fore I am for quashing the judgment of the magistrate.

Lord Rutherfurd Clark—I think this case was very properly stated by the Police Magistrate with the view of raising the question for the decision of this Court, and I think we may reasonably give our opinion upon the question so raised, but upon that question only, viz., whether the facts proved constitute an offence against section 272 of the Edinburgh Municipal and Police Act 1879? In other words, whether a person who loiters for half-an-hour on the public street with intent to steal is a person who by that fact frequents the street with that intention? We must keep in view that as far as this appeal is concerned we know nothing more of the history of the respondents than that they loitered on one occasion on a street for the purpose of stealing. Is that "frequenting" in the sense of the statute? There is in the Act a strong distinction between being "in a house" and "frequenting a house or street," and there is, I hold, no offence under the second class of cases unless the person is there frequently. I cannot read "frequenting" as equivalent to loitering. If loitering on one occasion was what the statute meant to express by "frequenting," it should have used that word, and by not using it I think it must be held to have rejected it. "Frequenting" implies the habit of being in a place, not the fact of being in a place even although there be loitering. I think therefore the magistrate's decision was well founded.

Lord Trayner—I too think this case was properly stated, and I am not without reasonable hope that our judgment may be of material service to prosecutors and magistrates in future. I have no doubt that the magistrate was right, and I think the question should be answered in the negative. I agree with the views stated by Lord Rutherfurd Clark, and I cannot distinguish this case from the English one of *The Queen* v. *Clark*, *supra cit.* Even if the question were ambiguous we should be bound to favour the accused, but I think there is no ambiguity. The English Legislature could not have found a more inappropriate word if they meant loitering once than "frequenting," which involves repetition and implies something done more than once—how often we are not called upon to say. I cannot read "frequenting" as equivalent to using, loitering, or being in.

Lord Justice-Clerk—I could have wished that this question, the subject-matter of which is very important, had been brought up in a case where some practical purpose was to be gained. Here we are virtually asked to lay down a general rule for future guidance in a case where the only question is, whether a particular state of facts found proved amounted to an offence under the statute? I have no vote in this matter, and I shall not give any opinion on the subject, but in conformity with the opinion of the majority of your Lordships the question will be answered in the negative.

The Court answered the question in the negative.

Counsel for the Appellant—Boyd. Agent—W. White Millar, S.S.C.

Counsel for the Respondents—Lyell. Agent—R. H. Macdonald, Solicitor.

COURT OF SESSION.

Saturday, October 29.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

JAMIESON *v.* M'INNES.

Contract—Building Contract—Scheduled Rate—Lump Sum—Error.

The schedule of prices appended to an estimate for the erection of the mason work in connection with a building contract brought out, according to the contractor's calculation, the contract price at the sum of £286, 10s. 8½d. There was a clause at the end of the schedule to this effect—"The work to be measured when finished, and charged at the schedule rates, or others corresponding thereto, as also in proportion to the slump sum in the letter of offer." The letter referred to was an offer to execute the work according to the plans, and to the extent of the schedule, for the sum of £286, 10s. 8d. On the completion of the contract the work was measured, and an error in the calculation of £32, 11s. 9d. against the contractor was discovered. *Held* that the contract was for a sum to be fixed according to measurement, and not for a lump sum, and that the contractor was therefore entitled to be paid the full value of the work done at the scheduled rates.

Patrick Jamieson, mason, Port-Glasgow, offered upon 1st June 1883, conform to estimate, with relative specification and offer annexed, to perform the digger, mason, and brick work in connection with a tenement to be erected for Duncan M'Innes.

The schedule of prices contained this item:—"18″ Brick walls and gables, pointed and drawn, or left rough where required, measured net, daylight size of through-going openings only are deducted, Roods 10, 16, @ 234/, £89, 14s." The schedule was prepared by a measurer employed by M'Innes, and £286, 10s. 8½d. was the total estimated cost of the various items specified, as calculated by Jamieson. There were notes appended to the estimate, which contained the following clause—"The work to be measured when finished, and charged at the schedule rates, or others corresponding thereto, as also in proportion to the slump sum in the letter of offer." The letter of offer therein referred to was addressed to M'Innes, and was in these terms—"Sir,— hereby offer to execute the digger, mason, and brick works of the tenement you propose to erect in Bay Street, Port-Glasgow, agreeably to plans thereof, now shown, and to the extent of this schedule, for the sum of two hundred and eighty-six pounds ten shillings and eightpence halfpenny."

M'Innes accepted the offer. The measurer afterwards went over the schedule, and altered the calculated cost of three items, and the total sum, making the latter £319, 2s. 5d., instead of £286, 10s. 8½d., appending this note—"Off errors in calculation of schedule, £32, 11d. 9d.," and bringing out the total of £286, 10s. 8½d. Jamie-

son offered to take £5 off the price agreed on, which was accepted, and this also was noted by the measurer as a deduction, making the agreed-on price £281, 10s. 8½d. In terms of the contract the work was measured when finished, and a new schedule prepared by the measurer, which gave the whole work done, and the calculated cost, as amounting to £308, 8s. 5d. From this was deducted £1, 10s. for old material, making the total £306, 18s. 5d. From this the measurer deducted £31, 6s. 10d. for errors in calculation of the schedule, in the proportion of £32, 11s. 9d. on £319, 2s. 5d.

