Saturday, December 16.

FIRST DIVISION.

[Jury Trial.

CANAVAN *v.* JOHN GREEN & COMPANY.

Reparation—Negligence—Master and Servant—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 3—*"Orders or Directions" to which Workman Bound to Conform—Order must be a Particular Order.*

A, an ordinary workman, was engaged to work at a stone-planing machine, where he was to be under the orders of B who was in charge of the machine, but no set orders were given him as to what his precise duties were to be, his knowledge of them being presumed. In the course of the operations it was necessary from time to time to clear the machine of chips, and this work was done by A. While he was so clearing the machine B, without warning him, set it in motion, and A's foot was crushed. It was not necessary that A should have stood where he did, and he had received no order from B how he was to do the work. B, however, had not interfered to prevent his standing where he did. A raised an action of damages under the Employers' Liability Act 1880 and obtained a verdict.

On a bill of exceptions and motion for a new trial by the defenders, *held* (*diss.* Lord Stormonth Darling) that in section 1 (3) of the Employers' Liability Act 1880 "orders or directions" to which the injured workman was bound to conform, and did conform, and in conforming to which he was injured, meant a particular order, "particular in this sense, that within its scope it supersedes the workman's own private judgment and discrimination and substitutes for it the behest of the person to whose directions he is bound to conform," and inasmuch as there was no such order given to A a new trial *granted.*

Expenses—Jury Trial—Bill of Exceptions—New Trial—Expenses of Discussion on Bill of Exceptions.

The rule that when a new trial is granted the question of expenses should be reserved, applies not only to the expenses of the former trial and of a motion for a new trial, but also to the expenses of the discussion on a bill of exceptions.

The Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 1, enacts—"Where personal injury is caused to a workman . . . (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (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."

John Patrick Canavan, labourer, 14 South Shamrock Street, Glasgow, raised in the Sheriff Court at Glasgow an action of damages at common law, or alternatively under the Employers' Liability Act 1880, against John Green & Company, masons and brickbuilders, 600 Eglinton Street, Glasgow.

He pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault and negligence of defenders, or those for whom they are responsible, is entitled to reparation therefor."

The defenders pleaded—"(3) If said accident was due to the fault of anyone it was that of pursuer's fellow-workmen, for whom the defenders are not liable, and decree of absolvitor should be granted, with expenses."

The Sheriff-Substitute having allowed a proof, the pursuer appealed for jury trial, an issue was approved, and the case was tried before Lord Stormonth Darling and a jury on the 24th and 25th March 1905, when a verdict was returned for the pursuer under the Employers' Liability Act, the damages being assessed at £170.

At the trial counsel for the defenders excepted to the direction of the presiding Judge. The bill of exceptions stated—". . . It appeared that on 17th May 1904 the pursuer, while in the employment of the defenders at their stone-dressing works in Glasgow, was severely injured by a stone-dressing machine in the said works. The machine in question, which is known as 'Anderson's Patent,' consists of a plane or table about 12 feet long and 3 feet broad, which, by being geared on to an engine, is made to travel backwards and forwards on two rows of fixed pulley rollers placed on the ground about 2 feet apart, each of the rollers being about 9 inches in diameter. Stones requiring to be planed are fixed in position on the table and are dressed by means of chisels attached to an adjustable cross bar below, which the table passes at a slow rate of speed. The defenders had placed a man named Alexander Garrie in charge of this machine, and it was the pursuer's duty to assist Garrie by placing and taking away the stones which required to be dressed and by removing from the table the shivers and debris which were planed off the stones. On the occasion of the accident a stone had been placed in position on the table ready for dressing, and the pursuer and Garrie were standing beside it. Garrie passed round one end of the machine to the other side where he put it in motion. About the same time the pursuer moved to the other end of the machine, and immediately thereafter his leg was crushed between the moving table

and one of the fixed pulley rollers. The machine was started by Garrie without giving any express warning, although at the moment he did not see the pursuer. In assisting Garrie at the said machine the pursuer was subject to Garrie's orders, but he had received no express order from Garrie on the occasion of the accident, nor did it appear that he had ever received from Garrie any special instruction as to the manner in which he should remove the shivers from the table, or as to where he was to stand in doing his work.

