II, section 9 (*b*), of the Workmen's Compensation Act 1906. That section provides as follows:—". . . [*His Lordship read the section.*] . . ."

I think the sheriff-substitute ought to have treated this case as one for allowing the memorandum to be recorded, and to have attached such conditions to the recording as would prevent the employers from suffering prejudice therefrom. The appellant in arguing the case indicated to us that he was quite willing that there should be such conditions attached as would prevent him doing diligence upon the recorded memorandum. I therefore think the proper course in this case is to remit to the Sheriff, with instructions to deal with the case under the section of the Act to which I have referred, to allow the memorandum of agreement to be recorded, and to attach such conditions thereto as in the circumstances he thinks just.

LORD GUTHRIE—I am of the same opinion. The sheriff-substitute has clearly stated the grounds upon which he arrived at his decision. It seems to me clear that in the sheriff-substitute's view the memorandum was not one that should be recorded because it did not express what the respondents proposed—namely, that the word "total" should be inserted before the word "incapacity" in the passage which runs—"The liability to pay workmen's compensation during the claimant's incapacity for work at the rate of ten shillings per week was admitted by the respondents." I agree with Lord Hunter in thinking that the sheriff-substitute was wrong in that view. That would really be the case that arose in *Pryde* v. *Moore & Company*, 1913 S.C. 457, where you had adjected to the ordinary agreement a stipulation that the payment was to continue only during total incapacity. If the sheriff-substitute advised himself wrongly in that matter, then it appears to me (that being the leading ground of his judgment) the result at which he arrived cannot be sustained.

He goes on to state another ground, that if the claimant was at the time of the application both earning wages equal to what he got before and was actually employed, then he had no other course but to dismiss the application. My opinion is, that instead of being bound to dismiss the application in such circumstances he was not entitled to refuse to record.

The matter turns on Schedule 2, section 9, sub-section (*b*). In the ordinary case the statute contemplated that a memorandum should be recorded, although it is quite true, as Mr Horne has stated, that in practice there are thousands of such agreements which are not reduced to writing and which have never been recorded. The statute, however, contemplates a memorandum, but then it provides that there is a particular case where, as I read it, it would be only reasonable that if certain conditions are fulfilled the Judge should be entitled to affix the terms. The terms that would naturally occur in a case of this kind would be to prevent diligence being done on the memorandum when recorded.

It is said, however, that the sheriff-substitute is not only entitled to impose terms but that there is committed to his absolute discretion the right to say whether a memorandum shall or shall not be recorded. If that was intended, it could have been expressed. It is quite distinctly expressed in regard to the terms, but I do not read the words "if at all" in the sense contended for by the respondents. Section 9 says that the Judge shall deal with the memorandum on being satisfied as to its genuineness. It seems to me that "if at all" was not intended to do anything more than—it may be unnecessarily—to call attention to the fact that the genuineness of the memorandum must be first cleared up.

If that is so, then I agree in thinking that the sheriff-substitute on his two grounds has come to a wrong conclusion. It was suggested that at all events the second ground was right and would be sufficient to justify the decision. But thinking as I do that both grounds are wrong, then the question does not arise.

LORD JUSTICE-CLERK—I am of the same opinion.

LORD DUNDAS was in the Extra Division.

LORD SALVESEN was on Circuit.

The Court answered the question of law in the negative and remitted the case to the sheriff to record the memorandum upon such conditions as he considered just in the circumstances.

Counsel for the Appellant—Watt, K.C. —Macdonald. Agents—Wilson & Matthew, S.S.C.

Counsel for the Respondents — Horne, K.C. — Duffes. Agents — Simpson & Marwick, W.S.

Thursday, March 11.

SECOND DIVISION.

[Lord Dewar, Ordinary.

HARVEY *v.* GLASGOW CORPORATION.

Expenses—Dominus litis—Police—Municipal Corporation Defending Action against Police Constables in their Employment—Glasgow Police Act 1868 (29 *and* 30 *Vict. cclxxiii*), *sec.* 134.

Circumstances in which *held* that Glasgow Corporation, in an action brought by a member of the public against two police constables in their employment, had a sufficient interest in the subject-matter, and had assumed such a degree of control of the litigation, as to render them liable in expenses as *domini litis* to the successful pursuer.

Opinion, per the Lord Justice-Clerk and Lord Salvesen, that a person may be *dominus litis* though he has no direct interest in the subject-matter of the litigation, provided (*per* Lord

Salvesen) "he is vested with its sole control and direction," and (*per* the Lord Justice-Clerk) "his will is the ruling will."