This was an action under the Debts Recovery Act in the Sheriff Court at Greenock at the instance of Jamieson against M'Innes to recover £38, 15s. 5d., the unpaid balance of the contract price. The defender admitted liability for £7, 8s. 7d. The sum in dispute was the deduction of £31, 6s. 10d.

The pursuer pleaded—"(3) The deduction of £31, 6s. 10d. made by the measurer to bring out the balance stated by the defender is incompetent."

The defender pleaded—"(2) That the measurement founded on by the pursuer brings out the net sum payable by the defender for the work there specified at £267, 8s. 7d., of which the defender has paid, and the pursuer admits having received £260, leaving a balance of £7, 8s. 7d., which the defender is and has always been ready and willing to pay to the pursuer. (3) The account sued for having undergone the triennial prescription, the constitution and resting-owing of the debt can only be proved by the writ or oath of the defender."

The case was treated as one to which the triennial prescription applied, and the case was referred to the oath of the defender.

On 10th June 1887 the Sheriff-Substitute (Nicolson) found the oath affirmative of the reference, and decerned in terms of the conclusions of the summons.

"*Note.*— . . . . . . According to the measurer's calculation the pursuer's estimate of the cost should have been £319, 2s. 5d. instead of £286, 10s. 8½d., but why he should therefore receive £31, 6s. 10d. less than the sum found due to him on a calculation of the work actually done does not appear. He offered to do the work for the sum he had calculated, and the offer was accepted. To mulct him in £31, 6s. 10d. because he had erred in his calculation and under-estimated the cost appears highly unreasonable, the error, if there was one, being in favour of the defender and not of himself."

On appeal the Sheriff (Moncrieff) pronounced the following interlocutor:—"Sustains the appeal and recals the interlocutor of the Sheriff-Substitute of 10th June 1887: Finds that the defender admits in his defences liability for the sum of £7, 8s. 7d.: *Quoad ultra*, for the reasons stated in the following note, finds the defender's deposition negative of the reference: Therefore decerns against the defender for the said sum of £7, 8s. 7d. sterling: *Quoad ultra* assoilzies the defender; finds him entitled to the sum of £4, 1s. 6d. expenses, and decerns for the same against the pursuer.

"*Note.*—This is a case of some difficulty. It has been treated, and I think properly, as one to which the triennial prescription applies, see *Chalmers* v. *Walker*, Nov. 19, 1878, 6 R. 199, and accordingly the pursuer has referred the whole case to the oath of the defender. The defender denies liability, except to the extent of £7, 8s. 7d., which he has all along admitted. Now, I agree with the pursuer in thinking that the defender is not, in the circumstances, the sole judge of whether any balance is due to the pursuer. He is bound to state his reasons for his opinion, and the Court is entitled to consider those reasons and to decide whether they are well founded in law. The defender's case is simply this. By estimate, No. 7 of process, the pursuer undertook to execute the work specified in the schedule for the sum of £286, 10s. 8d., and by a subsequent letter he reduced his offer to £281, 10s. 8½d. The defender at the same time got an offer from a firm of M'Bride & Co. to execute the work for £289, 4s. The pursuer's offer was accepted, being the lowest, and the defender says (and of this there can be little doubt), that if he, the defender, had known that the pursuer's offer should really have been to do the work for a lump sum of £320, instead of £281 odds, the contract would have been given to M'Bride & Co., and not to the pursuer. The pursuer, however, maintains that he is not bound by the lump sum brought out in his offer. One of the items in the schedule, as filled up by the pursuer, stood thus:—'18″ brick walls, gables, ... etc. Roods, 10, 16, 234′, £89, 14s.' Now it is plain that if the rate is correct, the sum entered in the money column is incorrect. The sum should have been £122, 4s., instead of £89, 14s., making a difference of £32, 10s. The pursuer broadly maintains that the rate must rule, and not the sum set against it. No doubt the estimate No. 7 of process must be construed as part of the defender's oath; but on the evidence before me, I think the balance of considerations is against the pursuer. The original fault undoubtedly lay with him. Even if the defender ought, as a matter of prudence, to have checked the schedule before accepting the pursuer's offer, the greater fault was that of the pursuer. The purpose of filling up the money column and offering to do the work for a lump sum, presumably is to enable the customer to decide between competing offers; and if, through the carelessness of the offerer, too small a sum is brought out, it is only fair that he should bear the loss, and not the customer, who could have got the work done more cheaply by another contractor.

