would, as was pointed out by Lord M'Laren, almost necessarily involve the complete supersession of the Trustees in their office, since all the powers they enjoy directly or indirectly subserve that end, since this object is by making the harbour better, safer, or more commodious, to attract ships to it and increase their receipts. Indeed, if this were not so it would be almost impossible to define the exact limits of the factor's authority or to determine precisely what remnant of their powers should remain with the Trustees. Of course the judicial factor must not starve the undertaking. He must out of the income he receives make as far as possible adequate provision for the carrying on of the undertaking as a going concern. He is then free to divide such surplus as may remain amongst the incumbrancers according to the priority of their respective claims.

In my opinion, therefore, the appeal is entirely unsustainable and should be dismissed with costs. I concur in the observations which have been made by the Judges of the First Division as to the power of the courts of law to compel the Trustees not to cheat their creditors by a *mala fide* refusal to exercise their power to increase the tolls or rates.

LORD CHANCELLOR—I may add that my noble and learned friend Lord Atkinson has signified to me that he does not differ from the observation I made upon the last part of his judgment.

Their Lordships dismissed the appeal with expenses as agreed between parties.

Counsel for the Pursuers (Respondents)—D.-F. Scott Dickson, K.C.—C. A. Russell, K.C.—Macmillan. Agents—W. B. Rainnie, S.S.C., Edinburgh—Thomas Cooper & Company, London.

Counsel for the Defender (Appellant)—Sir R. Finlay, K.C.—Sir C. A. Cripps, K.C.—Horne. Agents—J. & J. Ross, W.S., Edinburgh—Lowless & Company, London.

Tuesday, March 8.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord Kinnear, and Lord Shaw.)

MACKISON'S TRUSTEES *v.* DUNDEE MAGISTRATES.

(In the Court of Session, March 18, 1909, 46 S.L.R. 577, and 1909 S.C. 971.)

Master and Servant—Recompense—Wages—Contract—Extra Services—Burgh Surveyor—Mora.

In 1868 a burgh appointed a burgh surveyor who was to devote all his services to their business. He received a substantial but not a large salary. He held office till 1906, and during that period he did work not in the contemplation of parties at the time of his appointment, for which he received the outlays, and on three occasions small honoraria. He made no definite claim for special remuneration until 1906, when his claim was repudiated. It was proved he had himself worked in the belief or hope his claim would be recognised, and that the burgh had not treated his claim as one to be summarily and without investigation rejected. After his removal from office in 1906 he brought an action to recover a large sum as special remuneration.

Held that, after the lapse of so long a period and in the circumstances of himself and the defenders, the *onus* upon him to establish a contract for special remuneration was heavy, and as he had failed to discharge it, the defenders must be *assoilzied.*

This case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

At the conclusion of the appellants' argument—

LORD CHANCELLOR—I think your Lordships will desire to make an acknowledgment to the learned counsel for the appellants for the great conciseness and clearness with which they have stated the case, therein saving much, I have no doubt, of the valuable time of the House.

In regard to the case itself, I cannot help feeling the same sympathy which was expressed by the learned Judges in Scotland with the late Mr Mackison and his representatives, because he seems from what we have heard to have been a very zealous and deserving public servant. But while saying that, I have no right to say any more, nor to in any way convey any opinion in regard to the propriety or impropriety of the respondents' action in this matter. They are themselves the judges of what they ought to do outside the law, and I do not wish to say anything to convey an opinion upon that subject, which it is not my function or right to criticise.

We have to deal with this case upon its legal merits, and the question is one entirely of contract as to whether the late Mr Mackison, who was employed as borough surveyor, was by contractual relations with his employers entitled to something more than the salary for which he was serving. That he did a great deal of work is apparently not disputed, but it is necessary for those who represent him to show that he made a contract, express or to be inferred from evidence, that he was to be paid something beyond his salary in respect of the work which he did.

Now I think Mr Morison in his admirable argument has shown that there is evidence of that kind. But that is not enough. He must show that it is sufficient evidence to justify a court of law in acting upon it under the circumstances of this case.