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii) enacts—Section 134—"Where any order or sentence of the Magistrate or Dean of Guild, following on an application by the Procurator-Fiscal, is brought under review, or where any action is brought against the Fiscal, or against any officer or constable, in consequence of anything done in pursuance of this Act or of the order or sentence of the Magistrate or Dean of Guild, the Procurator-Fiscal shall immediately make a report of the facts and circumstances to the Magistrates' Committee, and such committee shall thereupon resolve either that such order or sentence so brought under review, or such action, shall be defended at the expense of the Board, or that it shall not be so defended; and if they resolve that it shall be so defended, the Magistrates' Committee shall thenceforth take the superintendence and control of the case, and the Board shall relieve the Fiscal or other defender from liability for all or any of the conclusions thereof; and if the Magistrates' Committee resolve that it shall not be so defended, they may, if they see cause, agree that the Board shall relieve the Fiscal, or other defender, from the consequence of not defending the same, and the Board shall in such case relieve them accordingly."

Duncan Harvey, coppersmith and brass-founder, Glasgow, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, for payment of a sum of £150, 1s., being the expenses due to him in an action of damages against two police constables of the city in which he had obtained a verdict, and in which he averred the Corporation had acted as *dominus litis*.

The pursuer pleaded, *inter alia*—"(1) The defenders having become responsible for the defence of the two police constables in the action mentioned on record, and being the true *domini litis* of the defence therein, are liable to the pursuer in the expense thereby occasioned. (2) The defenders, in virtue of the powers conferred upon them by the Glasgow Police Acts, having relieved the said constables of the expense of defending said action, are liable to the pursuer in the expenses of said action, and decree should be pronounced as craved."

The defenders pleaded, *inter alia*—"(1) The defenders, not being liable to the pursuer in respect of the defence to the action condescended upon, should be assoilzied from the conclusion of the summons. (2) The averments of the pursuer so far as material being unfounded in fact, the defenders should be assoilzied."

The Lord Ordinary (DEWAR) before answer allowed parties a proof of their respective averments. The *facts* of the case and the import of the proof appear from the opinion of the Lord Ordinary, who on 19th February 1914 decerned against the defenders in terms of the conclusions of the summons.

Opinion.—"On 23rd October 1910 the pursuer was apprehended without a warrant in Apsley Place, Glasgow, and conveyed to the Southern Police Office by Alexander Sturgeon and Andrew Stirling, both Glasgow police constables. The pursuer regarded his apprehension as illegal, and after corresponding with the Town Clerk and Chief-Constable in Glasgow he brought an action, concluding for £500 damages, against the constables in the Glasgow Sheriff Court in February 1911. After sundry procedure this action was remitted to the Court of Session for jury trial, and was tried before Lord Skerrington and a jury on 18th July 1912. A verdict was returned for the pursuer with damages assessed at £40. The verdict was applied and decree pronounced in the pursuer's favour for the damages and expenses, which were taxed at £150, 1s. The defenders have declined to pay the expenses, and maintain that they are not liable therefor. Hence this action. The defenders admit that they supplied the funds to enable the constables to defend the action, but they deny that they had such interest in the subject-matter thereof or such control of it as to render them liable as *domini litis*.

"It may be convenient if I state, before considering the evidence, what in my opinion must be proved to establish liability against the defenders as *domini litis*. It is not sufficient that they took an interest in the case, and gave encouragement and advice, and supplied the funds to carry it on. To render them liable it must be shown that they had practically the entire interest in the subject-matter of the action, and through that interest had a proper control over the conduct of the defence, with power to push it on or retard it, or put an end to it altogether. If that is established, then they were parties to the suit and under an implied obligation to the pursuer to perform the judgment and, *inter alia*, to pay such expenses as might be awarded. The question therefore is whether the defenders had in point of fact such an interest in the subject-matter of the action and power of control over it. I think they had. Their defence is that as the subject-matter was a claim directed against the constables, they were not, and could not be, concerned with that; that their only interest was to see that the constables got a fair trial, and with a view to that they provided funds for the defence. If that had been the true position of matters I should have had no difficulty in agreeing with them. But I do not think it is. It is true that the claim is directed against the constables, and originally they and they alone were interested. But the defenders intervened, and by their intervention I think they relieved the constables from all liability and undertook responsibility themselves. They are not in the position of ordinary employers who supply funds and give advice to a servant to enable him to defend himself against what they regard an unjust claim. The defenders' power to intervene, and their duties and responsibilities arising in respect of such intervention, are regulated

by the 134th section of the Glasgow Police Act 1866. It provides that—'. . . [*quotes, v. sup.*] . . .'

