surveys and preparation of parliamentary plans, &c., for railways, town improvements, and water supply." He also said—"My present duties in Dundee are very similar to those now embraced under the department of burgh engineer for Liverpool." These words are important when one considers that it was part of the "general duties" of the Liverpool engineer "(a) to prepare all

plans and sections for deposit, pursuant to standing orders, with respect to all street improvements, water-works, or other works undertaken by the Council, which are within the province of the Health Committee, or the Improvements Committee, or the Water and Baths Committee, unless otherwise ordered by the Council, and to prepare all other surveys, plans, and sections required by the Council or any committee thereof not relating to the corporate estate under the management of the Finance and Estate Committee; (b) to report upon all matters specially referred by any committee to the borough engineer." Then again Mr Mackison was in the habit of making up from time to time, for the information of his employers, statements as to the duties of the burgh surveyor's staff and the work of the office in its various departments. One of the most elaborate of these statements, dated 31st January 1879, contains a good deal that is worth noting in regard to this case. The work under the engineering department is stated to consist (amongst a great variety of items) of "the preparation of preliminary plans and estimates for projected tramways and relative reports. The preparation of plans, sections, estimates, statistics, and cartoon plans, and superintending the lithographing of parliamentary plans, when required, has been undertaken by this department. . . . The making surveys, taking levels, making plans and sections, drawing out specifications, . . . obtaining tenders for tramways, and checking contractor's offers after being opened." The architectural department of the office was stated to consist, *inter alia*, in "the preparation of the preliminary sketches, and probable estimates of additions to and alterations on the various buildings under the management of the Police Commissioners, such as markets, public baths, police buildings, and police and fire engines stations, police stables, &c., and the working plans, specifications, occasional schedules of quantities, and detailed drawings and working copies of same; and obtaining tenders. . . . The preparations of the service notice plans requisite on owners and others interested for acquiring properties." In an appended "list of works in progress in the paving, sewerage, improvement, and tramways, &c. departments," there is included, *inter alia*, "Tramways—Perth Road, Lochee Road, and Ward Road—Contracts Nos. 1, 2, 3, 4, and 5, £25,251, 19s. 6d." Later a similar "Statement of the principal work of the burgh engineer's department," dated 13th May 1887, and issued under the hand of Mr Mackison as burgh engineer, began with the observation that "it would be difficult to give a fully detailed statement of all the duties of this department, the works and duties being so varied and subject to continual augmentation; but the following will give the Commissioners a fair idea of the nature and extent of the work done." Then followed a carefully stated summary of the works and duties of the department, including the "tramways department," and bearing repeated

references to the preparation of parliamentary plans and sections, and the like business. In the last paragraph of this statement Mr Mackison noted that the average sum expended per annum during the preceding thirteen years on the burgh engineer's staff was £1204, and it appears that this sum included his own salary.

One comes now to consider the actual history of the earlier (and most significant) items of Mr Mackison's present claim. The first of these items relates to "the Dundee Police and Improvement Bill 1870-71," for which a very large sum is now demanded. But it appears that he was offered, and accepted, the sum of 100 guineas, "being in acknowledgment of extra services in connection with" that Bill. The receipt for this payment is produced. The second item of charge is in a similar position. It relates to the preparation of plans and other work in connection with tramways. Here, again, Mr Mackison was offered, and accepted, a honorarium of £50, "being for special and extra professional services;" and it is to be observed that on this occasion a honorarium of £25 was awarded in precisely similar terms to Mr Thomson, who was Mr Mackison's assistant, for his corresponding services in the same affair. I pause to note incidentally that in January 1873 Mr Mackison was offered, and accepted, a honorarium of £60 in full of his trouble and expense in visiting towns in England and France for the purposes of procuring information in regard to cattle markets and slaughterhouses. Now, it seems to me that Mr Mackison's acceptance of these (no doubt well deserved) honoraria for his extra services in connection with the first and second matters in which he was engaged, and in connection with which he now seeks to claim remuneration upon the footing of an outside employment, is a pregnant fact in the case. It goes, as I think, not only to absolutely negative his claim in regard to these particular items, but also to indicate very strongly that he had at those dates no idea of any legal right to make or enforce a claim for extra remuneration in regard to other matters which he afterwards maintained to have been outside the scope of the duties he was appointed to perform.