The circumstances of the case, put in the manner most favourable to Mr Morison's

argument, are these:—This gentleman constantly had in his mind that he was to be paid—that he worked himself in the belief, or at all events in the hope, that his claim would be recognised, and that the respondents, the Town Council, treated it as a claim which was not to be summarily and without investigation rejected. I say that is the evidence, but as nearly forty years have elapsed since the commencement of this work, and most of the people concerned have died, it is manifest that a court of law will scrutinise with great care evidence of that kind before acting upon it. We must be satisfied, where so much has been lost by time and by death, that there could not well have been any other contradictory proof that would have displaced the affirmative evidence given, or so impaired its authority that it could not have been accepted as the foundation of a judgment.

In the opinion of Lord Low he quotes one sentence from Lord Chancellor Selborne which seems to me to apply admirably to the present controversy. The Lord Chancellor said—"Where there is a controversy of fact, delay in bringing forward the case increases in proportion to the length of that delay the burden of proof which is thrown upon the plaintiff." It seems to me that the burden of proof is abnormally heavy in a case like this, and I feel that it would be a most unsafe precedent if your Lordships were to act in a case of this kind upon evidence which is of itself not very unequivocal or very strong, but which loses nearly all its force from the fact that those who could have contradicted it, or could have explained it, or could have attenuated its significance, are by no fault of the respondents no longer able to give the explanation.

Under those circumstances it seems to me the rule laid down by Lord Selborne amply applies, and that it is your Lordships' duty to dismiss this appeal.

LORD ASHBOURNE — I entirely concur with my learned and noble friend on the Woolsack in the judgment which he has just delivered. I do not think it is possible after listening to the able and forcible argument addressed to us to entertain any doubt on the subject. This gentleman, who was borough surveyor for a very great number of years, a very meritorious public officer, a man of very high character, and I have no doubt very much respected, was in receipt of a salary of £500 a-year—a substantial salary, but not one that would lead one to think it could easily be made the foundation for a claim for very many thousand pounds for doing some extra work in addition to the work which he was paid for by his salary. He claims, or his representatives claim, that he was entitled to seek for a great many thousand pounds more in respect of extra work which he did over and above the work which he was, admittedly, to do under a contract which compelled him to give all his time to the service of the city of Dundee. All that time he did perform a considerable amount of work denominated extra work. In respect of this some visits were required to London, and various expenses had to be incurred. Without question and dispute he was paid every single one of those expenses, and his staff, which was originally three, was raised to eighteen, which I am sure gave him great facilities for carrying on all the work, original, normal, abnormal, and extra, which could be put to him. Has he made out a contract to be paid any sum, putting aside the enormous indefensible figure that is put forward—has he satisfied your Lordships that a contract has been proved to have been made by his employers to pay him as a legal right extra claims in respect of work alleged to be extra? The *onus*, as my noble and learned friend on the Woolsack points out, is plainly upon him and his representatives, and it is rendered enormously difficult to discharge owing to the great length of time which he has allowed to elapse. If he believed or was advised that he had a sound legal claim, it was very unwise not to have brought it to the test of experience long ago. I will assume it must have passed through his own mind, but he preferred to let it pass on as it was in a quite easy going way, trusting that something might turn up sometime which would enable some reasonable settlement to be arrived at. He from time to time received various small payments—quite moderate slender payments, but which he accepted in respect of some of the additional work. But now the case is put forward in this enormous volume, which has been rendered more attractive by being reduced considerably in bulk, and the case now put forward is that he is entitled, after this long delay, after receiving these payments, and after everything else has occurred, to say that he has made out a legal claim to be paid for this extra work some extravagant sum.

I have no doubt he was on very friendly terms with all the people in Dundee, and particularly the Town Council, who seem to have been very trusty gentlemen, very familiar with all the work of the town. I cannot but think that his friends would have given him wise advice if they had suggested to him at a very much earlier point of time "Bring it to the test of a demand—formulate your claim—say you have a legal right, and find out what is going to be done with it. It must when it is presented in that way be met by either a frank acquiescence and adjustment in settlement or a prompt repudiation and denial." He did not do that. He was extremely unwise, and if any such advice had been given to him I am by no means clear from some of the evidence that has been read that he would have taken it. There was a difference of opinion prevailing amongst the authorities in Dundee. Everybody regarded him with a friendly feeling—some would have liked to give him some payment and to recognise his claim to some extent, but I'gather there was a substantial number of people in the town who held that he had no legal right, and that they as

the guardians of public money had no legal position that would have justified them in making the payment. I feel sympathy, as the Lord Chancellor has expressed and as Lord Guthrie has expressed, and as I believe all the learned Judges who have considered the case have expressed—sympathy with an old public servant who spent so many years of his life in the service of the town, but those are not topics that can be given undue weight to when the matter comes now to the arbitrament of legal decision. We must adopt a legal view of a legal claim.