"Now on 23rd March 1911 the Magistrates' Committee passed a resolution by which they 'agreed to recommend the Corporation to relieve the said defenders of the expense of defending the case.' When such a resolution is passed the 134th section provides that two things shall follow—(1) the Magistrates' Committee shall henceforth take *control* of the case, and (2) they shall relieve the defenders from all liability for all or any of the conclusions of the action. That is to say, the constables cease to have any interest in the subject-matter or power of control. Both are vested in the defenders, and they become the true *domini litis*, liable for all the conclusions, including the conclusion for expenses.

"But it is said that section 134 does not apply in this particular case, because before the committee passed the resolution the constables had already engaged a solicitor of their own, who conducted the case for them throughout, and that the Town Clerk, who invariably conducts cases to which this section applies, had no opportunity of conducting the case on behalf of the Corporation, and did not in point of fact do so. Even if this had been proved in evidence I doubt whether it would have helped the defenders' case. As I read the section, when the committee resolve to defend at the expense of the Board they are *directed* to take control. It is a duty imposed upon them; and I do not see how neglect of this duty could relieve them from responsibility. But in any case I am satisfied on the evidence that they by no means neglected this duty. Mr Lindsay, who was then Depute, and is now Town Clerk, although not nominally in charge directed and controlled the defence from beginning to end. When the pursuer's solicitor wrote to the constables threatening an action they took the letters to Mr Lindsay, and he drafted suitable replies, which the constables sent to the pursuer's agent. Mr Lindsay then wrote to the Chief-Constable asking him to report on the facts of the case for submission to the Corporation. The Chief-Constable did so, and his report was submitted on 29th September 1911. The committee then resolved to defend any action raised against the Corporation, and instructed the Town Clerk to watch any action which might be brought against the constables. In the end of January an action was raised against the constables. They at once took the service copies to Mr Lindsay, and he asked Mr Mackenzie, solicitor, Glasgow, who had defended the same two constables on a previous occasion, to undertake the defence. Mr Mackenzie did so, and was in charge of the defence until he was made assistant Town Clerk on 1st December 1911, and the action was then handed over to Mr Rosslyn Mitchell, solicitor. The constables were not consulted as to the change of agency. Mr Mackenzie says that he looked upon the constables as his clients, and so they were in a sense, but it is quite clear on the evidence that it was to Mr Lindsay that he looked for instructions. Mr Lindsay revised and adjusted the defences; he advised on all points of difficulty, including a proposal to settle, when the constables do not appear to have been consulted; he decided when counsel should be employed and selected the counsel; he attended debates in court and consultations with counsel. He was consulted in everything and controlled the whole defence, just as if one of his subordinates in the Town Clerk's office had been in charge of the case. It is suggested that he did all this not as representing the Corporation but partly because of benevolent interest in the constables, and partly on account of his friendship with Mr Mackenzie. I have no doubt he was interested in the constables, and that he would gladly help Mr Mackenzie or anyone else who required help. But Mr Mackenzie is a solicitor of experience who did not require help, and the constables' interests were safe in his hands. I am certain that he would not have asked for the assistance he received, nor would Mr Lindsay have given it from the Town Clerk's office, unless they had both known that the Corporation was interested in the defence. And the nature of that interest is disclosed in the minute of 23rd March, to which I have referred. It proceeds on the narrative that the Town Clerk reported that an action of damages for £500 had been raised against the constables, and that Mr Mackenzie, the law agent, had written to explain that he had received intimation that the pursuer was to be represented by counsel in the case, and that the defenders were unable on account of the expense to retain counsel. The committee then reconsidered the whole case, and having regard to the approved service of the defenders in the force, and the fact that the action had arisen in the honest discharge of their duty as reported on by the Chief-Constable, who had held a searching inquiry and had acquitted the constables of wrongous or reckless action, they agreed to relieve the defenders from the expense of defending the case. All this, I think, shows that after full consideration the defenders reached the conclusion that this was one of the cases in which they ought to exercise the powers conferred upon them by section 134, and relieve the constables from all liability under the conclusions of the action, and they accordingly resolved to do so. This was evidently their own view at the time, for my attention has been directed to the open record, where it is 'Admitted that the defenders, in agreeing to relieve the said constables of the expense of defending the action in question, acted under the authority contained in the section referred to.' The defenders have changed this view, and have deleted this admission from record; but I think their first impressions were correct, and that they really intended to relieve and did relieve the constables of approved service, who in the honest discharge of their duty had done nothing reckless or wrong, from all liability. But they could only do this by accepting liability themselves. I am

accordingly of opinion that the pursuer is entitled to decree in terms of the conclusions of the summons, with expenses."