The next, in historical order, of Mr Mackison's items of claim stands in a somewhat different position. It arose out of "The Dundee Street Tramways, Turnpike Roads, and Police Bill 1877-78." In October 1881 Mr Mackison, it seems, submitted to the Tramways, &c., Committee of the Commissioners a report containing a detailed statement of contracts and relative accounts in regard to the tramway extension. The committee's minute of 6th December 1881 bears that under reference to their minute of an earlier meeting on 30th May, "instructing the convener to consider and report as to the amount to be charged against the Tramway Company, and the amount to be allowed to the surveyor for engineering and other charges, the convener reported, and the committee re-

solved to consider the matter against next meeting. The surveyor's notes are annexed to this minute, and the convener was authorised to get some further information." Mr Mackison's annexed "notes" consisted of a sort of account for work done by him, under slump figures, amounting in all to over £700. The Tramways Committee met again on 3rd November 1884, when they had before them their minutes of 30th May and 6th December 1881 "on the subject of engineer's and other charges attending the construction of the tramways," and they remitted "this matter" to a sub-committee "to consider and report." The only member of this sub-committee examined as a witness—probably the only survivor—ex-Provost Hunter—says:—"I don't think the matter was ever taken up by that sub-committee," and the fact appears to be so. This was certainly a loose way of going about the matter. But I think that Mr Mackison, for his part, if he really thought he had a legal claim for this sum of over £700, and was not merely suggesting a foundation for some such honorary recognition of his services as had been made and accepted on previous occasions, was bound to have, and would have, taken means to remind the Commissioners of the matter and insist upon a satisfactory disposal of it, instead of remaining quiescent and accepting instructions for, and performing (as he did) year after year without remonstrance or demur, work of the same character as that for which he latterly asserted a right to extra payment over and above his salary. And, on the other part, it seems to me inconceivable that a body of business men such as the sub-committee in question, with able advisers at their hand to remind them of their duties, should have allowed this matter to go to sleep, as they did, if they had any idea that it involved a considerable and a rapidly increasing legal claim which would have to be some day met and satisfied.

There is a large bulk of evidence as to the attitude of the Commissioners and the Town Council during the long period in question in regard to Mr Mackison's "claim" for extra remuneration. The majority of the witnesses say that they never considered the claim to have any legal foundation, and even those adduced for the pursuer do not, I think, put the matter higher than to say that there was throughout a general impression or understanding that Mr Mackison ought to be paid, upon some quite undefined footing, extra remuneration over and above his salary in consideration of the work which he performed. I quote one or two passages, taken more or less at random from the pursuer's witnesses. Mr Perrie says, in examination-in-chief—"I understood he was to be paid extra. . . . (Q) Did you understand that Mr Mackison was to do the work on less terms than an outsider would have done it?—(A) I did not understand what he was to do it for. All I understood was that from his position as engineer he had a claim, but what that claim was I did not

know and did not form any opinion. He had a claim to be paid for the work he did, but the amount of it I had not considered." Mr Stevenson depones—"There was a very common impression outside that Mr Mackison had some claim, the nature of it I did not understand. . . . (Q) When you went into the Town Council did you hear anything said about the idea in regard to Mr Mackison's position?—(A) Yes; I heard statements made in committees which caused me to believe that Mr Mackison had a claim, but how it was calculated I never understood." Again, Mr McCulloch says—"There was a very strong impression that he ought to be remunerated very handsomely for all the extensive work he did outside his own work. (Q) Wasn't there a general idea that he had served the Corporation with a lot of hard work and for a long time and that some recognition over and above his salary ought to be given?—(A) It was a duty in equity." All this—and I have quoted only from the pursuer's witnesses—fits well enough with the view that if Mr Mackison had continued as he began upon the footing that a recognition might now and again be suitably made by way of honorarium for arduous labour creditably performed his employers would (as I think the proof amply indicates) probably not have been backward in so recognising his services as surveyor. But it in no way, to my mind, establishes that they ever assented to, or that he ever asserted, a legal claim of the character put forward in this action. Witnesses are brought on both sides who depone as to what the late Sir Thomas Thornton said upon the subject, and it is certainly matter for regret that that gentleman is not available to speak for himself. But I think that the gist of what Sir Thomas is reported to have said comes to no more than that he on various occasions expressed the view (which subsequent events have proved to be a very wise one) that the Council as business men would do well to give Mr Mackison some money payment and be done with it, as trouble might probably arise in the event of his death and of a claim of some sort being maintained by his executors.

