

record certain statements by which the pursuer is charged with specific acts of adultery said to have been committed at a date considerably later than the act alleged in the attack on her character which forms the subject of the present action. In the Outer House the Lord Ordinary found that those averments were irrelevant, and ought not to be remitted to probation; but I think the proper course to be taken with regard to them is to order them to be deleted from the record. The reason for adopting this course is that which was given by Lord President Robertson in *A v. B* ((1895) 22 R. 402), and approved by Lord President Dunedin in *H. v. P.* ((1905) 8 F. 232), namely, that it is neither legitimate nor expedient that an inquiry into the particular slander complained of should open the door to a roving inquiry into collateral issues which have but an indirect bearing on the case in hand. I add, however, that in a question of this kind—as indeed in any question where character and credibility are concerned—it is competent, if notice has been fairly given, to put to the pursuer in cross-examination such specific instances of conduct as those made in the averments to which I have referred, notwithstanding that it is incompetent to present substantive evidence in support of their truth. It is a delicate matter of policy for the party concerned to consider whether he is either safe or wise in hazarding such cross-examination. But the cases to which I have already referred establish that such questions in cross-examination of the pursuer are legitimate provided fair notice has been given of the subject-matter of the intended questions. With regard to the form in which fair notice should be given, it is enough to say that here sufficient notice has been given to the other side by the statements now ordered to be deleted. I think it is fair that as the expenses incurred in this reclaiming note are entirely due to the course which the defender has pursued those expenses should fall upon him.

**LORD MACKENZIE**—The course which your Lordship proposes should be followed in this case is one which has been settled by previous decisions, and therefore I concur in what your Lordship proposes.

**LORD SKERRINGTON**—I concur.

**LORD CULLEN**—I also concur.

The Court recalled the interlocutor reclaimed against, allowed the amendment, ordered the averments quoted in the interlocutor to be deleted from the record, and of new approved of the issue for the pursuer.

Counsel for the Pursuer—Morton, K.C.—Ingram. Agents—Mitchell & Baxter, W.S.

Counsel for the Defender—Maclaren, K.C.—Crawford. Agent—John Baird, Solicitor.

Friday, November 3.

## FIRST DIVISION.

[Lord Sands, Ordinary.

### WILSONS & CLYDE COAL COMPANY, LIMITED v. NORTH BRITISH RAIL- WAY COMPANY AND OTHERS.

*Harbour—Rates and Charges—Composite Rate for Loading—Normal Incidents of Loading—Pier and Harbour Orders Confirmation (No. 1) Act 1883 (46 and 47 Vict. cap. xliii) (Methil), secs. 11 and 12, and Schedule of Rates.*

A railway company in its capacity as a harbour authority charged certain coalmasters a composite rate for loading “duff,” *i.e.*, coal reduced to a state of dust mixed with water, which rate included the use of a hoist for tipping the waggon-loads into a chute. The company was in the habit of “poking” the duff, *i.e.*, loosening it by the insertion of a poker, steel rod, or shovel, in order to facilitate its descent from the waggons when tipped. The company having refused to “poker” waggon-loads of duff which had been forwarded in a wet and stiff condition unless on the basis of a special charge, the coalmasters brought an action for declarator that the company were bound to load without extra charge all coal consigned to them for shipment. *Held* that “poking” was not a service included in the composite rate except in so far as it was merely incidental to attendance upon the hoist.

*Contract—Railway—Harbour Authority—Agreement not to Increase Rates and Charges—Construction of Agreement—Composite Rate for Loading.*

A harbour authority which had been in the habit of shipping quantities of “duff,” *i.e.*, coal reduced to a state of dust mixed with water, for a composite rate, and in connection with its shipment to incidentally facilitate its descent from the waggon when tipped by “poking” it, *i.e.*, loosening it by means of a poker, rod, or shovel, made an agreement with the consigners not to increase its rates and charges or impose new or additional rates and charges. The harbour authority subsequently declined to load certain waggon-loads of duff which arrived at the hoist in a moist and caked condition, rendering it difficult to work, unless on the footing of a special charge for poking. *Held* that in the absence of any proof that the composite rate prior to the agreement was a contractual rate for, *inter alia*, the “poking” or digging *de facto* performed, a bargain to perform these services for the composite rate could not be read into the agreement, and that accordingly the harbour authority was not bound to load the duff in question for the composite rate.

The Pier and Harbour Orders Confirmation (No. 1) Act 1883 (46 and 47 Vict., cap. xliii)

(Methil) enacts:—Section 11—“ . . . The undertakers may, subject and according to the provisions of this Order, for the use of the harbour and works, levy, demand, recover, and receive in respect of . . . minerals and other matters and things described in the schedule to this Order any sums not exceeding the several rates specified in such schedule. . . .” Section 12—“The undertakers may levy, demand, recover, and receive such rates or other consideration as they may think reasonable for the use of any . . . cranes and other works, buildings, machinery, and conveniences belonging to the undertakers, for the use of which rates are not specially fixed by the schedule to this Order.” Section 16—“The undertakers may from time to time confer, vary, or extinguish exemptions from and enter into compositions with any person or persons with respect to the payment of the rates authorised by this Order, but so that no preference be in any case given to any person, and that anything done under this section shall not prejudice the other provisions of this Order.”

“SCHEDULE.

“Rates on Animals, Fish and Goods Shipped, Unshipped or Transhipped within the Harbour.

	Inwards.	Outwards.
	s. d.	s. d.
“Coals - - - per ton	0 6	0 3

“Rates for the Use of Machinery.

“For cranes, lifts, and other machinery worked by hydraulic or other power.

“If the weight lifted in each lift is less than 20 tons the charge to be per ton, lifted as follows:—

“For coals and minerals - per ton 0 2

“If the total number of lifts for one vessel does not exceed ten in one day, or if the weight to be lifted in one weight exceeds 20 tons, the rates to be fixed by the undertakers from time to time or according to arrangement.

“For Rails, &c.

“For use of rails, turntables, capstans, and other appliances, including the working of the traffic over or by means of the same:—

“On all goods, minerals, or other articles imported or exported to be charged against the shippers and importers - - - per ton 0 2

“For Weighing, &c.

“For weighing coals and goods shipped into and removed from vessels in the harbour or dock

per ton 0 1

“For Trimming Coals.