The defenders reclaimed, and argued — *Esto* that the Corporation had acted under section 134 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), that fact did not *per se* make them liable as *domini litis*. Liability as such depended on other facts. All that the Corporation had done under the section was to agree to pay the expenses of the constables, and a mere agreement to pay expenses did not infer liability as *dominus litis*—*Stevens* v. *Burden*, November 21, 1823, 2 S. 507 (447); *Waddel* v *Hope*, December 2, 1843, 6 D. 160; *Mathieson* v. *Thomson*, November 8, 1853, 16 D. 19; *Fraser* v. *Malloch*, February 8, 1896, 23 R. 619, 33 S.L.R. 594; *M'Cuaig* v. *M'Cuaig*, 1909 S.C. 355, 46 S.L.R. 287. The true test was whether the alleged *dominus* had power to compromise the action, and the Corporation had no such power in the present case — *M'Cuaig* v. *M'Cuaig* (*cit. sup.*), *per* Lord Dunedin at p. 357. They had no such direct and continuous control of the action as was necessary, and they had not the entire interest in the subject-matter of the action, which was one in which character was involved. The fact that the action was one involving character was important. It was to be remembered that the alleged *dominus litis* was *dominus litis* for the defender. Where the pursuer had selected his defender, in such a suit, the presumption was against his being able to show that anyone else had undertaken the control of the defence. Further, the interest of the *dominus* must be material, *e.g.*, in money at stake, and through that interest there must be full and exclusive control. Joint control and interest not material would not infer such liability — *Kerr* v. *Employers' Liability Insurance Corporation, Limited*, October 20, 1899, 2 F. 17, 37 S.L.R. 21. In any event section 134 was not carried out in terms, and the Corporation could not be bound by any actions of the Town Clerk outwith his mandate. The Corporation had power to act as they did at common law, and to meet the expenses out of the police rates under their general police powers.

Argued for the pursuer — The defenders were liable. As a Corporation their powers were limited by statute, and they could only act here under section 134 of the Glasgow Police Act 1866 (*cit*). Only under that Act could they meet the expenses out of the police rate as they had done. From first to last the proceedings had been controlled by the Town Clerk, and the Corporation could not plead as against the present pursuer that that official was acting *ultra vires*. But in any event section 17 of the Glasgow Corporation Act 1895 (58 and 59 Vict. cap. cxliii) gave express power to employ outside agents. Exclusive control was not necessary to infer liability as *dominus*. It was sufficient if there was joint control—*Maxwell* v. *Young*, March 7, 1901, 3 F. 638, 38 S.L.R. 443; *Fraser* v. *Cameron*, March 8, 1892, 19 R. 564, 29 S.L.R. 446; *Walker* v. *Walker*, January 20, 1903, 5 F. 320, 40 S.L.R. 271. If this were not so the Corporation would really become a party to the cause, but a *dominus litis* was something different, and could not be sisted as a party to the cause—*Hepburn* v. *Tait*, May 12, 1874, 1 R. 875, 11 S.L.R. 502. Even if all that the Corporation undertook was to relieve the defenders of their expenses, this included the expenses which the defenders might have to pay to the successful pursuer. Apart from the statute, there was ample ground for holding that at common law the Corporation had the active interest in the case.

At advising—

LORD JUSTICE-CLERK.—In this case I agree with the judgment at which the Lord Ordinary has arrived. The question involved is one not unattended with difficulty, and some of the dicta which have been laid down in previous cases do not, as I think, give assistance that can be accepted without doubt. It is not easy to give any exact definition of what constitutes a *dominus litis*. He is of course a party standing behind the actual party to the suit in regard to which the position of *dominus* is alleged against him. The answer to the question whether he is in the position of *dominus* turns very much upon the question whether he was by his interference and exercise of control over the litigation the cause of expense to the other party in conducting his case in which he proved to be in the right. This of course does not cover the case in which the alleged *dominus* has done nothing more than given financial aid to the litigant to carry on his pleadings. That may not involve control at all. He must have assumed and been allowed a truly dominating position—a position in which the actual litigant is in his hands—so that the proceeding or not proceeding or the compromise of the case depends upon what he may determine. In other words, if in the position in which he gets himself placed his will is the ruling will he will be liable for expenses as *dominus litis* if the party whose case he has taken up should be unsuccessful. It is his control and direction which makes him so liable; and I should hold this to be the case even although it could not be directly affirmed that, besides having had and used this power of direction and control ceded to him, he had any personal interest in the subject-matter of the litigation. In saying so I am aware that I am going beyond what has been expressed in previous cases, with some of the expressions used in which on this matter I feel difficulty in agreeing. But in the present case it appears to me that the defenders had an interest to give their support and aid to the two constables who were defenders in the case in which the expenses were incurred and now claimed against them, and that they did take up a position of control of the cause which makes them liable to pay these expenses. The case appears to fall within the very exact definition given by Lord Rutherfurd in the case of *Mathieson* v. *Thomson*, 16 D. 19—a definition which is very clear and is expressed in well-chosen words. The facts of the case as set forth by

