[His Lordship then proceeded to consider the defender's pleas on the merits of the case, which consisted of averments that the decree-arbitral was invalid (1) as being *ultra fines compromissi*, and (2) on account of an alleged clerical error therein.] Mr Steuart being now restored to his position as a litigant, and standing *electus in curia*, I have considered his case on its merits, and find no relevant or sufficient defence stated by him. Decree must therefore go out against him, no longer by default, but *causa cognita*, and with expenses.

LORDS DEAS, MURE, and SHAND concurred.

The Lords recalled the Sheriff-Substitute's interlocutor of 5th December 1881, and having heard counsel, repelled the defences, and decerned of new against the defender for the sum of £5, 13s. 9d., and expenses in both Courts.

Counsel for Appellant — Scott — Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Trayner—MacWatt. Agent—Alex. Morison, S.S.C.

Tuesday, January 17.

SECOND DIVISION.

[Sheriff of Forfarshire.

M'MANUS *v.* J. & C. HAY.

Reparation — Master and Servant — Actionable Negligence—The Employers Liability Act (43 *and* 44 *Vict. c.* 42), *sec.* 1.

A workman was injured through the falling of a piece of machinery which he was engaged in lifting in obedience to the order of the foreman, "to whose orders he was bound to conform" in the sense of the Employers Liability Act 1881. The Court being satisfied on the proof that the order was in itself reasonable and proper, and that therefore no actionable wrong had been committed, *assoilzied* the defenders.

William M'Manus, labourer, Dundee, presented a petition in the Sheriff Court of Forfarshire, in which he prayed the Court to ordain J. & C. Hay, builders, Dundee, to pay him the sum of £40 in name of damages for an injury sustained by him in executing an improper order of the foreman of the defenders (in whose employment he was), and which resulted in the loss of the point of one of his fingers.

He pleaded—"(1) The pursuer having been injured by reason of the negligence of Johnstone, the defenders' foreman, for whom they are responsible, and to whose orders he was conforming, is entitled to decree as sued for; or otherwise (2) The pursuer having been injured by the act of Johnstone, or others in the service of the employer, in consequence of the impropriety of the instructions given by him, for whom the defenders are responsible, is entitled to decree for the sums sued for, with expenses."

The defenders denied that the order was an improper one, and attributed the occurrence of the injury to the pursuer himself or to pure accident.

They pleaded—"(1) The injury complained of not having been caused through any fault of the defenders, or those for whom they can be made responsible, the action is untenable, and ought to be dismissed. (2) *Separatim*, the demand is excessive."

By the 1st section of the Employers Liability Act 1880 (43 and 44 Vict. c. 42) it is enacted as follows—"Where, after the commencement of this Act, personal injury is caused to a workman . . . (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

In the proof which was led the following facts appeared: — The defenders were employed by Mr Bissett, baker, Dundee, to remove the engine-seat of an engine which he had bought from a Mr Birnie, from a certain yard to his premises in Hilltown, and they instructed Robert Johnstone, their foreman, to get this done. Accordingly the latter with four men, of whom the pursuer was one, proceeded to perform the job. The engine was moved off the seat by rollers, and it then became necessary to get it into a convenient position for the purpose of placing it in a cart. Johnstone then, discarding the ordinary mechanical means of rollers, notwithstanding that he was warned by Birnie that it would be safer to use them, and that the lift was, in Birnie's opinion, too heavy for five men, ordered the men to grasp a flange under the engine, and slew it round in order to bring the heavy end near the cart. When the men had got the engine from twelve to fifteen inches from the ground Johnstone let go his hold in order to get a brick to put under it, and then the engine came down on to the ground and crushed the pursuer's finger. The engine was subsequently raised to the cart with the assistance of seven men. There was evidence to the effect that five men were amply sufficient in ordinary circumstances to perform the job.

The Sheriff-Substitute (CHEYNE) found that (1) the order to lift the engine was given by the defenders' foreman, to whose orders the pursuer was bound to conform; (2) that the order was, in the circumstances, a negligent and improper one; and (3) that the pursuer's injury resulted from his having conformed to the order: Found in law, on these facts, that the defenders were bound to compensate the pursuer for the injury so sustained by him, and were consequently liable in damages in this action, assessed the damages at the sum of £21 sterling, and decerned against the defenders for the sum accordingly.