“For trimming coals in vessels in the harbour and dock - per ton 0 2”

Wilsons and Clyde Coal Company, Limited, 75 Bothwell Street, Glasgow, *pursuers*, brought an action against the North British Railway Company, *defenders*, whereby they sought to have it found and declared, *inter alia*—“(First) That on a sound construction of an agreement entered into between the defenders with the consent of the Burntisland Harbour Commissioners and the Harbour Commissioners for their interest on the one part, and the pursuers and other

coalmasters forming the Fife and Clackmannan Coalowners' Association on the other part, dated 30th March 1914, the defenders bound and obliged themselves, *inter alia*, not to increase the rates and charges on coal or the charges for trimming coal beyond the rates and charges in operation at Methil at 24th March 1910, and not to impose any new or additional rates or charges on coal. (Second) That the defenders are bound under the provisions of the said agreement, and of the Pier and Harbour Orders Confirmation (No. 1) Act 1883, and in particular of sections 11 and 16 thereof, to load or ship the whole coal, including duff (which is coal) consigned to and delivered at Methil for shipment, and that at the rates in operation at 24th March 1910. (Third) That on and after 8th May 1920 the defenders wrongfully and illegally refused or failed to ship or to load on board the s.s. “Solent” at Methil, in consideration of the full amount of such rates and charges, 74 tons, 13 cwt. of duff, part of a consignment of duff despatched by the pursuers to, and tendered to the defenders at, Methil for shipment on said vessel. . . .”

(The above-mentioned agreement having expired on 31st October 1922 a conclusion for implement had ceased to be relevant at the date of the hearing on the reclaiming note, and has accordingly been omitted from this report.)

The parties averred, *inter alia*—“(Cond. 2) Under the provisions of the Pier and Harbour Orders Confirmation (No. 1) Act 1883 (46 and 47 Vict. cap. 43 (Methil)) the defenders, who are now the undertakers at Methil Harbour, are entitled to exact the charges and rates specified in the schedule annexed to the Order as confirmed. These are maximum rates, and can as provided in the Act be reduced by agreement. The maximum rate allowed by the Act for shipping coal and for the use of machinery, rails, &c., is 6d. per ton. At the time when the said agreement was entered into the rate charged for shipping coal was less than the maximum allowed by the Act, being a rate of only 2½d. per ton, less a discount of 15 per cent. This rate was regularly exacted by the defenders and was paid by the consigners upon the footing that the work of so shipping coal included all necessary poking or digging of the coal, and that the rate charged and paid covered the cost of this work when required. The work of poking or digging coal when required is part of the process of shipping coal, and the cost of this element of the work is covered by the rates and charges authorised by the Act and regulated by the said agreement. All necessary poking and digging of the coal was in fact performed by the defenders as part of the service, in return for which the said rate was charged. The statements in answer so far as not coinciding with the pursuers' averments are denied. (Ans. 2) . . . Explained that the rate of 2½d. (less discount) was a compounded rate in respect of (1) the rate (or shore dues) on coal shipped within the harbour, the maximum rate for which under the Order of 1883 for outwards coal is 3d. per ton; (2) the rate for the use of hoists,

for which the maximum is 2d. ; and (3) the rate for the use of rails, for which the maximum is 2d. None of these statutory rates applies to or covers poking or digging of the coal out of the waggon. (Cond. 3) Article second of the said agreement is in the following terms:—‘During the period from the 24th day of March 1910 to the 31st day of October 1922 the harbour and dock dues on vessels, the rates and charges on coal and pitwood, and the charges for trimming coal at Bruntisland and Methil in operation at 24th March 1910 shall not be increased, and no new or additional rates or charges on coal or pitwood shall be imposed: Provided that nothing contained in this or the preceding article of this agreement shall prevent the Railway Company or the Harbour Commissioners from making such additional charges as, failing agreement, may be determined by an arbitrator to be appointed by the Board of Trade in respect of (a) levelling of coal for separation of parcels of coal or for general cargo, and (b) trimming, carrying, or wheeling bunker coal, or shall prevent the Railway Company from charging the special rate of one halfpenny per ton referred to in section 19 of the North British Railway Act 1907, or from charging for the provision and use of weighing machines under the said section.’ (Cond. 4) Article third of the said agreement is in the following terms, viz.—‘In the event of the Railway Company or the Harbour Commissioners seeking during the last-mentioned period to make charges for services which were not being rendered at the docks on 24th March 1910, any difference between the coalmasters on the one hand, and the Railway Company or the Harbour Commissioners on the other hand, as to the coalmasters’ liability to pay for such services or as to the amount of the charge to be imposed, shall be determined, failing agreement, by an arbitrator to be appointed by the Board of Trade.’ (Ans. 3 and 4) The agreement is referred to for its terms. (Cond. 5) The contents of the coal-truck cannot in all cases be discharged into a steamer’s hold by mere tilting at the hoist and a process of poking or digging is necessary. This process when required is a necessary part of the work of shipment and falls to be performed by the defenders accordingly. The defenders have regularly carried it out for many years without making any additional charge. In the year 1912 an endeavour was made by the defenders to exact additional rates for this part of the work of shipment, and bills were posted both at Methil and Bruntisland docks intimating the additional rates. The defenders maintained and maintain that they are entitled to impose these additional rates, but the coal companies interested have always opposed their contention, and have constantly repudiated liability for the accounts which have been rendered to them by the defenders for such poking and digging. No attempt has been made by the defenders to collect the amounts which they now assert to be due in respect of such additional rates. The statements in answer so far as not coinciding with the