the Lord Ordinary do, as I consider, establish the pursuer's case. The defenders took up the matter as one of important principle. I do not see how it can be reasonably held that the Corporation could have acted as they did through their officials on any other footing than that the constables were in their hands as regards the conduct of the litigation. It is a very significant fact in the case that the law agents scarcely ever met their clients the constables, but were constantly having consultations with the city officials. It was quite natural that the constables should so leave it in the Corporation's hand, for they in their position would feel that as their conduct did not involve character, as it did not bring them under the censure of their superiors, they might well let them proceed to take charge of their case as one of public interest to the Corporation and fight it or settle it as they thought fit. And the whole procedure followed by the defenders is to my mind inconsistent with any other idea than that they took upon themselves the real and efficient control of the case.

I see no ground for impugning the soundness of the Lord Ordinary's interlocutor, and I would move your Lordships to refuse the reclaiming note.

LORD SALVESEN—[*Read by Lord Guthrie*] —In this case I agree generally with the result at which the Lord Ordinary has arrived, but although his statement of the law is mainly culled from authorities—and I have no quarrel with the way in which he applies it—I am not in absolute accord with the opinions expressed in the two cases that were chiefly relied on, viz., *Fraser*, 23 R. 619, and *M'Cuaig*, 1909 S.C. 355. I consider the most correct statement on the law, so far as it goes on the subject of *dominus litis*, is to be found in the opinion of Lord Rutherfurd in *Mathieson* v. *Thomson*, 16 D. 19, where he says—"But when you go a step further, and find a party with a direct interest in the subject-matter of the litigation, and through that interest master of the litigation itself, having the control and direction of the suit with power to retard it or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*, and though another name may be substituted, the party behind is answerable for the expenses." I assent to all that the learned Judge there says, for I do not think that it is necessarily implied in the statement that the control of the *dominus litis* should be derived entirely through his interest in the subject-matter of the litigation. If he has an interest in the subject-matter, and has in fact the control of the suit, whether through his interest or because the actual party has entrusted him with its control, he incurs in my opinion the responsibilities of a *dominus litis*. I respectfully adopt the language of Lord President Dunedin in *M'Cuaig's* case, where he says—"The true test of whether a party is or is not *dominus litis* is probably whether he has or has not the power to compromise the action." On the other hand, I do not think, as that learned Judge seems to indicate in another passage, that the *dominus litis* must hold "the entire interest, using that term not in an absolute sense but as denoting the whole interest for all practical purposes." I think, for instance, if two parties have an equal interest in the prosecution of a lawsuit, but to one has been assigned the entire control and direction of it although his name does not appear in the litigation at all, the latter is responsible for the expenses as the *dominus litis* while the other is also liable as the party in whose name the litigation is being conducted. It must be borne in mind that a successful pursuer of an action cannot recover the sum sued for from a mere *dominus litis*. His claim against him is for expenses only, and rests on the principle that it is the *dominus litis* who has put him to expense which might otherwise not have been incurred. Of course this principle cannot be carried too far, for it must not be applied to cases where mere financial assistance has been given, as it can never be affirmed in such a case that the party would not have prosecuted the action, it being open to him to compromise or to abandon or to submit to decree (as the case may be) at any time. It is different where the party who is behind the actual litigant controls the action, for it is then certain that it is through his intervention that the expenses of the successful party have been incurred. Nor do I agree with Lord Kyllachy in what he says in *Fraser's* case, that the liability of the *dominus litis* is based on the law of agency, except to the extent that it may be said that the party to the litigation is his agent in the conduct of the suit. It is of course an elementary principle that if a party is litigating entirely in the interest of another by whom the litigation is controlled, the latter must be responsible for the expenses of the successful opponent. He would, however, be so on the rule applicable to principal and agent without any appeal being made to the peculiar doctrine of *dominus litis*. To take a concrete instance, if an agent for an undisclosed principal is sued and a decree is obtained against him for damages for breach of contract and expenses, and the pursuer afterwards discovers that the defence has been truly carried on for the benefit of the undisclosed principal, I think it is plain that on failure to recover from the agent against whom he has a decree he may recover both damages and expenses from the principal. The reason is that the expenses to which he has been put are part of the loss which he has sustained through the principal's breach of contract, but in a case where there is no claim whatever against the *dominus litis*, but only against the party who is the defender in the suit, the only liability which the *dominus litis* can incur by defending the action is the liability for expenses. That is all the additional loss that the pursuer has been put to by his intervention. By controlling and financing the litigation he does not make himself responsible for the debt sued for. He is thus not in the position of the undisclosed principal except to the