"In addressing the jury counsel for the pursuer maintained that Garrie was guilty of negligence in starting the machine without knowing where the pursuer was and without giving him warning, and that in respect the pursuer was conforming to Garrie's orders at the time of the accident, and the accident resulted from his having so conformed, the defenders were responsible for Garrie's negligence under section 1 (3) of the Employers' Liability Act 1880. Counsel for the defenders having thereafter addressed the jury, Lord Stormonth Darling charged the jury, and in the course of his charge he directed the jury as follows:—

"'Now I have to tell you that if you think that the injury here was caused by the negligence of Garrie, he was a person to whose orders the pursuer was at the time of the injury bound to conform and did conform, and the injury resulted from his having so conformed. Of course, gentlemen, you quite understand that, when I say that, I suppose that you have first cleared out of the way the question of fault on the pursuer's own part, because what I am saying now would not apply to a case where you thought there was negligence or contributory negligence on the pursuer's part; but if that is out of the way, then I do tell you that if you think the injury arose by reason of the negligence of Garrie, his negligence renders the defenders liable in the circumstances. Well, I will tell you why in a word. It is a direction for which I am responsible, and you will kindly take it from me, but I say so for this reason: It is suggested that under this sub-section there must be some special order which is the immediate cause of the injury. I do not so read the statute. I think all that the statute requires is that the negligent person—Garrie, to wit—was in a position of superiority to the injured workman in the sense that the injured workman was bound to obey his orders, and that if the injured workman was in the course of doing his work then he was in the sense of the statute conforming to these orders, although the orders were not special. It would be an absurd thing to say that in the very ordinary case of a workman's labourer working the whole day to that workman's hand, bound to obey him, liable to be reprimanded or even dismissed if he disobeyed him, it would in my estimation be absurd to say that he is not conforming to the orders of that man, although the orders are not repeated from time to time. The intention of the statute, it seems to me, is that when one workman is placed at the disposal and under the lawful orders of another and is doing his duty conformably to these orders, if injury to him results through the negligence of that superior workman then the master and not the superior workman—which would be a very empty form of remedy—the master himself is liable. I think it respectful to tell you the reason of my laying down this law, but you will take it from me that this is the law of the case.'

"Whereupon the counsel for the defenders excepted to the said direction, and asked Lord Stormonth Darling to give the following directions to the jury:—1. That the defenders are not responsible to the pursuer under section 1 (3) of the Employers' Liability Act for the consequences of any negligence on the part of Alexander Garrie unless the pursuer's presence at the place where he was injured was due to a specific order given to him by Garrie to work in or about that place. 2. That the defenders are not responsible to the pursuer under section 1 (3) of the Employers' Liability Act for the consequences of any negligence on the part of Alexander Garrie unless the order to which the pursuer was conforming at the time of the accident was in itself a negligent act on the part of Garrie. Which directions Lord Stormonth Darling refused to give."

The defenders moved for a new trial and a rule was granted; and the case subsequently came up for discussion on the rule and on the bill of exceptions.

Argued for pursuer—The Lord Ordinary's direction to the jury was right. The pursuer was bound to obey the orders of the defenders' workman Garrie. At the time of the accident he was obeying an implied order of Garrie. It was not necessary that the order should be specific or particular, and it would be extravagant to expect that the order should be repeated before every turning of the stone. The use of the term "directions" in the statute supported this contention, and seemed to indicate something less than a specific order. Otherwise no man of ordinary intelligence doing routine work such as the pursuer was doing would ever take benefit under the Act. When a man was working under implied orders the statute was satisfied when a routine was established and the workman was shown to be conforming to that routine—Bevan on Negligence (2nd ed.), p. 853; *Millward* v. *Midland Railway Company*, 14 Q.B.D. 68; *Wild* v. *Waygood*, [1892] 1 Q.B. 783; *Snowden* v. *Baynes*, 24 Q.B.D. 568, *affirmed*, 25 Q.B.D. 193; *M'Coll* v. *Black & Eadie*, February 6, 1891, 18 R. 507, 28 S.L.R. 354; *Flynn* v. *M'Gaw*, February 21, 1891, 18 R. 554, 28 S.L.R. 392; *Mitchell* v. *Coats Iron and Steel Company*, November 6, 1885, 23 S.L.R. 108.

Argued for defenders — The evidence showed that the pursuer was not working under any order, implied or general, at the time of the accident. In any event, it was not sufficient merely to prove an implied order. The Act required a specific or particular order, and no such order had been given—*Dolan* v. *Anderson & Lyell*, March

7, 1885, 12 R. 804, 22 S.L.R. 529; *Grant* v. *William Baird & Company*, February 20, 1903, 5 F. 459, 40 S.L.R. 365; *Sweeney* v. *M'Gilvray*, November 23, 1886, 14 R. 105, 24 S.L.R. 91.

At advising—

LORD PRESIDENT—We have to dispose of a bill of exceptions and a motion for a new trial on which a rule has been granted. It will, I think, be convenient that I should first state to your Lordships my view of the evidence which was laid before the jury. The pursuer was an ordinary workman, and was engaged by the foreman of the defenders named Irvine. He was told by the foreman that he was to work at a stone-planing machine in a certain shop, and that he was to be under the orders of Garrie, who was in charge of the machine. No set orders were given him by the foreman as to what his precise duties were—seemingly he was assumed to know generally what they were, just as an ordinary miner is assumed to know the ordinary work of working a mine.