pursuers’ averments are denied. Explained that the services performed, as admitted by the defenders’ shoremen, are exactly the services for which the defenders are now claiming the right to exact an additional rate. (Ans. 5) Admitted (1) that the contents of a coal-truck are not in all cases discharged into a steamer’s hold by mere tilting at the hoist, and that in some cases loosening of the contents may be necessary; (2) that the defenders’ shoremen at Methil, who have nothing to do with the machinery at or the mechanical operation of the hoist, but who accompany the waggon on to the hoist and go up with the waggon to release the door, have occasionally in order to help the loading performed some loosening or easing of the contents of waggons where these would not run freely from the waggon when tilted; and (3) that in 1912 the defenders imposed a charge for poking and digging duff, which the coalmasters declined to pay. Denied that poking and digging is part of the work of shipment and falls to be performed by the defenders. Explained that any poking and digging ever performed by the defenders prior to 1912 was *ex gratia*, and they decline to perform the said work. *Quoad ultra* no admission is made. (Cond. 6) On 4th May 1920 the pursuers despatched from their Glenraig and Lethans Collieries twenty-two waggons containing duff for shipment per s.s. ‘Solent.’ The said waggons contained 222 tons, 14 cwt. of duff. The full rates for shipment of the coal shipped so far as authorised by the said agreement were charged by the defenders, but the work of shipment was only in part performed. Eleven of the said waggons were fully discharged by the defenders into the said steamer, but the remainder were only partially discharged, duff to the amount of 74 tons, 13 cwt. being left in them. The eleven waggons containing such undischarged duff which belong to the pursuers, instead of being returned to them after shipment of the coal, were shunted by the defenders to a siding where they lay on demurrage. The statements in answer so far as not coinciding with the pursuers’ averments are denied. Explained that no additional rate was charged by the defenders in respect of the service of poking and digging, which, as admitted, was required in the case of the eleven waggons which were fully discharged. (Ans. 6) Admitted that on 4th May 1920 the pursuers despatched from their Glenraig and Lethans Collieries twenty-two waggons containing duff for shipment at Methil Dock per the s.s. ‘Solent,’ that eleven of the said waggons were fully discharged by the defenders into the said steamer, that only parts of the contents of the remaining eleven waggons were discharged, and that the said remaining eleven waggons were shunted into a siding at the dock. *Quoad ultra* no admission is made. In the case of the eleven waggons which were fully discharged by the defenders into the steamer, the tipping of the waggons did not release the whole contents, as these were not all in a suitable state for shipping, but with some easing or poking by the defenders’ shoremen the

whole duff was got out of these waggons into the steamer. In the case of the eleven waggons which were only partly discharged into the steamer, these were to some extent emptied at one end. The undischarged contents were a solid mass, and could not have been released without the use of picks and shovels. It would have taken from forty-five minutes to an hour or more to release completely the contents of each of these eleven waggons. These waggons were accordingly, after the unsuccessful attempts to ship their contents, put aside at Methil awaiting the instructions of the colliery agent, who was in communication with the pursuers. When the contents of the waggon do not leave it after it has been tilted on the hoist, the waggon has to be lowered and the men have to go inside and release the material, after which the waggon is again raised and tilted. The contents may not run out of the waggon after the first loosening, and the waggons may have to be lowered several times to enable the men to continue poking till all the material is released. . . . (Cond. 7) In breach of the express terms of the said agreement, the defenders refused to do the poking or digging necessary for the shipment of said duff unless the pursuers agreed to pay additional rates therefor. The said refusal and demand were unwarranted and illegal. The charge of such additional rates is in violation of the agreement between the pursuers and defenders. The said poking and digging was at 24th March 1910 regularly performed by the defenders as part of the work of shipment. It had been so performed by them for years prior thereto, and, as already set forth, it is an integral part of the defenders' duty of shipment. (Ans. 7) Denied. The defenders have not charged or imposed any additional rate. They decline to do the work of poking or digging. Such work is no part of their duty, and is not covered by the statutory rates and charges. The agreement founded on does not affect the question of poking or digging. Reference is made to the immediately preceding answer.

The pursuers pleaded, *inter alia*—"1. On a sound construction of the agreement descended on, the pursuers are entitled to decree in terms of the first declaratory conclusion of the summons and of the relative conclusion for implement. 2. The defenders being the owners of said dock at Methil, and bound to work it subject to the terms of the Act of 1883 as modified by the North British Railway Act 1889 and the North British Railway (Methil Harbour) Act 1891 and the foresaid agreement, decree should be pronounced in terms of the second declarator craved. 3. The said duff having been duly tendered to the defenders for shipment, and the defenders being bound to load the same, the pursuers are entitled to decree in terms of the third declaratory conclusion."

The defenders pleaded, *inter alia*—"1. The first and second declaratory conclusions being unnecessary should be dismissed. 3. The defenders not having increased any rate or charge on coal or duff, and not having imposed or sought to impose any

new or additional rate of charge on coal or duff, are entitled to absolvitor. 4. In respect the rates charged for duff do not cover poking or digging, the defenders are entitled to absolvitor. 5. The defenders not being bound to ship duff unless tendered to them in such a condition that it will run with reasonable freedom from the waggon, are entitled to absolvitor."

On 26th July 1921 the Lord Ordinary (SANDS) after a proof, the import of which sufficiently appears from his Lordship's opinion, pronounced the following interlocutor:—"Sustains the first plea-in-law stated for the defenders; dismisses the first and second declaratory conclusions of the action; also sustains the fifth plea-in-law stated for them, and assolizies defenders from the third declaratory conclusion of the summons and the petitory conclusion; dismisses the conclusion for specific implement as laid, and decerns. . . ."

*Opinion.*—"The defenders as the harbour authority at Burntisland have undertaken by agreement to perform certain services for the pursuers at certain rates of charge. One of the obligations is in connection with the shipment of coal, for which a charge is fixed at the rate of 2½d. per ton. The present action has relation to duff, but it is conceded that duff is coal within the meaning of the agreement. The defenders have statutory authority to make charges for certain services—3d. for shore dues, 2d. for the use of hoist, and 2d. for rails. The 2½d. rate is a composition for all the services rendered, including shore dues, rails, and hoist. The question arises whether the services undertaken, and for which 2½d. is allowed, include anything but the statutory services, for in my view it is quite competent for the defenders, though not bound to render any further service, to agree to do so, and to make a charge therefor. If the services undertaken, and which are covered by the charge, included no more than the statutory services, then the present case would not present much difficulty. The shore due is a charge for use of the pier and harbour, and is not a stevedore charge; and the service of the hoist is completed when the waggon is tipped, and does not include the digging of hard substances out of waggons with pick and shovel after they have been hoisted by the lift.