effect that the nominal party is his agent in carrying on the litigation. I incline therefore to the view that a person may be the *dominus litis* though he has no direct interest in the subject-matter of the litigation provided he is vested with its sole control and direction.

In the present case it is not necessary to go so far, because I am of opinion with the Lord Ordinary that the defenders had a sufficient interest to justify their intervention on behalf of the constables who were sued. They were satisfied that the constables had acted in the honest discharge of their duty and had not been chargeable with wrongous or reckless actings of any kind. The constables had, moreover, had a previous record of approved service. In these circumstances the Corporation had a moral, if not a legal, duty to defend them from a claim which they believed to be unfounded. If an employer will not relieve his servant from the consequences to which he may be exposed in the proper discharge of his duty, he is certain to subject himself to criticism at the instance of all his other employees who are similarly engaged, and it may affect the terms upon which he can procure good servants. The same is particularly true of a corporation who, although they are not the employers of their police force in the sense of being responsible for their actings, must nevertheless provide the funds to pay the expenses of the establishment and have themselves a responsibility to the public, from whose pockets the money ultimately comes, for the due performance of the difficult duties with which the police are charged. This would be so, I think, at common law, but it is expressly recognised by section 134 of the Glasgow Police Act 1866. It cannot be said that the Corporation had the sole interest, for the constables who were sued had a more direct interest in resisting a claim of damages which was competent only against them as individuals; but it was, in my judgment, a sufficient interest to entitle the Corporation to undertake their defence, and that altogether apart from the statute I have referred to. Did they then, with the sanction of the constables, assume the direction and control of the litigation? In my opinion they did. I shall not again go over the facts which have been summarised by the Lord Ordinary, but there are some additional facts to which I desire to draw special attention. The first is that when one of the constables went abroad (it appears, indeed, that he absconded) the defence was continued exactly as if he had been in Glasgow all the time. Again, when Mr Mackenzie, the solicitor selected by the Town Clerk to conduct the case for the constables, accepted an official position in the Town Clerk's office and gave up private practice, Mr Rosslyn Mitchell was appointed his successor without any consultation with the nominal clients. The formal approval of one of them was no doubt subsequently obtained, but it was really given as matter of course and on the footing that he had no interest in the matter now that the Corporation had intervened. If a compromise had been at any time thought desirable, I do not doubt that it would have been effected by the Corporation on the same footing. So long as the constables were kept clear of loss they were not concerned as to what the Corporation paid. Their character was not involved, merely the question whether they had exceeded their duty on the particular occasion, and on this head they had already satisfied the Chief-Constable and the Magistrates' Committee. Being persons in humble circumstances, it was a matter of indifference to them if they had to pay damages and the opposing litigant's bill whether the agent who had been chosen for them got his expenses paid or not. To them the distinction that is now sought to be made between relieving them of their law-agent's expenses and conducting the defence of the case would have been meaningless; and I am satisfied that they would not have been permitted to compromise the action on the footing that the pursuer of it was to receive compensation, as the defenders from the first considered that an important point of principle was raised which ought to be determined by the verdict of a jury if the claim was not abandoned.

While, therefore, I should have been prepared to hold that the defenders here were *domini litis* at common law, it is not necessary to proceed on this footing, because I hold that they assumed liability under section 134 of the Glasgow Police Act 1866. It is true that the exact procedure prescribed by that section was not followed, because no report was obtained from the Procurator-Fiscal. The defenders, however, frankly said that they made no point of this, as they had found it more convenient to obtain a report from the Chief-Constable, and were in use, on his report, to decide whether an action against any constable was to be defended at the expense of the Board, or was not to be so defended. Great reliance was placed by the defenders on the form in which the Magistrates' Committee minuted the resolution at which they arrived on 23rd March 1911. The ordinary form seems to be to adopt the language of the statute and to recommend the Corporation to defend the action at their expense; whereas what they actually did was "to recommend the Corporation to relieve the said defenders of the expense of defending the case." No doubt these words are capable of being read as meaning that the Corporation were only to undertake liability for the account of the solicitor in whose charge the litigation then was. If this had been the true intention, I think the recommendation would have been more carefully expressed, because this would have been the only case in which the Corporation had hitherto undertaken so limited a liability under this section. The subsequent actings of the defenders are, moreover, wholly inconsistent with this construction. In the first place, they paid an account of expenses for which the pursuer in the action obtained

