same department. A change of wages will not of itself import a change of grade, but if it accompanies a change of department, or a change of the class of machine, or even of the species within the same genus of machine, and is not temporary but reasonably permanent, I think that there is in the sense of the schedule a change of grade.

If so, then the appellant changed her grade of employment when on 5th December 1912 she was moved to a drawing machine drawing "a finer quality of material called B and C tow," and her wages were raised to 8s. a-week. And it is unnecessary to consider the effect of earlier changes.

There remains to consider the effect of section 2 (*a*). On the assumption of the above, the basis of the compensation is the average wage of a period of about five weeks during which the appellant was employed in a grade in which she "was employed at the time of the accident." That is a comparatively short time. But section 2 (*a*) says "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Remunerated when? The manifest answer is, at the date of the accident. But that answer must be read reasonably. It does not mean at the rate being earned on a casual job without any reference to what I may call the industrial history of the workman during a more extended period. There are cases in which current earnings at the actual date of the accident do not give the rate, in the sense of the statute, "at which the workman was being remunerated," and accordingly the sub-section under consideration provides "that where by reason of the shortness of the time during which the workman has been in the employment of his employer"—that expression being interpreted according to section 2 (*a*)—"or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had" to outside considerations.

This provision, instead of creating any difficulty in the present case, confirms, I think, the view which I have expressed. For short as the time may have been it was long enough to give a continuous and uniform rate of wages over more than a month. The work was as far as possible removed from the casual. Given good conduct, there was no ground for saying that the employment was not permanent with a prospect of a rise, as the word "permanent" is understood in relation to employment. But "the terms of the employment," by which I understand the circumstances of the employment in fact, as well as the conditions of the employment as a contract, strongly support the view that the computation of the average weekly earnings on the basis of the wages earned in fact at the date of the accident by this particular employee "is best calculated to give the rate per week at which" she "was being remunerated."

I should therefore propose to answer question 3 to the effect that the change in the employment of the appellant on 5th December 1912 to the work of operating a drawing machine of a higher class was a change in the grade of her employment in the sense of the Workmen's Compensation Act 1906, and to find it unnecessary further to answer questions 2 and 3.

The case will have to go back to the Sheriff to assess the compensation, for though the average wage is by this judgment practically fixed at 8s., it does not follow that the compensation will be exactly that sum, as there may have to be certain allowances made.

I do not deal with the first question, as it was not argued on the footing of the view of the case which I have found myself called on to take.

LORD KINNEAR and LORD MACKENZIE concurred.

The LORD PRESIDENT did not hear the case.

The Court pronounced this interlocutor—

"Find in answer to the third question of law that the change in the employment of the appellant on 5th December 1912 to the work of operating a drawing machine of a higher class was a change in the grade of her employment in the sense of the Workmen's Compensation Act 1906: Find it unnecessary to answer the other questions of law: Recal the determination of the Sheriff-Substitute as arbitrator: Remit the cause to him to proceed as accords, and decern."

Counsel for Appellant—J. R. Christie—Fenton. Agent—T. M. Pole, Solicitor.

Counsel for Respondent—Constable, K.C.—Mackenzie Stuart. Agent—J. Ferguson Reekie, S.S.C.

Wednesday, July 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

STRUTHERS *v.* SMITH.

Discharge—Implied Discharge—Agent and Principal—Account—Docquet—"Fitted Accounts."

A, a house factor, who factored a property belonging to B, rendered every half year statements showing the rents which he had collected and the sums which he had disbursed. On payment to B of the balances brought out in the statements as due to him, B granted discharges to A. A resigned his position as B's factor, and rendered a statement of account showing a balance due to him. This claim against B he assigned to C, who sued. The claim

contained certain sums which as averred had been disbursed by A during periods for which statements had already been rendered by A and discharges granted by B, the said sums not having been included in the said statements.

The Court *held* that the action was relevant and *allowed* a proof.

Observed that the pursuer in challenging the accuracy of the statements had a very heavy *onus* to discharge, the effect of the statements being the same in law as if the factor had appended to them docquets stating that the sums shown as disbursements were the disbursements for the period covered by the statement.

William Struthers, commission agent, 42 Tenison Street, York Road, Lambeth, London, S.E., *pursuer*, brought an action in the Sheriff Court at Glasgow against James Smith, 62 Robertson Street, Glasgow, *defender*, for payment of £85, 16s. 3d.