I entirely concur with the judgments of the learned Judges in Scotland and with the opinion expressed by my noble and learned friend on the Woolsack, that the appeal should be dismissed with costs.

LORD KINNEAR—I agree entirely in all that has been said by my noble and learned friends.

I think this is a mere question of fact. I have no doubt that the original pursuer, the late Mr Mackison, was employed to do a considerable amount of work that was not probably within the contemplation of parties when his appointment as borough engineer was made; but the question is whether there was any agreement between him and the Town Council that he should receive extra payment for such work. He was bound to give his whole time to the service of the Town Council—he is not therefore in the position of an ordinary professional man who may say—When employment is offered to me and I accept it there is an implied obligation to pay me for it either according to some settled rate or upon a *quantum meruit*. He was engaged to give his whole time to the service of the Town Council, and when he was asked to do more work than was directly within the scope of his employment as defined on his appointment it is necessary for him to prove that there was a contract to employ him on these terms. Now that, as I say, is a mere question of fact.

I will only add, that agreeing as I do with all that has been said, I agree also with Lord Low's statement of the facts and his comment upon the evidence, and therefore it is unnecessary to say more than that I concur in the judgment proposed.

LORD SHAW OF DUNFERMLINE—I may be allowed to concur in the remarks made by my noble and learned friend on the Woolsack as to the conciseness and skill with which the appellant's case has been presented by his learned counsel at your Lordships' bar.

With reference to the doctrine as to the increase of the burden of proof in proportion to the delay in taking proceedings, when the trial is to be a trial on an issue of fact nothing further needs to be said on the general rule than what was laid down by Lord Selborne in the passage which has been quoted. But I should desire to add these two propositions with regard to that general rule. First of all, I think the doctrine as to the burden of proof in consequence of delay is specially applicable in the case of a servant who is salaried for his full time; and, in the second place, I think it is specially applicable in the case of the employee of a body who under their various statutes are bound from year to year to render an account of their intromissions to a varying public and to adjust their assessments to meet the expenditure from year to year. Notwithstanding those two specialties, I do not of course exclude the possibility of establishing such a case as is here put forward, namely, that the contract of employment was for the extra services of such salaried official in respect of extra work performed by him. I only call attention to the fact that those specialties largely increase the burden of proving such a case in a court of justice. On this case had a claim, at least in any respect approaching the enormous aggregate now presented to your Lordships, been made upon the Town Council of Dundee at any time during the thirty odd years when these remunerations were alleged to have been incurred, I cannot doubt that such a claim, so put forward, would have been dealt with either by a severance of the relation between the two parties and the treatment of the matter then and there, when all the parties were alive, as a question of contract upon which the evidence would have been easily available, or, on the other hand—and perhaps that would be a more reasonable ground—by an increase to the annual allowances of salary to be paid to Mr Mackison.

On these grounds I desire to express my entire concurrence with the judgment in the Court below, and in particular with the opinion of Lord Low.

Their Lordships dismissed the appeal.

Counsel for the Pursuers (Appellants)—T. B. Morison, K.C.—Lowson. Agents—G. R. Stewart, S.S.C., Edinburgh—James Millar & Coleman, London.

Counsel for the Defenders (Respondents)—Chree — Macmillan. Agents — Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—William Robertson & Co., Westminster.

Friday, December 17, 1909.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, and Lord Shaw.)

KINLOCH AND ANOTHER (KINLOCH'S TRUSTEES) *v.* YOUNG.

Road—Right-of-Way—Prescriptive Public Use—Deviation and Substitution.

Circumstances in which *held* that for the purpose of establishing by prescriptive use a public right-of-way from one highway to another, which use did not extend to the full prescriptive period, it was right to take into consideration the earlier use of a way between the