an interim decree, and for which they were not liable if it was only the constables' law-agent who was to be kept *indemnis;* and in the second place, they charged the whole expenses which they had paid not against the common good but against the police rates. According to a sound construction of the recommendation the expense of defending the case included, and was intended to include, the expense which the constables might be called upon to pay whether successful or unsuccessful, including, in the latter case, the pursuer's account of expenses, which is the subject of the present action. The ground on which the defenders have now repudiated liability is a mere afterthought, which had not occurred to them even at the time when they lodged defences in the action; and was first tabled in the adjusted pleadings. I am accordingly of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD GUTHRIE—The pursuer seeks to make the defenders liable for the expenses found due to him in an action of damages brought by the pursuer in February 1911 against two Glasgow police-constables, Stirling and Sturgeon, for illegal arrest. The pursuer alleges that the defenders, although not parties to that action, had such an interest in the subject-matter of the action and took such complete control of it that they ought to be made liable, as *domini litis*, for the expenses found due to the pursuer by the defenders Stirling and Sturgeon. The pursuer obtained a verdict for £40 from a jury in the Court of Session, to which tribunal the case was appealed for jury trial.

Much argument was addressed to us as to the amount of interest requisite for a plea of *dominus litis* and as to the extent of control. Opinions of eminent Judges were cited in which, dealing with the question of interest, the expressions varied from "entire" or "preponderating" to "substantial" or "material." It is sufficient to refer to two of the cases quoted to us. In the case of *Mathieson* v. *Thomson*, 1853, 16 D. 19, Lord Rutherfurd defined a *dominis litis* as "a party who has an interest in the subject-matter of the suit, and through that interest a proper control over the proceedings in the action." If this test be applied I think the pursuer is entitled to succeed. The same result follows if Lord Kyllachy's view in the case of *Fraser* v. *Malloch*, 1896, 23 R. 619, approved by Lord Dunedin in *M'Cuaig*, 1909, S.C. 335, be taken, that the question of the extent of interest and amount of control are only elements in the proof, the radical question being in the present case whether in the action at the instance of the pursuer against Stirling and Sturgeon these men were acting not as principals but as agents, the defenders being the true principals, although undisclosed.

On probabilities the case against the defenders is a strong one. They admit that if, as alleged by them, they did not undertake to defend but only agreed *ab ante* to pay the constables' expenses, this was a course never taken before or since. They further admit, in view of the terms of their own minutes, that the case had all the elements to be found in the actions brought against their constables, which they have been and are in the habit of defending, and in which they do not dispute that they are liable as *domini litis*. But the evidence goes further. It appears that in addition to the elements, which usually (in the interests of discipline, and in order to enable the defenders to get the best men for the force) move the defenders to undertake the defence of actions against their constables (namely, the long and approved service of the men accused and the defenders' belief either in the entire baselessness of the charge, or that if the constables had committed a fault it was due to excusable over-zeal in the public interest) a very important general question, affecting the whole police administration of the defenders, was involved in the decision of the case against Stirling and Sturgeon.

This appears clearly if the minute of the Magistrates' Committee of 30th October 1913 be first considered. In that minute reference is made to a case similar to that against Stirling and Sturgeon which was brought by Stephen Shields against constables Shearer and Bruce subsequent to the decision against Stirling and Sturgeon. The defenders had on 23rd January 1913 adopted the Magistrates' Committee's suggestion that "as provided for and authorised by section 134 of the Glasgow Police Act 1866, such action be defended at the expense of the Corporation." From the minute of 30th October 1913 it appears that the Magistrates' Committee were told that an issue in the case of *Shields*, 1913 S.C. 1012, 50 S.L.R. 794, had been approved in terms which, so far as the issue did not contain the words "maliciously and without probable cause," are identical with the terms of the issue in *Harvey's* case, 1912 S.C. 974, 49 S.L.R. 717, and in consequence they were advised to appeal to the House of Lords "in respect of the serious consequences, so far as regards police administration, likely to ensue from acquiescence in the judgment, which overturned the hitherto accepted legal proposition that in an action against a constable for wrongous arrest there must be an averment of facts and circumstances from which malice can be inferred." It is noticeable that in the discussion in the case of *Shields*, as reported 1913 S.C. at p. 1014, the defenders (the case being defended by the Corporation of Glasgow) pleaded that the decision of *Harvey's* case "was inconsistent with all the previous decisions and should be reconsidered." And Lord Salvesen in his opinion in the case of *Shields*, referring to the point arising in that case and the case of *Harvey* which the Corporation asked should be reconsidered, said—"The importance of the decision from the point of view of the police force in Glasgow is no doubt great."

