far as made in support of his action at common law upon negligence, I confess that even accepting the verbal explanations of his counsel as to what they were really intended to mean, they appear to me to lie perilously near, if indeed they do not go beyond, the line which separates relevancy from irrelevancy. But it is perhaps safer and better to adopt the course proposed by your Lordship, viz., to allow a proof before answer rather than to throw them out here and now as plainly irrelevant. In this view it is probably safer also to avoid anticipating the result, and to refrain from comment beyond saying that a good many of the Lord Ordinary's observations appear to me to be powerful and formidable.

LORD ORMIDALE—The pursuer's claim for damages is laid on two grounds—first, on negligence at common law, and second, on breach of the implied warranty under section 14 (1) of the Sale of Goods Act 1893.

I agree with the Lord Ordinary that the averments of the pursuer are irrelevant to infer a breach of warranty under the Sale of Goods Act, and I do so on the short ground that, taking it that the coal was supplied for the particular purpose of household consumption, nothing that is said about it leads one to infer that it was other than reasonably fit for that purpose. There is no complaint about the coal as coal. As the amended record now reads, it is not averred that the explosion was in any way due to a defect in the coal, and coals and only coals were the goods bought and supplied under the contract. What caused the accident was a thing the pursuer did not purchase, viz., a detonator or other manufactured metal substance—an article quite foreign to the coal.

As regards the common law ground of action I have more difficulty. The averments as to the defender's duty and his neglect of it are on the very border line between relevancy and irrelevancy, and I further think that it would have been better pleading if the pursuer had in reply to the defender's answer one stated expressly whether he admitted or denied that the coal the defender sells is sold in bags which he receives filled from the wholesale merchants. I am not prepared, however, as regards the question of negligence at common law to dismiss the action without inquiry, but I agree that in the circumstances the inquiry should be by proof and not by jury trial.

LORD SALVESEN did not hear the case.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Disallow the issues proposed by the pursuer: Find that the pursuer's averments so far as laid under section 14 (1) of the Sale of Goods Act 1893 are irrelevant, and repel his fourth plea-in-law: *Quoad ultra* remit to the Lord Ordinary to allow the parties a proof before answer in common form upon the case so far as laid at common law, and to proceed as accords. . . ."

Counsel for the Reclaimer (Pursuer)—Fraser, K.C.—Crawford. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Respondent (Defender)—Mackay, K.C.—Aitchison. Agents—J. & A. F. Adam, W.S.

Saturday, February 5.

SECOND DIVISION.

[Sheriff Court at Glasgow.

VALENTINE *v.* GOW HARRISON & COMPANY.

Ship—Seaman—Contract of Service—Ship's Articles—Construction—Pay for Overtime.

A ship's articles contained the following conditions regarding overtime:—"*In port when watches are suspended* the hours of work for navigating and engineer officers (except chief engineer) shall be as follows:—Monday to Friday, 7 a.m. to 5 p.m.; Saturday, from 7 a.m. to 1 p.m. *Time worked* outside these hours, and on Sunday, Christmas Day, and New Year's Day, to be paid for at the rate of 2s. 6d. per hour, except in the following cases:— . . . *Officers in Charge.*—No overtime payable where navigating or engineer officers are appointed as officers in charge for night duty and are given equivalent time off duty."

Held that, under the articles, navigating or engineer officers appointed as officers in charge for night duty and not given equivalent time off-duty were not entitled to overtime pay for such duty, unless when so employed they had actually worked.

John Lough Valentine, engineer, 39 Kelvindale Street, Glasgow, *pursuer*, brought an action against Gow Harrison & Company, steamship owners and brokers, Glasgow, *defenders*, for payment of the sum of £66, 5s., which he alleged was due to him under a contract of service with the defenders.