"As pointed out in a previous opinion in this case, the defenders are not under any statutory or common law obligation to act as stevedores. They might place the pier and the rails and the hoist at the disposal of the shipper of goods, and leave him to direct and manage the shipment of his goods with the assistance of the plant and men thus placed at his disposal, just as happens in many great ports where the harbour authorities place a berth, a crane, and the service of a cranesman at the disposal of the ship and the stevedore, leaving them to see to the shipping or the unshipping of the cargo. But this is not the arrangement as regards coal shipped at Burntisland. The Coal Companies appear to have agents on the spot to attend to

their interests, but these agents do not direct, control, or interfere in any way with the work of transit and shipment. In ordinary course once the coal is put upon the waggon at the colliery it finds its way to the hold of the ship without any interposition either of the colliery company or the shipper. The Railway Company and the Harbour Authority do the whole job themselves. The agreement between the parties must be construed in the light of this practice and understanding. If there be any incidents of service between the railway line and the hold which is rendered by the defenders, this must be held to be included in the 2½d. charge. For example, it is obvious that between the time when waggons arrive at the railway sidings and the time when the coal is stowed in the hold there must be direction and superintendence to co-ordinate the different operations, which is quite distinct from the actual service of particular plant, such as rails or hoist. But this direction and superintendence the defenders are bound to give, and they can make no extra charge therefor, because under the agreement, interpreted in the light of practice, they must be held to have undertaken this.

“It appears that the coal dust, which is called duff, and which must all have passed through a 3-16th inch riddle, had for many years prior to the agreement of 1914 been shipped at Burntisland though not in very great quantities. Duff is not so easily handled as coal. Unless under exceptional circumstances, such as severe frost, coal falls in a body out of the waggon when it is tipped, and the process does not take more than a minute. But, as might be conjectured from its nature and its damp condition, duff does not fall out so readily, and it is often, and indeed generally, necessary to give it some encouragement by poking and loosening the corners. This service, in my view, the defenders, under their agreement and in light of practice, are bound to render so long as the agreement subsists. But if the duff be in bad order for handling, the work may be much more serious. It may be necessary to dig out the whole waggonful shovelful by shovelful, with several turnings over as the far end of the waggon is approached, and a single waggon may thus take an hour to empty. It is in evidence that one consignment was so hard that it could not be discharged at the hoist at all, and had to be removed to be dug out and shipped by crane at a cost of 3s. 6d. per ton. On another occasion the contents of the waggon came out in a solid mass and blocked the chute, which had to be dug out. Even making all allowances for taking the thick with the thin, as the pursuers put it, the idea that such service, if required to any extent and not on one or two fortuitous occasions, should be regarded as covered by a charge of 2½d. per ton seems most unreasonable.

“There is, no doubt, evidence that certain incidents of this kind occurred long before the agreement of 1914, and I understand that the pursuers’ case is that they are ordinary incidents in connection with the

shipment of duff, and must have been contemplated when the agreement was entered into. I am not satisfied, however, that it is proved that prior to 1914 difficulty of this kind was such an ordinary incident in connection with the traffic in duff that the defenders are barred from insisting that if they are to handle duff it shall be forwarded to them in a reasonable condition for convenient handling. It must be kept in view that when the defenders made complaints, which the pursuers now found upon as showing the state of matters before 1914, the defenders’ contention was that they were not bound under their agreement to undertake any poking, and in support of their contention they naturally cited the most extreme instances as enforcing their protest.

“In the year 1920 there was a great increase in the quantity of duff shipped. It is matter of public knowledge that about this time very high prices were obtained for the shipment of coal, and anything that resembled coal was shovelled into holds. I am satisfied by the evidence of M’Kelvie, who seemed to me a reliable witness, that at this time very considerable quantities of duff were in very bad condition as regards facility for handling. He says—‘(Q) With regard to the average amount of poking and digging required to be done to the duff before the war as compared with 1920, has the labour been greater or less?—(A) It was much worse in 1920. . . . The duff from a number of collieries was exceptionally bad as regards poking, viz., Oakley, Townhill, Muirbeath, and Wilsons & Clyde, which means Glencraig and Lethans. The duff from these collieries came to us in 1920 in a solidified mass, soaked with water to such an extent that there were actually pools of water standing on the top of the waggons. I am talking of the year 1920. That was worse than I had ever seen the duff in all my experience.’ Again, with regard to a consignment from Oakley in March 1920 he says—‘Our men refused to ship these waggons because they were in that solidified wet state, and it was a case of shovelling from the door right back, and of course it was not a case of one shovelling, because whenever you put the material down it had to be lifted from there again, and accordingly our men held that that did not come under the category of poking.’ In regard to the particular waggons, the rejection of which gave rise to the present action, the facts appear to be these—There were twenty-two waggon-loads of duff. Eleven of the waggons had been specially prepared, i.e., a layer of small coal had been placed below the duff. The eleven waggons were tipped and emptied without any serious difficulty or delay. The other eleven waggons had not been ‘prepared’ and the duff was in solid hard agglomerated masses. The men would not work at any single waggon for more than fifteen minutes. They worked at each of these waggons for this period and succeeded in removing about one-third of the contents. David Sutherland says of these eleven waggons—‘With regard to the other eleven waggons there had been

no small coal placed in the bottom of them because none of the contents ran out. We tried tilting them and nothing ran out when we tilted them. We tried to loosen the stuff in these eleven waggons. For that purpose we had the waggons lowered almost level again, and we two cradle men got inside and tried to loosen it with shovels. We were able to loosen some of the stuff in these waggons with shovels. (Q) But the largest proportion, were you able to loosen it?—(A) We could have loosened it if we had been long enough on to it. We spent fully fifteen minutes I would say over each of the waggons that went back. I would say that on an average about three tons came out of these eleven waggons. About one-third of the contents was shipped, leaving about two-thirds in them. The two-thirds that was left was of a sort of tough clayey nature. I would not term the stuff that we were shipping at that time duff at all. I would say it was more like siltings out of washer tanks. It would have taken us nearly an hour, I believe, if we had gone on with the work to have cleared out these eleven waggons and shipped the rest of the contents. I do not mean that it would take that in addition to the quarter of an hour that we had already spent on each waggon, but an hour altogether on each waggon. We would have required to use picks and shovels.

“In my view the contents of the waggons was not such as harbour authorities were bound to handle under a contract to handle and ship coal at 2½d. per ton.

“The importance of this case to the parties is somewhat diminished, and the pursuers’ case is weakened, by the disclosures in the evidence that if certain precautions are taken or arrangements made there is no necessity to forward duff in this condition. The eleven prepared waggons in this consignment gave no trouble. Greater care has been taken in preparation since this dispute arose, and there has been no serious trouble with duff since 1920. Moreover, it is in evidence that though at one time duff from Valleyfield gave trouble, the Fife Coal Company, who, I take it, are the largest exporters in Fife, forward their duff in a condition which gives no serious trouble.