On appeal the Sheriff-Principal (TRAYNER) sustained the appeal, recalled the interlocutor appealed against, and assoilzied the defenders from the conclusions of the action. He added a note, in which he said—"The question, however, remains, Was the order a proper one? I cannot say it was not. The pursuer's case is that the engine should have been removed by mechanical appliances, and that the order to remove it by

hand was an improper order. But the weight of the evidence is against him. The Sheriff-Substitute thinks that the result proves that the order was improper, as the engine was too heavy for the five men employed to lift it; and he regards this view as strengthened by the fact that it took seven men to put it on the cart afterwards. Arguing from results is not always conclusive. It is easy to be wise after the event. That the five men let the engine fall does not prove that they could not lift it, and it might very well take seven men to lift the engine on to a cart while it did not need more than five men to 'slew' it round. But the preponderance of evidence, in my opinion, goes to show that the job in which the pursuer was engaged might have been safely performed by five men. It is said, however, that Johnstone having let go his hold of the engine to seek a brick, caused or contributed to the pursuer's injury. I think, in the first place, on a view of the whole evidence, that this is not proved, and, in the second place, if it were proved, I should have difficulty in holding that such an act was 'negligence' in the sense of the sub-section 3 of section 1 of the Act. The negligence there treated of appears to me to be negligence in reference to the order given.

"On the whole matter I have therefore come to the conclusion that the pursuer has failed to make out his case against the defenders, and that they are entitled to absolvitor."

The pursuer appealed, and argued — There was clearly proved such unreasonable neglect of ordinary precaution as made the defenders liable under the above Act for the serious injury sustained by the pursuer while conforming to the orders of their foreman. The work was one which was usually performed by mechanical means, and this fact, coupled with the fact that Johnstone had disregarded a definite warning against neglecting those means, raised a presumption that the work was an improper one in the circumstances, which the defenders were bound to rebut. In any view, the risk was a needless one.

The defenders replied—No liability attached to them, inasmuch as the order was proved, on a preponderance of evidence in the proof, to have been a perfectly safe and proper one. The injury was either the result of a pure accident, or else was the result of the pursuer having let go his hold.

At advising—

Lord Young—In this case I should gladly give this poor man some compensation for the loss of his finger, and I must say I wish that it had occurred to his masters or to Birnie to have given him some small sum, as I suggest, rather than have entered on this litigation; but they have thought otherwise, and we have now to decide whether the Sheriff-Substitute or the Sheriff has taken a right view of the case. I am of opinion that the Sheriff is right, and that this was clearly an accident without any actual wrong or negligence on anyone's part. Irrespective of the recent statute, where a person had suffered damage through the negligence of another, the latter, who had been guilty of the negligence, was responsible and not the common employer of both. Under the recent statute, however, if the person who has been guilty of the negligence is a foreman or a superior workman to whose orders the person injured has been subject, and if the injury is attributable to his negligence, not only is he responsible but his master too. There must, however, be negligence, and such negligence as shall infer responsibility for the consequences. Now, as I understand the words of the statute, "to whose orders or directions the workman at the time of the injury was bound to conform, and did conform," it means that the relative position of parties was such that one owed obedience to the other, and that the order was such as could not have been declined without contumacy. Now, I do not think that there is any more in the incident than this—Johnstone asks four men with whom he is working to assist him in turning an engine round, and I think it is according to the evidence that five men should have been sufficient for the work. The question then is really this—Was his trying to move the engine an actionable wrong or negligence on his part? He may certainly ask them to make an attempt to lift it, and then if the trial fails they may decline to attempt it. This may be actionable wrong, but it is hard to suppose such a state of things here. They did try to move the engine, and might have moved it with perfect safety under ordinary circumstances. This, I repeat, is according to the balance of evidence. Five men did lift the engine up, and it then occurred to Johnstone to get a brick and place it under it so as to act as a lever, and then unfortunately the pursuer got his hand crushed, and that is the accident complained of. Accidents often occur without there being an actionable wrong. I do not think therefore that there is sufficient negligence to found action; accordingly I agree with the view taken by the Sheriff. I cannot say that I sympathise with the view taken by the defenders, that this raises an important general question under the statute for employers to try. I think, on the contrary, that it is a very special case indeed. There are, no doubt, important questions under the statute which it is the interest of employers to have tried, but this is not one of them. It is much much more like the case of a servant losing his finger while performing some service for his master. I am of opinion, then, that the legal ground of action fails.

Lord Craighill and Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I am of the same opinion. I think that the pursuer's ground of action fails in fact.

The Lords therefore dismissed the appeal and affirmed the judgment.

Counsel for Pursuer and Appellant—Shaw—Sym. Agents—Martin & M'Glashan, S.S.C.

Counsel for Defenders and Respondents—Brand. Agent—David Milne, S.S.C.