The contract of service incorporated the ship's articles, which, *inter alia*, provided—"*In port when watches are suspended* the hours of work for navigating and engineer officers (except chief engineer) shall be as follows:—Monday to Friday, 7 a.m. to 5 p.m.; Saturday, from 7 a.m. to 1 p.m. *Time worked* outside these hours, and on Sunday, Christmas Day, and New Year's Day, to be paid for at the rate of 2s. 6d. per hour, except in the following cases:— . . . *Officers in Charge.*—No overtime payable where navigating or engineer officers are appointed as officers in charge for night duty and are given equivalent time off-duty. *Ports Outside U.K.*—No overtime payable at ports outside U.K. where vessel does not load or discharge cargo and remain for more than 24 hours, except that time spent by navigating officers outside working hours as defined above in the actual work of loading or discharging cargo may be computed

towards overtime whether vessel remains for 24 hours or not. *Lost Time.*—No overtime payable until a full day has been worked."

The parties, *inter alia*, averred—". . . (Cond. 2) On or about 30th October 1918 the pursuer was engaged with the defenders to serve as fourth engineer at a monthly salary of £17 and £3 bonus on board the ss. 'Virgilia,' then being used as an Admiralty transport, and signed the usual agreement and ship's articles with them. In addition to said salary and bonus it was also agreed between the pursuer and defenders and provided for in the ship's articles that while in port when watches are suspended the hours of work for navigating and engineer officers (except chief engineer) shall be as follows: —[*Here followed a reference to the ship's articles.*] No equivalent time off-duty was given to pursuer for night duty. (*Ans.* 2) Denied that no equivalent time off-duty was given. *Quoad ultra* admitted. (Cond. 3) On 1st November 1918 the s.s. 'Virgilia' sailed from Greenock to Barry Dock, where it was loaded with coal and sailed for Gibraltar. On arrival at Gibraltar said coal was discharged, and the said steamship proceeded from there to Norfolk, Virginia. At Norfolk the said steamship was again loaded with coal, bunker and ballast, and sailed *via* Panama Canal to Newcastle, New South Wales, where ballast coal was discharged and re-loaded as bunker coal, a full cargo of Australian coal being loaded also, and the said steamship sailing thereafter for Melbourne. At Melbourne cargo coal was discharged and grain loaded, and the said steamship proceeded to Britain *via* Suez Canal, the pursuer terminating his engagement with the defenders on the 'Virgilia' on its arrival at Avonmouth, Bristol Channel, England. On signing off at Avonmouth the pursuer did so under protest, and claimed from the defenders the sum of £66, 5s. for times worked by him during said voyage outside the ordinary working hours of the said steamship in terms of the ship's articles signed by him. (*Ans.* 3) Admitted under reference to answer 4, and except in so far as the claim made is said to be in terms of ship's articles, which is denied. (Cond. 4) The pursuer produces an account or statement showing the various times worked by him during said voyage for which he is entitled to be paid additionally at the rate of 2s. 6d. per hour. The various sums to which the pursuer is so entitled in respect of overtime in terms of this engagement amount *in cumulo* to £66, 5s. With reference to the statement made in answer it is admitted that the sum of £3, 5s. has been paid to account. The further statements made in answer are denied, and it is explained that under said ship's articles the pursuer was entitled to overtime when merely on duty whether engaged on active duties or not. (*Ans.* 4) Denied. The statement produced is inaccurate in respect that overtime is claimed (1) where payment had in certain cases been already made, (2) in circumstances falling within the exceptions detailed in answer 2, (3) that equivalent time off was given. Further, on nearly all occasions for which overtime is claimed the pursuer did no work, and is therefore not entitled to overtime under said articles. Explained also that it is and always has been a universal custom in shipping that officers and engineers take their turn on night duty while in port, and that without payment of overtime except where they are required to undertake some active duties. Ship's officers or engineers require leave to go ashore, and night duty does not mean an extra duty but merely withholding of leave. The fact of an officer remaining and sleeping on board in his turn so as to be available in case of emergency did and does not entitle him to overtime. It is further explained that the above provisions in said articles with regard to overtime were introduced generally about March 1918 as a result of negotiations between owners' associations and, *inter alia*, the Marine Engineers' Association, of which pursuer is a member, that doubts arose as to whether they entitled engineers to claim overtime for night duty where no work was done. That was agreed by all parties, including the said association, and it remains the custom in shipping that an engineer's obligation for night duty without payment is the same as before. (Cond. 5) The pursuer has applied personally by letter and through his law agents for payment to him of the said sum of £66, 5s., but the defenders refuse or delay to make same, and the present action has been rendered necessary in consequence. (*Ans.* 5) Admitted. Explained that the pursuer is entitled to the sum of £8 in respect of overtime worked by him during said voyage. The pursuer has refused to accept this sum, and has by his agent returned the defenders' cheque for that amount when tendered."