“I summarise my conclusions as follows :—The defenders are bound, during the subsistence of the agreement, to perform the pooking which is an inevitable incident of traffic in duff. But on the other hand the pursuers are bound to forward the duff in a condition which enables it to be handled with reasonable convenience. It is not for me in this process to attempt any definition in matter of degree, but I may observe that the view suggested by certain of the witnesses seems not unreasonable, viz., that fifteen minutes is the utmost limit of time allowable for the unloading of a single waggon, and that duff should not be forwarded in a condition which requires more time to be spent upon a single waggon. No question of degree, however, can arise in the present case, for the conglomeration in the trucks in question was altogether *plus*

*quam tolerabile*. I express no opinion upon defenders’ obligation in the case when for some accidental reason a single waggon causes exceptional trouble, or in the case where the duff is despatched in proper order and is frozen hard *en route* by sudden and severe frost.

“I shall sustain the first plea-in-law for the defenders and dismiss the first and second declaratory conclusions of the action. I shall also sustain their fifth plea and assolve them from the third declaratory conclusion and the petitory conclusion, and I shall dismiss the conclusion for specific implement as laid.

“As regards expenses upon the general question on which the parties joined issue success is divided. Upon the particular matter which was made the occasion of the present action the defenders are successful. I shall accordingly find the defenders entitled to one-half of their expenses.”

The pursuers reclaimed, and argued—The Harbour Authority was bound to render this service of “pooking” in return for the composite rate. They had not only agreed with the defenders to do so, but were also bound by statute and the existing practice in the matter. The term “charges” included services, and was not limited to dock dues. The Harbour Authority was not entitled to impose new charges, as it was now endeavouring to do, for services it was rendering on 24th March 1910; nor could it cease performing current services, as that was simply another mode of imposing new charges. Two services in the loading of coal, namely, levelling and trimming, were expressly excepted in the agreement, from which it followed that all others must be included. Duff came under the category of coal. It might be that the loading of duff might in certain circumstances present some difficulty and necessitate a certain amount of digging, as in the case of frozen coal, and accordingly its loading might be rendered a more expensive operation. By the Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. 63) a harbour authority might impose certain special charges, as the charges of 3d. and 2d. here, for services which were really not dock charges, but the agreement which had been entered into since the passing of that Act included these services. By attempting to impose those extra charges the Harbour Authority was acting in breach of that agreement. The mere fact of difficulty occasionally arising in the handling of the duff did not absolve the Harbour Authority from the duty that lay upon them of observing the terms of the agreement. The question of hardship did not enter into the construction of the contract. The unreasonableness or not of the agreement constituted no answer in law, and if once a contract had been concluded it was immaterial if it subsequently became unremunerative—*Inglis v. Buttery & Company*, 1878, 5 R. (H.L.) 87, per Lord Blackburn at p. 103; *Hong-Kong and Whampoa Dock Company, Limited v. Netherton Shipping Company, Limited*, 1909 S.C. 34, 46

S.L.R. 35; *Blackburn Bobbin Company v. Allen & Sons*, [1918] 2 K.B. 467. In construing the agreement the Court would take the parties' actings and surrounding circumstances into consideration—*Macgill v. Park*, 1899, 2 F. 272, per Lord President Kinross at p. 275, 37 S.L.R. 203; *Lewis v. Great Western Railway Company*, (1877) 3 Q.B.D. 194, per Brett, L.J., at p. 208. Counsel also cited the case of *Lochgelly Iron and Coal Company, Limited v. North British Railway Company and Burtisland Harbour Commissioners*, 1913, 50 S.L.R. 731.

Argued for the defenders—Neither the defenders' Private Act nor the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), sub-secs. 21 and 22, imposed upon the Harbour Authority, either expressly or by implication, the duty of performing the service presently in dispute. The defenders had no desire to impose additional charges. They merely declined to do certain work which they were not bound to do and for which they were not remunerated. It was true that they had performed this work, but they had done so gratuitously and could stop whenever they thought fit. Had they done so by virtue of a duty which had lain upon them that would have been expressly provided for in the agreement, and not merely implied as the pursuers were maintaining. Although the defenders had for long performed this service for the pursuers, they had all along maintained the *ex gratia* nature of this service, and repudiated the duty which the pursuers attempted to impose upon them. The pursuers had failed to show that there was any practice on the part of the Harbour Authority to handle waggon-loads of duff by means of pick and shovel at the time the agreement was arrived at. Counsel referred to the case of *Manchester Coal Traders*, 10 Railway and Canal Traffic Cases, p. 129.

LORD PRESIDENT—The main contention between the parties is that which is raised by the second conclusion of the summons, namely, whether the company is bound either under statute or under agreement with the pursuers "to load or ship the whole coal, including duff, consigned to and delivered at Methil for shipment."

How, in the first place, does the matter stand with regard to the pursuers' claim against the Railway Company under statute?

The harbour of Methil was originally constituted under the Pier and Harbour Orders Confirmation (No. 1) Act of 1883, and was subsequently acquired by the North British Railway Company, who are now the Harbour Authority. The pursuers and other Fife coalmasters dispose of a large proportion of the coal they produce by sea sale. They avail themselves of the services of the defenders—as a railway company—to carry that coal from their pits to various ports on the coast of Fife, and in particular to Methil. They also avail themselves at Methil of the accommodation (and also of the services of weighing and trimming) provided to coal traffic by the defenders as owners of the harbour

undertaking. The charge exacted by the defenders in respect of accommodation (exclusive of the services above mentioned) at the harbour is at the rate of 2½d. per ton; and the pursuers' case on the Harbour Act of 1883 is that in exchange for this charge the defenders are bound to provide and perform everything which may be required to load this coal on board the vessels which are to export it. As in other Harbour Acts, the maximum rates and charges authorised by the Act of 1883 are partly on the ships which resort to the harbour, and partly on the goods for the loading or unloading of which the harbour is used. We are concerned only with the latter class of charges, because these alone enter into the composition of the statutory charge of 2½d. per ton. There is first of all (1) a maximum general rate on all "outwards" coal using the harbour for shipment. Then there are maximum additional rates (2) for the use of hoists actuated by hydraulic power, and (3) for the use of dock rails and motive appliances connected therewith including the working of traffic over them. The 2½d. covers all these three forms of accommodation. There are also maximum special rates for the services of weighing the coal and trimming it in the vessels after it has been put on board, when the Railway Company performs them—as it does in the case of the pursuers' coal traffic—but the 2½d. does not include these, and they do not affect the dispute in this case. As designed and used, the harbour of Methil is a port for the shipment of rail-borne coal, and practically nothing else. It is equipped with a system of motive power appliances which enable the coal waggons to be brought alongside by a minimum of hand service, and with automatic coal hoists which tip the waggon-contents into chutes conducting them by gravitation into the ships' holds.