The defender was the owner of a property in Edinburgh for which William Barnetson & Sons had acted as house factors. Their duties were to collect the rents, pay all disbursements, including tradesmen's accounts, and to remit the balance to the defender. Each half year from 1904 to 1910 Messrs Barnetson sent the defender a statement setting forth the rents received, the disbursements made, and the balance due to the defender. On receipt of the balance due the defender granted Messrs Barnetson a discharge in respect of the half year's rents. At Martinmas 1910 Messrs Barnetson sent the defender a cheque for £100 to account, but did not render a statement at the time. In January 1911 they resigned their position as factors for the defender, and shortly thereafter rendered a statement for the period ending Martinmas 1910, showing a balance of £69, 19s. due to them by the defender. Soon after they rendered an amended statement, showing £85, 16s. 3d. to be due to them by the defender. The disbursements contained in this statement included sums paid by Messrs Barnetson to tradesmen in the years 1907 and 1908 which together exceeded the whole amount of the balance brought out as due to them. Thereafter Messrs Barnetson assigned their claim against the defender to John Robertson, solicitor, Edinburgh, who in turn assigned it to the pursuer.

The pursuer pleaded, *inter alia*—"(2) The said William Barnetson & Sons having on behalf of the defender made disbursements in excess of the sums collected by them for him to the amount sued for, the defender should be found liable in payment of said excess."

The defender pleaded, *inter alia*—"(4) The accounts between the said William Barnetson & Sons and the defender having been periodically settled each half-year for six years regularly, cannot now be opened up. (4A) The said Barnetson & Sons having accounted each half-year for their intromissions, delivered up signed statements and vouchers, and received final receipts and discharges from defender, the pursuer is barred from this action."

On 1st April 1912 the Sheriff-Substitute (CRAIGIE) allowed a proof.

The pursuer appealed to the Sheriff (MILLAR), who on 26th June 1912 assoilzied the defender.

Note.—". . . On the law I think there is sufficient justification for the view that, according to Scotch law, where the parties have met and settled accounts, and after payment have discharged each other of their obligations, it is not competent for one of the parties to go back and open the account, unless on the ground of fraud or error in fact not due to any carelessness on the part of the person seeking redress. I think that is especially true with regard to a factor. If he did not correctly set forth the disbursements the proprietor might find it very difficult years afterwards to check the accounts rendered to him. For instance, one of the largest accounts claimed in this case is for house painting, and it might be very difficult, years after this work had been done, for the defender to say that the account had been properly incurred. Again, it would deprive the owner of the property of the opportunity of considering whether the administration of the factor was such that he should retain him or dispense with his services. Further, a person of limited income derived from property might be encouraged to spend money which if he were called upon afterwards to repay might place him in very straitened circumstances. As to the authorities, I would refer to paragraph 585 of Bell's Principles, and the cases quoted there, and also to the case of *Cameron* v. *Henderson and Others*, 18 R. 728, and the cases there quoted, especially those of *Stewart* v. *Maconochie*, 14 S. 412, and *Russell's Trustees* v. *Russell*, 13 R. 331. In the English law the doctrine of settled accounts is well established—*Cave* v. *Mills*, 1862, 31 L.J., Ct. of Ex. 265; *Hunter* v. *Belcher*, 2 De Gex, Jones, and Smith's Reps. 194; *Attorney-General* v. *Brooksbank*, 2 Young and Jervis' Reps. 37; and the case referred to in 2 Smith's Leading Cases, 433 to 436. Upon the admitted facts I think the defender is entitled to absolvitor in this case."

The pursuer appealed, and argued—The pursuer was entitled to a proof of his averments. The question was whether Messrs Barnetson were entitled to include in their final statement disbursements made in 1907 and 1908 which had not been charged against the defender in previous statements. The Sheriff was wrong in holding that there had been an absolute discharge cutting off the pursuer's right to claim for these disbursements. "Fitted accounts" only raised a presumption of discharge which might be rebutted by evidence—*Laing* v. *Laing*, July 17, 1862, 24 D. 1362; *Glasgow Royal Infirmary* v. *Caldwell*, November 2, 1857, 20 D. 1. The doctrine of settled account in the law of England was also only a presumption. *Cameron* v. *Panton's Trustees*, March 19, 1891, 18 R. 728, 28 S.L.R. 490, and *Russell's Trustees* v.