On 8th December 1919 the Sheriff-Substitute (LYELL) after a proof pronounced this interlocutor—"On a just consideration of the ship's articles here in dispute, Finds (1) that the pursuer was entitled either to payment from the defenders of 2s. 6d. or to equivalent time off-duty for every hour during which he actually worked on the nights when he was appointed officer-in-charge for night duty while the ship lay in port; (2) that the pursuer was not entitled to such payment or equivalent for every hour spent on board as officer-in-charge for night duty on the said nights during which hours the pursuer did no work other than so remaining on board: and finds in law that the defenders are not liable in the sum sued for, but only in the sum of £8 already tendered and refused: Therefore assoilzies the defenders and decerns. . . ."

Note.—"It can hardly be said that the ship's articles in question are a model of perspicuous intelligibility. The leading purpose is, however, clear. When the ship is in port and watches suspended the navigating and subordinate engineer officers' hours of work are from 7 a.m. to 5 p.m. on Mondays to Fridays, and on Saturdays from 7 a.m. to 1 p.m. Leaving out of view the references to Sundays and special days as irrelevant to the point here in dispute, the next thing to be observed is that 2s. 6d. per hour is to be paid these officers, in addition to their

stipulated salaries, for 'time worked' outside these stipulated hours, with certain exceptions. Be it observed that, so far as we have got, the requisite antecedent to the payment of each 2s. 6d. is not that one hour shall have been spent on board, but that one hour's work shall have been done, outside the ordinary working hours. That is too plain for argument. Then follow a number of so-called excepted cases, the crucial clause, on which the solution of the question here turns, being as follows:—'*Officers in charge.*—No overtime payable where navigating or engineer officers are appointed as officers in charge for night duty and are given equivalent time off duty.' That seems to me, in the first place, to mean exactly what it says. If you appoint a man officer in charge for night duty and give him an equivalent number of hours off duty, he has no claim for any overtime for work done during the time he was on night duty. Conversely it follows that if you appoint a man officer in charge for night duty, but give him no equivalent time off duty, he *has* a claim to be paid overtime, but that claim is defined in terms of the articles as meaning a claim at the rate of 2s. 6d. an hour for any 'time worked' while on night duty, because the hours when he is officer in charge for night duty are 'outside' the ordinary working hours in port. The true question thus comes to be—What is the meaning of the expression 'time worked outside these hours' in the enacting clause of the articles? The argument of the pursuer on the point is at first sight specious enough. He puts it that for every hour spent by him as officer in charge for night duty he is entitled either to a corresponding hour off or 2s. 6d. In my view, however, he fails to grasp the meaning of 'overtime payable' in the clause that he relies on. By reference to the enacting clause we discover that overtime is only payable for 'time worked outside' the ordinary hours. The proper meaning of the clause in question seems to me to be that where the pursuer has been appointed as officer in charge for night duty but has been given no equivalent time off duty, he is entitled to payment of 2s. 6d. for every hour during which he has worked during the nights that he was so appointed officer in charge, but he is not entitled to payment for time only. In a sense it is true that once a man is on duty he is at his work. The evidence, however, is to the effect that an officer in charge in port merely goes to his bunk. When a reasonable reading can be given to these articles it would certainly be out of the question to adopt the fantastic suggestion that the pursuer is to be entitled to payment of 2s. 6d. an hour for sleeping on board. For any work that he did during these nights he is obviously entitled to payment, unless he has been granted equivalent time off duty. As I understand it, the defenders' suggestion that the sum due on that footing is £8 is not denied. It has been already tendered and refused. I shall therefore direct that it be deducted from the amount of the defenders' expenses, for which the pursuer is of course liable."