Another aspect of the case, which was strongly founded upon by the defenders' counsel, arises on a consideration of the manner in which Mr Mackison rendered, year by year, the accounts of his department to the city treasurer, allocating the departmental expenses against the particular works performed in it without any note or hint of reservation in regard to the enormous claim for his own extra remuneration which he latterly tabled and sued for. The inconvenience, not to say injustice, to the rate-payers of Dundee which would arise if this supervenient claim were to be sustained by the Court is obvious enough, apart from the evidence of Mr Stiven, the treasurer. I do not say that if the claim were otherwise well founded it would be absolutely barred by Mr Mackison's method, or want of method, in rendering his accounts, year after year, in the manner above indicated;

but I think his actings in this matter lend considerable countenance to the view that he never, until recently, had any idea of making the enormous claim which he in fact did make, and which, though greatly modified in an illogical and arbitrary fashion, is still insisted in.

The crucial averment upon record is (Cond. 8) to the effect that Mr Mackison was employed, in regard to the matters therein detailed, "on the footing and agreement in every case that he was to be paid the usual professional charges, under deduction of office charges and expenses." That is a relevant enough averment of a case based on contract. But the pursuer's counsel frankly admitted that no "agreement," in the proper sense of the word, to that effect is proved, or indeed ever existed; and from what I have already said I think it is equally clear that the same must be affirmed as to the existence of any definite or substantial "footing"—whatever that may mean—upon which a legal claim to any part of the sum sued for can be based. I believe I have now summarised the principal points of this voluminous case; and the result seems to me to be that the action fails entirely. I consider, for the reasons expressed, that if and in so far as any part of the work in respect of which it is now sought to make a charge did not fall fairly within the understood and agreed scope of Mr Mackison's appointment, such work was imposed upon him, as surveyor, by definite instructions from time to time, and accepted and performed by him in that capacity, without any, or at all events any sufficient, protest or reservation of a claim for extra remuneration; and that, while his employers might have been quite willing, if the matter had been put to them in that way, to award him occasional honoraria, as circumstances seemed to warrant, there never was any undertaking or understanding of any sort to recognise a claim on his part for extra remuneration as matter of legal right or upon any agreed or definite "footing." My impression, as already stated, is that Mr Mackison never really thought he had a right to make any such claim, or intended to do so, until matters came to a head in the latter years of his life.

A suggestion was made by counsel—and there are passages in the evidence which lend it some support—to the effect that Mr Mackison may have had the idea in his mind, but deliberately refrained from rendering accounts for extra remuneration from fear that he might by so doing lose his situation as a servant at will. But if this be, as it may be, the true solution of the matter in fact, it seems to me to be equally fatal to the success of this action; because on that hypothesis Mr Mackison—for a definite reason, well or ill founded—deliberately refrained from tabling his claim, and accepted and performed all the work he was instructed by his employers to do as part of his salaried duties, and without protest or reservation.

In whatever aspect the case is viewed, it

seems to me that the pursuer cannot succeed, and that the Lord Ordinary's interlocutor is right and ought to be adhered to.

LORD JUSTICE-CLERK—I agree.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Dean of Faculty (Dickson, K.C.)—Sandeman—Lowson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday March 18.

SECOND DIVISION.

[Lord Salvesen, Ordinary.]