Russell, December 11, 1885, 13 R. 331, 23 S.L.R. 211, were decided after proof. *Stuart* v. *Maconochie*, February 4, 1836, 14 S. 412, was very special in its circumstances.

Argued for the defender—When principal and agent met together and settled an account the presumption was that it was correct. No doubt if error were relevantly averred proof would be allowed, but the averments would need to be very clear and specific — *Parkinson* v. *Hanbury*, [1867] L.R., 2 H.L. 1, *per* Lord Westbury at p. 19. Here, especially in view of the suspicious circumstances of the case, the averments were insufficient. The defender also referred to Bell's Prin. 585.

LORD PRESIDENT— . . . [*After a narrative*] . . .—The learned Sheriff-Substitute before whom the case came to depend allowed a proof. Contrary to what one would have expected, the pursuer appealed to the Sheriff, and he seems to have maintained before the Sheriff—and indeed on no other view is the fact of the appeal at all explicable—that in respect that he produced vouchers for the payments which he says were made by the factors on behalf of the defender, he was entitled to decree *de plano*. The learned Sheriff took a different view of the case from his Substitute, and held that as these half-yearly accounts had been rendered, the principle of fitted accounts applied, and that the defender was accordingly entitled to immediate absolvitor.

I am sorry I cannot agree with the learned Sheriff, because I do not think that is the principle of what is called fitted accounts. I have always understood that there are two situations which you may have. On the one hand you might have an absolute discharge by A in favour of B in which case the matter is ended, unless that discharge can be reduced on the appropriate averments of fraud, essential error, or something of that sort. On the other hand there is the case where you have what are known as "fitted accounts" which do not constitute a discharge, but which raise a presumption that there has been a final settlement between the parties. The law on this question was laid down in the well-known case of *Laing* v. *Laing*, 24 D. 1362, by Lord President Inglis (at the time Lord Justice-Clerk), who pointed out that the fact of a docquet was to reverse the *onus*, and was not to exclude inquiry altogether, and that he who avers that the account is wrong must be put to explicit proof of that fact. Now in this case, although in the strict sense of the word there was no docquet on the accounts, there was something which was exactly equivalent to a docquet. The accounts were rendered half-yearly, and it was the duty of the house factors to put down the whole disbursements made by them during the period covered by the statement. No doubt two things might have happened to prevent him doing so. Tradesmen's accounts are not always rendered with absolute punctuality, and sometimes the period for which they are rendered does not correspond to the period for which the factor's statement is rendered. If a tradesman's account has not been rendered in time to be included in the factor's statement, it is quite clear that the factor's right to recover would not on that account be excluded; or again, if there had been a case of mere *incuria*, it would have been in the power of the factors to say—"Here is an account which we have omitted to charge against you in our previous statement, and I am entitled to claim payment of it now." I think all that is clear, but I also think that it is always to be presumed that the factors would not omit from their statements any account that had been paid by them, and that the *onus* is very strong against the person who alleges that there has been such an omission. From the nature of the case here there can only have been one discharge in the proper sense of the word. It was always the factors who had to give money to the principal, and it would be the principal who had to discharge the accounts. But I think that the fact that the factors put in a certain sum as disbursements is the same in law as if they had docquetted the accounts "these are our disbursements during the period." That being so, it seems to be impossible to hold the case absolutely concluded. There must be a proof as the Sheriff-Substitute has said, but in taking that proof he must bear in mind that the effect of these accounts is just the same as if they had been docquetted, and that the *onus* is upon the pursuer to show that they do not include all the disbursements that have been made, and, unless he clearly shows that the money is still due to him, then the docquet, so to speak, will prevail.

In view of the fact that the whole trouble and expense since the judgment of the Sheriff-Substitute has been caused by the pursuer, and that he is now only getting what the Sheriff-Substitute allowed him, I think the pursuer should bear the whole expenses of the process since the date of the Sheriff-Substitute's interlocutor.

LORD KINNEAR—I agree with your Lordship in all respects.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I agree.

The Court recalled the Sheriff's interlocutor and allowed a proof.

Counsel for the Pursuer (Appellant)—Chisholm, K.C.—A. A. Fraser. Agent—John Robertson, Solicitor.

Counsel for the Defender (Respondent)—Sandeman, K.C. — Hon. W. Watson. Agents—M. & M. M'Call, S.S.C.