The pursuer appealed to the Sheriff (MACKENZIE), who on 31st May 1920 adhered.

Note.—"This case turns upon the construction of the provisions relating to overtime contained in the ship's articles under which the pursuer was engaged by the defenders as fourth engineer on board the steamship 'Virgilia' in the year 1918. The question raised cannot be said to be free from difficulty, and in my opinion the articles in question are capable of being construed either as the pursuer or as the defenders contend, but I have come to think that the construction put upon them by the learned Sheriff-Substitute is the more reasonable, and is to be preferred."

The pursuer appealed, and argued—Time was of the essence of the contract. If an engineer officer was retained for night duty and was not given equivalent time off duty he was entitled to overtime payment—*Officer* v. *Davidson & Company*, 1918 S.C. (H.L.) 66, 55 S.L.R. 185, *per* Lord Dunedin at 1918 S.C. (H.L.) 78, 55 S.L.R. 191.

Argued for the respondents — The sum sued for was a payment claimed for "time worked," but the pursuer had not been called upon to perform any work during his spells of night duty, and he was not entitled to payment merely for the flight of time. The construction which the defenders placed upon the articles was reasonable and should be preferred to the pursuer's construction, which was grotesque. On the pursuer's construction of the articles an engineer officer might be able to claim more pay for night duty which had involved no work than he was entitled to for actual work done.

At advising—

LORD JUSTICE-CLERK — The decision in this appeal depends on the construction of the clause in the provision as to overtime, which is in the following terms — "*Officers in charge.*—No overtime payable where navigating or engineer officers are appointed as officers in charge for night duty and are given equivalent time off duty." I have not found it easy to determine between the two views suggested, but I have ultimately come to be of opinion that the view taken by the Sheriffs is right.

The series of provisions begins by specifying what are "the hours of work" while the vessel is in port and watches are suspended. Then it provides that "Time worked outside these hours" and on certain named days is "to be paid for at the rate of 2s. 6d. per hour except in the following cases," and the rule quoted above as to "officers in charge" is one of the exceptions.

What is to be paid for is "Time worked outside," *i.e.*, beyond the specified hours of work. The condition-precedent to receiving pay at the rate of 2s. 6d. per hour, *i.e.*, for overtime, is, in my opinion, that the officer shall "work" at times outside or beyond the specified hours. In my opinion the term "work" in the phrases "hours of work" and "time worked" applies to and means the ordinary or usual work of a navigating or engineer officer. That is to say, that when such officer is engaged at the

usual work of such officer outside or beyond the specified hours, he is to be paid overtime rates for the hours he so works. But where such officer does such work in hours outside the specified hours, if he is "officer in charge," he is not to be paid overtime for such work if equivalent time off duty is given him for the time when being officer he so works. I cannot read the regulations as providing that the mere fact of being officer in charge entitles that officer to be paid overtime rates for the whole time during which he is so in charge although no work whatever is done.

I am therefore of opinion that the judgments of the Sheriffs are right, and that the appeal should be refused.

LORD DUNDAS — I think the learned Sheriffs are right.

The question depends upon the true meaning and construction of the conditions regarding overtime. The first clause of these prescribes "the hours of work" for certain engineer officers "in port when watches are suspended." The next clause provides that "time worked outside these hours" is "to be paid for at the rate of 2s. 6d. per hour, except in the following cases." One of these cases reads thus — "*Officers in Charge.*—No overtime payable where . . . engineer officers are appointed as officers in charge for night duty and are given equivalent time off duty." I do not read this exception as in any way altering or overriding the main conditions, by which overtime is payable only for "time worked" outside ordinary hours. It does not, I think, import that an officer, merely because he is appointed officer in charge for night duty, is *eo ipso* entitled to be paid overtime at 2s. 6d. an hour during that period of duty whether he does any active work or whether he lies in his bunk. "Time on duty" is not the same thing as "time worked." The meaning of the clause, upon a proper and natural construction, seems to me to be that for such work as he may be called upon to perform while officer in charge for night duty he is to receive overtime pay unless he is given equivalent time off duty.