Essentially the function of a harbour authority is of a negative character. Its business is to provide certain structural accommodation adapted to bring sea traffic and land traffic together and enable them to be exchanged, and to make that accommodation open and available both to the carrier by sea and the carrier by land on tender of the statutory dues exigible in respect of its use. *Prima facie*, at any rate, it is no part of the harbour authority's duty to load or unload the goods brought to the harbour by land or sea, or indeed to perform any services to the traffic. A harbour authority differs in this respect from a railway company, which is expressly authorised by statute to perform, and does in fact perform, all the positive services of carriage, although even in the case of a railway company the original conception of its undertaking was also negative in character. It was merely to provide a road, and the public on payment of a toll were to be entitled to use it with their own engines and carriages. As, however, commerce has grown, and the resources of engineering have extended their application, it has come about that in every big harbour undertaking there is, besides the

simple structural accommodation provided by breakwaters and dock basins for the convenience of ships, and by piers and wharves for land access to the ships' berths, a more or less extensive equipment of mechanical appliances which afford facilities both to traders and shipmasters in handling their traffic and in loading and unloading their goods. Thus automatic power cranes and coal tips or hoists are provided; easily handled forms of motive power, hydraulic or electric, are installed and adapted by means of capstans to the locomotion of railway waggons on the dock rails. Even so, however, the harbour undertaker's function remains essentially negative—namely, to make these facilities available to those who tender the appropriate rate for their use. What I have called the negative character of his function may be obscured but is not altered by the practical necessity which compels him to supply the power required to make the system of mechanical and automatic appliances effective, and to restrict the actual operation and control of it to employees of his own, instead of submitting it to indiscriminate use by the public using the harbour. The services thus rendered by the harbour undertaker are not, strictly speaking, rendered directly to the trader or to his goods, but are incidental to the provision of the accommodation afforded by the harbour undertaking and placed at the disposal of the public. Weighing and trimming, on the other hand, are true services, and if the trader and shipmaster choose to avail themselves of them they may, and according to the practice at Methil they do.

It will be seen that—provided the contents of the waggons consist of ordinary coal which will pour out of them by its own weight when they are tipped on the hoist—the whole function of loading the coal on the ship (from receipt of the waggon at the dock gate to the delivery of its contents into the ship's hold) is *in effect* performed by the harbour authority. But none the less would it be a mistake to suppose that because that happens to be the result in the case of coal which can be automatically lifted up in the hoist and poured into the ship, therefore the true character of the obligation of the undertaker is to load the coal on board or to ship the coal. It is not that, but merely to make the accommodation and apparatus of the harbour (including any authorised special services—such as weighing and trimming—which the undertaker offers and the harbour user accepts) available to the public for a consideration within the sum of the authorised maximum rates. To test the matter—suppose the material in the railway waggons, though falling under the denomination of coal, is such as will not run or pour out of the waggon when tipped, but must be dug out and carried on board, the harbour undertaker cannot be asked to perform that service. His machinery and automatic appliances are not capable of dealing with coal of that description, and it is a fundamental principle underlying the undertaker's statutory profession that his

obligations never exceed the capacity of his undertaking as it actually exists. In short, he has no general statutory obligation to load or ship the coal.

The present dispute has arisen in this way. There are shipped at Methil large quantities of "duff." "Duff" is coal, but coal reduced to a state of dust mixed with water. When this material arrives at the harbour it is frequently so solid and sticky that—to take the particular instance which gave rise to the present action—when the waggon is hoisted and tipped its contents or the greater portion of them will not run or pour out at all, but adhere to it in a solid mass which has to be excavated with pick and shovel in order to get it transferred on board the ship. The Railway Company refused to perform this work, and informed the pursuers that the waggons and their contents awaited their instructions. The pursuers preferred not to load this intractable material by their own workmen or contractors, but maintained that the Railway Company was bound to load it on board, and to supply whatever service might be required for that purpose. As I have already pointed out, this work is not part of the accommodation and service which the harbour undertaker is bound by statute to provide for the 2<sup>d</sup>.

But the second conclusion raises a general issue which is not completely concluded by a decision on the particular instance which led the pursuers to table the wide claim implied in it. It appears that in many instances the "duff" submits itself to the automatic process with a little encouragement locally known as "poking"—in other words, the "duff" will run out if loosened by the insertion into it of a "poker," which may be anything from a steel rod to a shovel. The question whether and how far the duty of the Railway Company *qua* harbour undertaker includes this form of service may in my opinion be one of very considerable nicety according to circumstances, for although the process of coal-hoisting and tipping as performed at Methil Harbour is properly described as automatic, it is of course (like every other automatic process) not perfectly so. The machine has to be tended and its motions controlled by applying and cutting off power from its various parts. Indeed, one small but important item in the process—that, namely, of knocking out the bolt which keeps the end of the waggon closed—has to be done by hand by one of the attendants. More than that, no mechanical automaton is able without the occasional assistance of the person who tends it to overcome the little hitches and irregularities which occur in the infinitely varying circumstances of practical working. Even in the case of ordinary coal the material jams either in the waggon or in the chute now and again, and one of the attendants loosens it with a "poker." The "poking," which is necessary in the case of "duff" to induce it to submit to the automatic process is in very many cases a much more serious affair both from the point of view of labour and from that of the length of time during



which the use of the hoist is interrupted. I am not prepared to say that the Railway Company is entitled to refuse to do any "poking" at all except on condition of being paid extra for it, although I am clear that it is entitled to refuse to excavate the "duff" from the waggon or to prepare it by digging so as to make it—what it often is not when brought to the hoist—of a kind and consistency suitable for passing through the automatic process. I will say this much—So long as the "poking" is only an incident of the automatic process performed in relation to material which in its own character is suitable to be dealt with by the automatic process, the Railway Company is in my opinion bound to perform it. I did not understand the company to dispute this, and it appears that they have acted on that footing. Such "poking" being truly an incident of the use of the hoist is covered by the 2<sup>d</sup>. But anything further goes beyond the harbour undertaker's statutory obligation. The Railway Company is not bound to afford the use of its coal hoists for material which (owing to its own nature) is incapable of being run or poured out of the tipped waggon, nor is the Railway Company under any obligation to provide labour either for preparing the material so as to make it suitable for passing through the hoist or for getting it on board by methods other than those provided by the automatic process.