HOGARTH & SONS v. LEITH COTTON SEED OIL COMPANY.

Shipping Law—Carriage of Goods—Contract for Delivery from Ship's Tackles—Landing into Shed at Expense of Consignee—Custom of Port—"Indefinite"—"Uncertain"—"Not Uniform, Universal, and Notorious"—Inconsistent with Contract.

The bills of lading under which a cargo was carried from Bombay to Leith, provided that the cargo should be "delivered from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Leith." The cargo consisted of bags of three different commodities, marked by nineteen different marks and deliverable to eight different consignees. On the arrival of the vessel the shipowners refused to deliver into the consignees' lorries at the ship's side, and landed the whole cargo into shed, where it was assorted according to the various marks. The shipowners thereafter raised an action against the consignees to recover the expense of "shedding" the cargo, and averred that it was "the custom of the port of Leith for ships discharging mixed or general cargoes similar to" the one in question, "with a variety of distinguishing marks and deliverable to a number of receivers, to send the cargo into shed and thereafter assort the several parcels according to the various marks at the expense of the consignees."

Held, after a proof, that as the custom averred by the pursuers was (1) indefinite and uncertain, (2) not uniform, universal, and notorious, and (3) inconsistent with the contract, it could not be imported into the contract, and the defenders were therefore not liable.

Messrs Hugh Hogarth & Sons, the managing owners of the steamship "Baron Fairlie," raised an action against the Leith Cotton Seed Oil Company, concluding for, *inter alia*, the sum of £20, 13s. 6d.

VOL. XLVI.

The following narrative is taken from the opinion of Lord Ardwall:—"The pursuers in this case are managing owners of the s.s. 'Baron Fairlie' of Ardrossan, and for the purposes of this action represent the whole owners thereof. The defenders are a company carrying on the manufacture of cotton seed oil and cotton cake, and for the purposes of this action represent the receivers of a cargo of cotton seed, bone meal, and Kurdee cake carried by the said vessel from Bombay to Leith under bills of lading of which No. 10 of process is a specimen.

"By the said bills of lading the pursuers undertook to deliver the cargo 'from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Leith.'

"The cargo consisted of 52,424 bags of cotton seed, 18,280 bags of bone meal, and 727 bags of Kurdee cake.

"These bags were distinguished from each other by nineteen different varieties of marks. The cargo was shipped under twenty-seven separate sets of bills of lading representing different portions thereof, and there were eight consignees or receivers of the cargo. The pursuers having had considerable difficulty in delivering from the s.s. 'Gloamin' a cargo of a somewhat similar nature but not so much mixed, intimated to the defenders before the ship arrived that the entire cargo would probably have to be treated as an ordinary general cargo to be landed by the ship's porters or stevedores, and assorted in shed, the cost of 'shedding' to be paid by the defenders. In reply the defenders gave a note of the bags of cotton seed consigned to them, and intimated that all the bags bearing their marks would be weighed and sampled separately on board the steamer, and would be loaded on to the lorries direct *ex ship* by their own porters. They further intimated that if the seed was put into shed by the pursuers' men, it would be entirely at the pursuers' own expense. Some further correspondence followed, which shows very clearly the positions taken up by both parties from the first. The 'Baron Fairlie' arrived in Leith on 5th February 1907, and the discharge of the cargo started at ten o'clock that day. The pursuers refused to deliver the cargo into the defenders' lorries, which were ready to receive it at the ship's side, and landed the whole of it into shed and assorted the various bags there according to their marks and the bills of lading, and delivered their portion of the cargo to the defenders out of the shed. In the present action they seek to recover, *inter alia*, the defenders' proportion of the expense of putting the cargo into shed and weighing it there, amounting to 6d. or 7d. per ton, or in all £20, 13s. 6d. It ought here to be mentioned that the present is a test case, and represents much more than that amount.

"The defenders maintain that under the contract between them and the pursuers contained in the bills of lading they were entitled to delivery from the ship's tackle at the ship's side. The pursuers maintain

NO. XXXVIII.