I do not think it important, even if it be relevant, to consider the language of the conditions as altered in January 1919.

The appeal in my judgment fails.

LORD SALVESEN—The question in this case turns upon the true construction to be placed on certain conditions regarding overtime which qualify the contract of service between the pursuer and the defenders. These conditions were fixed by the Shipping Controller during the period of the war with a view, no doubt, to avoid strikes amongst marine engineers, and constituted an entire innovation on the conditions of service on board ship which had previously been in vogue in merchant vessels, and excluded every demand for overtime during the currency of a voyage.

I agree with the Sheriff-Substitute in the view which he takes that the ruling stipulation is the one beginning "time worked." The rate of 2s. 6d. per hour, which is the rate of payment for time worked, falls clearly, I think, under this clause to be paid only for active service, which of course might include the duty of watching although no manual work was actually done. The clause which creates the difficulty is the one that follows: — "*Officers in Charge.* — No overtime payable while navigating or engineer officers are appointed as officers in charge for night duty and are given equivalent time off duty." I think this clause is capable of being construed in either of two ways. The first, which commends itself to me, is that where overtime is worked by an engineer officer in charge for night duty he is not to be entitled to charge for such work if he is given equivalent time off duty, but if he is not given such equivalent that he is entitled to 2s. 6d. per hour for the overtime which he actually works. It is, no doubt, however, capable of the construction for which the appellant contends, that all time during which an officer is appointed on night duty is to be paid for at the specified rate, whether the whole of that time is occupied by him in his bunk or in employing himself in recreation. Such a construction is I think unreasonable, because it appears from the evidence of the pursuer's leading witness Young that where a ship on foreign service was kept in port for a month an engineer officer would be entitled to get more than his whole wages for a month (in addition to these wages) for simply sleeping on board the ship (which in any case he cannot leave without permission) for a period of ten nights. I am satisfied that such a construction was never within the contemplation of the authority which framed the rules, and as the other construction, which is a reasonable one, is equally open, I am prepared to adopt it. I am confirmed in this view by the circumstance which appears from the proof that although thousands of navigating and engineer officers must have been employed under the same conditions of service and paid off, this is the first time that such a claim has been presented. I admire the ingenuity of the lawyer who discovered in the conditions a basis for such a claim, but I cannot think that it is in accordance with either common sense or equity that it should be conceded by the Courts. If it had been the only possible construction which a legal tribunal could have put upon the conditions, we would, no doubt, have had to give effect to it whatever the consequences; but for the reasons already given I do not think it is a natural construction, far less a necessary construction, of the conditions referred to.

I am therefore of opinion that we ought to adhere to the interlocutor appealed from.

LORD ORMIDALE did not hear the case.

The Court pronounced this interlocutor—

"... Dismiss the appeal: Find in fact (1) that the pursuer served under articles which included the provisions set out in No. 9 of process . . . [*ut supra*] . . .; (2) that it is not proved that the pursuer worked for any time outside the hours specified in No. 9 of process beyond what is admitted, and which at

the specified rate of 2s. 6d. per hour would entitle him to be paid the sum of £8 under said articles: Find in law that the defenders are not due to the pursuer anything beyond the said admitted sum of £8: Of new assoilzie the defenders from the conclusions of the action, and decern. . . ."

Counsel for Appellant (Pursuer) — MacRobert, K.C.—Crawford. Agents—Gardiner & Macfie, S.S.C.

Counsel for Respondents (Defenders) — Macmillan, K.C. — Normand. Agents — J. & J. Ross, W.S.

HIGH COURT OF JUSTICIARY.

Monday, February 14.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Ormidale.)

[Sheriff Court at Cupar.

PENRICE *v.* BRANDER.