Then in the second place, how does the pursuers' case stand under agreement?

The pursuers say that by an agreement entered into between them and the Railway Company in 1914, the Railway Company undertook generally to ship "duff" at Methil whatever its condition might be, and to provide any service that might be necessary to get it loaded on board. The agreement of 1914 certainly contains no express obligation of the kind. That is common ground. But it is said that by its terms, construed in the light of the circumstances which brought the parties together at the time, an obligation of this kind is to be spelled out.

The agreement of 1914 begins by giving the Railway Company a dispensation from the effect of a judgment of the House of Lords—*Lochgelly Coal Company v. North British Railway*, (1913) 50 S.L.R. 731—which required certain recently increased rates on ships at Methil Harbour to be restored to their former level, and ordered a reduction to be made in the coal-trimming rate. That is the effect of the first article of the agreement. It has in my opinion no relevancy to the present question whatever. But the second article begins as follows:—"The harbour and dock dues on vessels, the rates and charges on coal and pit wood, and the charges for trimming coal at Burntisland and Methil in operation at 24th March 1910 shall not be increased, and no new or additional rates or charges on coal or pit wood shall be imposed." It will be observed that the scope of this article is much wider than the first. The first was limited to those which the company had illegally increased. But the second article is general, and deals with the rates on vessels, coal, and pit wood,

and the charges for trimming. These are not to be increased and no new charges are to be imposed. So far the article seems to deal with the statutory charges under the Act of 1883 and those only. But the article goes on—"Provided that nothing contained in this or in the preceding article of this agreement shall prevent [the Railway Company] from making such additional charges as, failing agreement, may be determined by an arbiter appointed by the Board of Trade in respect of" separation of different parcels of coal in the ship's hold, and bunker coal, and certain other specified matters. This makes it impossible to read the first part of the article as confined to statutory charges, and I arrive therefore at the conclusion that this was an obligation on the Railway Company during the currency of the agreement to impose no additional charge, statutory or other, on coal shipped at Methil over and above those which were in fact being made on 24th March 1910. The position of matters with regard to the "poking" controversy at the time this agreement was made was this. At least since 1903 the question how far the "poking" and digging of "duff" was a mere incident in the automatic tipping process (and therefore covered by the tonnage rate), or how far, on the other hand, these services (if performed by the Railway Company) should be the subject of an agreed charge, had been in dispute between the parties. In their letters written in the beginning of that year the Railway Company tabled the proposition that they were under no obligation to put "duff" through the hoists for the tonnage rate of 2<sup>d</sup>. if the digging and poking required were such as to involve a delay of more than five minutes per waggon in the hour. Some two years before the agreement of 1914 was made the Railway Company had begun to render accounts for poking and digging, and they had gone the length of publishing a schedule of charges which they proposed to make for these services. There is great force in the view that one would have expected that when the parties came together they would have settled this dispute among the rest. But I do not regard myself as entitled to look at the evidence of the negotiations which took place. Nor does that evidence, even if admissible, materially assist the pursuers' case. The argument for the coalowners is that it must be inferred that the stipulation that no new or additional charges were to be imposed proceeded on the basis of an acceptance on the part of the Railway Company of a contractual liability to perform whatever poking and digging had been done by the Railway Company in practice prior to the agreement. I should appreciate the force of that argument if there was any proof that the 2<sup>d</sup>. per ton charged prior to the date of the agreement had been a contractual price for (among other things) the poking or digging *de facto* performed. But there is no such proof. For the reasons explained in the earlier part of this opinion the payment of the statutory charge of 2<sup>d</sup>. did not command these services, and so far

from there being any antecedent extra-statutory contract by the Railway Company to do pooking and digging without further charge than the 2½d., the fact was that the company was persistently repudiating any obligation to perform these services and claiming to charge extra for them. In these circumstances there are no materials from which I would be justified in inferring that a bargain to perform these services for the 2½d. must be read into the agreement.

The result is to affirm the conclusions reached by the Lord Ordinary except in one particular. The Lord Ordinary has dismissed both the first and the second conclusions of the summons. The first conclusion does nothing to solve the real question between the parties, but the second conclusion does raise the real question, and I think it ought to be disposed of by decree of absolvitor.

**LORD SKERRINGTON**—The Lord Ordinary was right in dismissing the first conclusion of the summons, because it was an idle one. But it was an oversight on his part to dismiss the second conclusion, because it is one which must be either affirmed or negatived. In my judgment it must be negatived. In this conclusion the pursuers ask for declarator that the defenders are bound under the provisions of an agreement and of a statute to load or ship the whole coal, including duff, consigned to and delivered at Methil for shipment, and that at the rates in operation at 24th March 1910. When one examines the statute founded on by the pursuers with its schedule of rates it becomes apparent that the Act does not impose upon the harbour authority any such exceptional duty as is specified in the conclusion, but merely the ordinary duty of giving the use of the harbour and of its works to the public in return for the payment of certain specified rates. The conclusion as it stands is one which could not possibly be affirmed. The real question, however, which the pursuers desire to raise by their second conclusion is whether the defenders when they provide a hoist for the loading of coal and also the men to work the hoist are not bound to perform all such services as are necessary in order to secure that a peculiarly sticky kind of coal known as "duff" shall leave the railway waggon when it is opened and tilted and so fall down the chute. It may be admitted that the defenders are bound to perform by their hoistmen any services which are really incidental to the use of a coal hoist, and I do not say that they might not be responsible if their hoistmen refused to lift a finger in order to assist the duff to leave the waggon. No question of this kind arises in the present case. The question is whether the defenders by providing a hoist which is suitable for the loading of ordinary coal come under an obligation to load, either by their hoist or failing that by hand, a waggonful of coal which has been converted into a more or less solid block and which will not leave the waggon until a considerable amount of time and labour