It is not necessary to assume that the importance of the question involved both in *Harvey's* and *Shield's* cases was so clearly realised in the first case as in the second. But it is apparent that in both it was felt

from an early stage that the interest of the whole police administration was involved in a way which made it more natural for the Corporation to undertake the defence than in the ordinary class of case of an approved servant believed to be free from blame in which the Corporation have been in the habit of undertaking the defence. Indeed this probably explains why, when the only request made was that the Corporation should find the money necessary for the employment of counsel, the defenders, instead of merely acceding to this request, resolved in any case to have to do with the case not only as it then stood but in all its subsequent stages.

When we look at the terms of the minute of 23rd March 1911 it will be found that the preamble as to the reasons for the Corporation intervening are precisely those stated in the minutes of 22nd August 1912 and 17th January and 30th April 1913 as the cause why the Corporation resolved to defend these actions raised against other constables, except that the minute of 23rd March 1911 contains a reason which would naturally lead to this result, not present in the other minutes, namely, the approved service of the constables Stirling and Sturgeon in the force.

It was at first attempted to justify the defence on the ground that the defenders in the course resolved on by them were acting under their common law rights, and could have charged Stirling and Sturgeon's expenses against the common good. The pursuer's answers seem to me conclusive—first, that the defenders in fact charged the said expenses against the police rate, which they were entitled to do only if they were acting under the Police Act of 1866; and second, that the Town Clerk, Mr Lindsay, admitted in his evidence that they were so acting. The same admission was given in the original defences, but the admission was withdrawn for a denial at adjustment. The question is reduced by Mr Lindsay to this—Were the Corporation acting under the first of the two courses specified in section 134, in which case the pursuer is admittedly entitled to succeed, or under the second, in which case they will already have discharged their obligations. But if the case is in the one position or the other, the pursuer says that the second course is excluded because its application is limited to the case where the Magistrates' Committee resolve not to defend the action, which they did not do in this case, and to a case where the defender called in the summons resolves not to defend the action and does not do so, whereas Stirling and Sturgeon resolved to defend and did defend. If this be so, and if the defenders acted as Mr Lindsay says under section 134 of the Act, it follows that they must have adopted the first of the two courses specified in the Act.

But, at the best for the defenders, their minute of 23rd March 1911 is ambiguous, and its construction will be determined by their actings. These seem to me only consistent with the defenders having assumed the defence of the action as principals. I am not putting out of view Mr Lindsay's duty under the minute of 23rd March 1911 to watch the case as representing the committee, nor his personal interest in Mr Mackenzie, who conducted the litigation until on his retirement from legal practice he handed it over to Mr Rosslyn Mitchell, nor his personal interest in the particular constables. I refer to the Lord Ordinary's opinion, in which Mr Lindsay's active control of the litigation is fully dealt with. I do not think he overstates the effect of the evidence when he says—"Mr Lindsay, who was then Depute and is now Town Clerk, although not nominally in charge, directed and controlled the defence from beginning to end." I gather from the agents' accounts that while the agents had two meetings with Sturgeon and four with Stirling, they had twenty-seven with Mr Lindsay, eighteen of which were subsequent to the minute of 23rd March 1911.

In the view I take of the case it is unnecessary to consider the pursuer's contention that the defenders were responsible apart from the Statute of 1866.

I am therefore of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD HUNTER, who was present at the advising, gave no opinion, not having heard the case.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer and Respondent —Sandeman, K.C.—Paton. Agents—Tait & Crichton, W.S.

Counsel for the Defenders and Appellants —Cooper, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Friday, March 5.

SECOND DIVISION.

[Sheriff Court at Stirling.

FERGUSON *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Negligence—Railway—Master and Servant—Statutory Duty—Prevention of Accident Rules, sec. 9—Railway Employment (Prevention of Accidents) Act 1900 (63 *and* 64 *Vict. cap.* 27)*—Fulfilment of Duty.*

The Prevention of Accident Rules passed by the Board of Trade on 8th August 1902 in virtue of the Railway Employment (Prevention of Accidents) Act 1900, sec. 9, provides—"With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of keeping a good look-out or for giving warning against any train