Justiciary Cases—Food and Drugs—Genuineness of Milk—"Abstraction of Milk Fat"—Milk Drawn from Bottom of Can after Cream had Risen—Sale of Food and Drugs Act 1875 (38 *and* 39 *Vict. cap.* 63), *sec.* 6—*Sale of Food and Drugs Act* 1899 (62 *and* 63 *Vict. cap.* 51), *sec.* 4 (1)—*Sale of Milk Regulations* 1901, (1).

The Sale of Milk Regulations 1901, issued by the Board of Agriculture in exercise of the powers conferred upon them by section 4 of the Sale of Food and Drugs Act 1899, provide—"(1) Where a sample of milk (not being milk sold as skimmed, or separated, or condensed milk) contains less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water."

A farmer sent to a neighbouring town three cans of milk, having given instructions to the servant in charge to mix the milk before it was drawn off for sale so as to maintain an equal distribution of milk fat throughout. The servant failed to carry out the instructions, with the result that certain samples of milk which were purchased by a sanitary inspector for the purpose of analysis were found to be deficient in milk-fat. In a complaint against the farmer for selling milk which was not genuine, contrary to the Act and the Regulations, it was proved that there was a well-known method of redistributing the fat in the milk which the accused usually practised, and which his servant had instructions to follow, but which on the morning in question his servant had omitted to adopt. *Held* that an abstraction of milk fat in the sense of the Regulations had taken place, and that the accused had been rightly convicted.

Opinions expressed in *Knowles* v. *Scott*, 1918 S.C. (J.) 32, 55 S.L.R. 167, *followed.*

Observations (*per* the Lord Justice-Clerk) as to the form of the complaint and the necessity for further specification.

The Sale of Food and Drugs Act 1875 (38 and 39 Vict. cap. 63) enacts—Section 6—"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser. . . ."

The Sale of Food and Drugs Act 1899 (62 and 63 Vict. cap. 51) enacts—Section 4 (1)—"The Board of Agriculture may, after such inquiry as they deem necessary, make regulations for determining what deficiency in any of the normal constituents of genuine milk, . . . or what addition of extraneous matter or proportion of water in any sample of milk, . . . shall for the purposes of the Sale of Food and Drugs Act raise a presumption, until the contrary is proved, that the milk . . . is not genuine or is injurious to health, and an analyst shall have regard to such regulations in certifying the result of an analysis under those Acts."

The Sale of Milk Regulations 1901 (1) is quoted in the rubric.

George Penrice, farmer, Pitcruivie Farm Largo, *appellant*, was charged in the Sheriff Court of Fife and Kinross at Cupar, at the instance of George Brander, Procurator Fiscal, *respondent*, upon a summary complaint in the following terms:—"You are charged at the instance of the complainer that on 2nd July 1920, in Leven Road, Lundin Mill, Fifeshire, you did by the hands of your son Robert Penrice, in response to a demand by him for (1) threepence worth of 'sweet milk,' sell to John Macrae, sanitary inspector for the Eastern Division of the County of Fife, milk which was not genuine sweet milk, as it contained less than 3 per cent. of milk fat, and (2) threepence worth of 'sweet milk,' sell to said John Macrae milk which was not genuine sweet milk, as it contained less than 3 per cent. of milk fat, contrary to the Sale of Food and Drugs Act 1875, section 6, whereby you are liable for each offence to a penalty not exceeding £20, and in default of payment thereof to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act 1908, and you have been previously convicted of contravening the Sale of Food and Drugs Act, namely, in Cupar Sheriff Court on 24th June 1919, when you were fined £3 or 14 days."

The complainer pleaded not guilty, and on 3rd September 1920, after evidence had been led, the Sheriff-Substitute (STUART) found him guilty as libelled and imposed a fine of £4.

The appellant obtained a Case for appeal.

The Case set forth—"The following *facts* were proved:—1. That on the date and at the place libelled, about 7·30 a.m., the said John Macrae purchased from Robert Penrice, the appellant's servant who was in