"No doubt the rate and the sum set against it cannot stand together. But why should the rate prevail, and why is it to be presumed that the rate is right and the sum wrong? The rate and the sum have no apparent relation to each other; the error is not merely clerical, such as the substitution of a 3 for a 5, and I fail to see why, if a mistake has been committed, the rate should be taken as binding on the defender.

"The Sheriff-Substitute speaks of the error as one made by the pursuer against himself. But if he were now entitled to have it corrected, it would prove to be in his favour, because in that case he would, through his own mistake, have obtained the contract over the head of a lower offerer, and would at the same time have secured his own price.

"At one time I thought that a proof might be allowed of the value of the item in question, on the footing of *quantum meruit*, although the pur-

suer did not ask that this course should be taken but maintained that the full rate should be allowed. But on consideration I can see no legal justification for this middle course."

The pursuer appealed, and argued that the contract was not one for a lump sum, but for a sum to be calculated at fixed rates.

The respondent argued that he had made the contract upon the faith of the lump sum contained in the offer, and that otherwise he would have accepted an offer which, though apparently higher, in reality proved to be lower than the pursuer's.

At advising—

Lord Young—If it had not been for the judgment of the Sheriff I should not have thought this case arguable. The pursuer contracted to do a certain amount of work at prices according to rates put down in a schedule. The schedule was made out in the ordinary form, and, as usually happens, the price of each item was calculated on the estimated amount of work according to the schedule rate, and the whole summed up at the end. The parties assumed that it was correctly so summed up. The contract, however, was not a contract to do the work for a lump sum, but a contract for a sum to be fixed when the work had all been finished and measured, so as to show what amount of work was actually done, and the schedule rates applied to that actual amount of work. Well, that was what was done here, and the sum sued for is the balance still due on the sum so brought out. The answer which the defender makes to the action is, "Oh, but in your original offer you made an *error calculi* in applying the schedule rates to the estimated amount of work to be done, bringing out a smaller total than you were entitled to charge, and I am entitled to have the difference deducted from your account." I think that is an extravagant proposal, but to excuse its extravagance the defender says that when he had the pursuer's offer before him he also had another offer to do the work for a somewhat larger sum than the pursuer's, as it then erroneously appeared to be, but which was smaller than the sum now claimed by the pursuer, and the defender says that he would not have accepted the pursuer's offer had he not been induced to do so by the pursuer naming the smaller total sum. I do not think that is a good plea—the work was honestly done and ought to be paid for. No injustice therefore will be done by giving the pursuer the decree which he asks. But I do not proceed on that ground only. I think that the contract was a contract for a sum to be fixed according to measurement, and not for a lump sum.

Lord Craighill—I concur. I think the contract was one, not by which for a slump sum the contractor undertook to execute the digging, mason, and brickwork that was provided in the specification, but, on the contrary, was a contract by which he became bound to do the work at certain rates which were specified. What was to be due to the contractor depended upon the extent of the work done, as multiplied by the rates which which were specified. Now the brickwork was measured at the end of the day as was provided for by the contract. The fact that there was to be a measurement of the work after it was done shews that it was in the view of the parties that the quantities in the specification were not to be conclusive. If anything was to be conclusive it was a second measurement, by which the extent of work done was to be ascertained, and a charge made at the specified rates. It is true that an error was committed, but it seems to me that that error is of the same legal character as an error in addition.

It seems to me, therefore, that the Sheriff-Substitute was right, and the Sheriff was wrong, when the one held, and the other did not, that the contract was one for work done as at certain rates, and that the contractor was entitled to the sum sued for notwithstanding the error that had been committed.

Lord Rutherfurd Clark—I concur in the judgment proposed. There are only two questions to determine—namely, what is the contract? and what is due under the contract? The pursuer's claim is for work done under the contract, measured according to the contract, and at rates specified in the contract. Now, I cannot see my way to resist the argument by which that claim is supported. But what the defender says is, that he had a lower offer which he would have accepted but for the fact that the total sum for which the pursuer offered to do the work was £31 less than that now sued for. Well, that may be so, but that rather points to a different remedy. I am not going to say whether or not there is a claim for damages on the part of the defender for being led to reject an offer to do the work for a less sum than the pursuer is entitled to under the contract. Nor would I say that such an action should be brought; but it seems clear on the present contract, and on this record, that the pursuer must get paid for work brought out by the measurement which has been made, at the rates which he stipulated for.

The Lord Justice-Clerk concurred

The Court sustained the appeal, repelled the defences, and decerned in terms of the conclusions of the summons with expenses.

Counsel for the Appellant—Macfarlane. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Respondent—Wallace. Agent—Adam Shiell, S.S.C.

Tuesday, November 15.

FIRST DIVISION.

RAMSAY *v* RAMSAY.

Heritable and Moveable—Heir and Executor.

A person purchased heritable subjects burdened with debt, but died intestate prior to the payment of the price. *Held*, in a question between the heir and executor of the deceased, that the executor was liable for the price without relief against the heir.

John Chalmers Ramsay, wine and spirit merchant, Kirkcaldy, died intestate and without