has been expended in breaking it up. The short answer is that the defenders' statutory duty is measured by their appliances, and that by providing an ordinary coal hoist they do not undertake to put every kind of coal that may be tendered to them into such a condition that it can be loaded by means of the hoist. As regards the agreement referred to in the second conclusion, I think that the language of its second article is wide enough to preclude the defenders from making any charge for their services in facilitating the loading of coal over and above the sum of 2½d. which they exacted at the time when the agreement was entered into. The pursuers' counsel argued that this stipulation would be futile if it was within the option of the defenders to discontinue these services at pleasure, and that accordingly the agreement must be construed as impliedly binding the defenders to perform during its whole currency all such services as might be necessary in order to enable the pursuers' coal to be loaded in the manner customary at the date of the agreement, viz., by means of a coal hoist. I see no necessity for any such implication seeing that the pursuers received a substantial benefit by being protected against any pecuniary claim in respect of services which the defenders might choose to render in connection with the shipping of the pursuers' coal. Moreover, the obligations which the pursuers seek to impose on the defenders are of such an unusual, indefinite, and onerous nature as to make it practically certain that if any such stipulation had been contemplated by the parties it would have been expressed in carefully chosen language. The argument of the pursuers' counsel in regard to the construction of the agreement proceeded upon the same fallacious assumption as vitiated their argument upon the statute, viz., that it is part of the normal and general duty of a harbour authority to "load" or "ship" the goods which are brought to the harbour, and that the statutory rates and charges (in the present case 2½d. instead of the maximum of 7d. per ton) were paid to the defenders in consideration of their "loading" or "shipping" the pursuers' coal.

It follows that the defenders must be absolved from the second conclusion of the summons, and also from the third conclusion which seeks to have it declared that a legal wrong was committed when the defenders failed to "ship or to load" eleven waggonfuls of duff which, as appears from the evidence, was in such a condition that no duff left the waggons when they were tilted on the hoist, and only about one-third of the contents left the waggons after two cradlemen had devoted a quarter of an hour to loosening the contents of each waggon with their shovels.

**LORD CULLEN**—I have come to the same conclusion. The pursuers' contention is that the operations included in what is called pooking, in the degree which the defenders refuse to undertake without special payment, fall to be regarded as normal inci-

dents in the loading of duff by means of the coal hoist. It appears to me that the necessity for them really means that the duff when tendered is not in a condition to be loaded by means of the processes for which the hoist is intended, so that a materially different process of loading is required, under which the duff has to be first broken up in the waggons and then shovelled out of them. If the defenders are under obligation to do the loading of duff in this manner, it seems to me that that must be because they are not merely bound to make the hoist available to the pursuers, but are under a general obligation to ship or load the duff in whatever may be the state in which it is tendered to them and, indeed, it is for such a general obligation that the pursuers contend. The second conclusion of the summons is to the effect that the defenders are "bound to load or ship." Like your Lordships, however, I am unable to see that the defenders are by statute put under any such obligation, and while the construction and effect of the agreement of 1914 is attended with some difficulty, I have come to the conclusion on the grounds which your Lordships have already stated that it does not impose such an obligation on them.

The Court dismissed the first declaratory conclusion of the summons, and assoilzied the defenders from the second and third declaratory conclusions and the petitory conclusion.

Counsel for the Pursuers and Reclaimers—W. T. Watson, K.C.—Keith. Agents—Wallace, Begg, & Company, W.S.

Counsel for the Defenders and Respondents—MacRobert, K.C.—Gentles, K.C.—Inglis. Agent—James Watson, S.S.C.

## HIGH COURT OF JUSTICIARY.

Monday, November 6.

(Before the Lord Justice-General, Lord Cullen, and Lord Hunter.)

WILLIAMSON v. MACPHERSON.

*Justiciary Cases—Statutory Offence—Bet-ting—Ready-Money Betting—Money for Bets Posted to Bookmaker before the Event to which the Bet Referred but not Received by him till after Race—Betting Act 1853 (16 and 17 Vict. cap. 119), sec. 1.*

A bookmaker was convicted of a contravention of the Betting Act 1853 in respect of having used certain houses or offices for betting purposes. It was proved that letters containing money for the purpose of betting had been posted to him before the races to which they referred were run, but it was not proved that they had been actually received before the hour of the races to which the bets were applicable. *Held* that it was not necessary in order to a conviction under the Act to prove that

the money had been not only posted but also received before the race was run, and conviction *upheld*.

The Betting Act 1853 (16 and 17 Vict. cap. 119) enacts—Section 1—"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise. . . ."

Alexander Williamson otherwise David Roberts, George Lyall, and Thomas Gordon, *appellants*, were charged in the Edinburgh Police Court at the instance of Charles Angus Macpherson, Public Prosecutor, *respondent*, upon a summary complaint in the following terms:—"You are charged at the instance of the complainer that you Alexander Williamson otherwise David Roberts, being the occupier of or person using houses or offices at 13 Saint James Square and 1 South Charlotte Street, both in Edinburgh, between 7th and 13th June 1922, both dates inclusive, did open, keep, and use said houses or offices for the purpose of money or other valuable thing being received by you or on your behalf as the consideration for an undertaking, promise, or agreement, express or implied, to pay thereafter money on events or contingencies of or relating to horse racing; and you George Lyall and Thomas Gordon, time and places libelled, did assist the said Alexander Williamson otherwise David Roberts in the conduct of the business of said houses or offices opened, kept, or used for the purpose aforesaid, contrary to the Betting Act 1853, sections 1 and 3, as extended to Scotland by the Betting Act 1874"; and you Alexander Williamson otherwise David Roberts have been previously convicted as in the list annexed, whereby you are each liable to a penalty not exceeding one hundred pounds together with costs, and in default of payment to imprisonment for a period not exceeding three months, or without the option of a fine to imprisonment for a period not exceeding six months, with or without hard labour."

The accused pleaded not guilty.

On 1st July 1922, after evidence had been led, the Judge of Police found the charge proved against the appellants, and Alexander Williamson or David Roberts was sentenced to a fine of £100 or three months' imprisonment, George Lyall was sentenced to a fine of £25 or sixty days' imprisonment, and Thomas Gordon was admonished and dismissed.

On the application of the accused a Case was stated for appeal.

The facts proved were as follows:—"1. During the period libelled the appellant Alexander Williamson otherwise David