The stone-planing machine consisted of a moveable table, which was moved by means of chains actuated by steam, and the stone to be planed was placed on the table, and as the table was moved the stone went along with it, and was pushed up against a chisel or planing tool held firmly in position, just as a log is pushed up against a circular saw. To facilitate the motion of the table with the heavy block of stone upon it the table travelled over rollers. These rollers never shifted their position, but were free to move on their axes. As the table moved forward it mounted and passed successively over one roller after the other. At the end of each forward journey the table naturally became encumbered with the chips or planings which had come off the stone, and accordingly, before another journey was taken it was necessary to clear the table of these chips. This work was done by the pursuer. In order to do it on the occasion of the accident he stood at the end of the table. Inadvertently he placed his foot in front of the table between its end and the nearest unoccupied roller, on what would be its forward track. While he was in that position Garrie suddenly, and without giving the pursuer any warning, started the engine, the table moved forward, and catching the pursuer's foot between its own end and the said roller, crushed it severely. In respect of the injury so inflicted the pursuer raises the present action. There are only, in my opinion, two other facts which need be mentioned in order to decide the legal question which arises. These are (1) that the table, being only 3 feet 6 inches broad, it was not in any way necessary in order to remove the chips that the pursuer should put his foot where he did, or stand in front of the table at all. It might have been effectively and safely cleared from the side. The second is, that while on the one hand no specific instructions were given by Garrie to the pursuer as to where he was to stand when he was clearing the chips, on the other hand there is no evidence that in going where he did he was acting in an unusual manner, or that Garrie in any way checked him from going there.

In these circumstances the proximate cause of the accident was not doubtful. It was the negligence of Garrie in starting the machine without warning the pursuer while the pursuer had his foot in a place where the machine could crush it. But inasmuch as Garrie was the fellow-servant of the pursuer, it is equally clear that at common law the plea, which for convenience sake I call the plea of collaborateur, would, apart from the question of contributory negligence of the pursuer, afford a good defence to the action.

The point therefore turns upon the provisions of the Employers' Liability Act. Now the section of that Act which has relation to such cases as the present is the first section, sub-sections 2 and 3. They run thus —[*His Lordship quoted section* 1 (2), (3) *supra.*]

Though I shall be compelled to revert to No. 2 for other purposes, it is clear it has no direct bearing here, because no one alleges that Garrie was a person who had superintendence entrusted to him within the meaning of the Act. The jury found a verdict for the pursuer, and admittedly did so because they thought the case fell within the third sub-section.

In order to create liability under the third sub-section, it seems to me that three separate sets of things must be proved, and unless each and all of them is proved the said section cannot apply. These three sets of things are as follows:—(1) Injury must be caused to the workman by the negligence of a person in the service of the employer; (2) that person must be the person to whose order or direction the injured workman was bound to conform and did conform; (3) the injury must have resulted from his having so conformed.

As regards (1) there is no question. Garrie was in the service of the employer, and the injury happened to the pursuer through his negligence. As regards (2) it is also incontestible that the pursuer was bound to conform to the directions of Garrie. As to whether he did conform, that, I think, depends in what sense the words "did conform" are taken. If all that is meant by "did conform" is that the workman gave general obedience to his directions—*i.e.*, was not an unruly servant—then there is no evidence to suggest that the pursuer was otherwise than an obedient servant. But if "did conform" means did conform at the time of the accident to any particular direction, then there is no evidence to show that any such particular direction was ever given.

As regards (3), the same fact—viz., that no particular direction is found ever to have been given—necessarily negatives the idea that the injury resulted from his having so conformed. I shall explain in the sequel in what sense I use the expression "particular direction."

It follows that in the view I take of the evidence and of the statute there was no evidence to support the verdict of the jury, and that a new trial would fall to be granted on that account. But it is clear that the jury proceeded on a view of the statute different from what I have expressed, and that they were directed to that view by the charge of the learned Judge who tried the case; and further, as I understand from my brother Lord Stormonth Darling that he approves of the verdict, it is more necessary that I should examine the exceptions which are taken to the charge then given. The portion of the charge to which exception is taken is as follows—[*His Lordship read the direction excepted to, supra*].

By the first part of what I have read I am of opinion that the learned Judge took away from the jury three questions of fact necessary to allow of the application of these sub-sections of the statute, and that these questions of fact ought to have been left to the jury.

But further, on the facts I am of opinion that, as regards the two latter of the three questions the Judge came to an erroneous conclusion, but did not do so because his Lordship's view of the facts differs from those that I have already set forth, but because his view of the meaning of the expressions of the statute is different from mine. I say that his Lordship's view of the facts is the same as mine, because I do not find any material difference between the narrative of the facts as narrated in the bill of exceptions, which was approved of by his Lordship, and the narrative as I gave it a short while ago to your Lordships. As regards the law, his Lordship's meaning is clearly expressed by what follows.

The particular suggestion which seems to have been made by the defenders' counsel, and which his Lordship is rebutting, is that there must be some special order which is the immediate cause of the injury. In arguing this it would rather seem that counsel had used the expression "special order" in the sense of an order given immediately before the accident, or at least given when the operation during which the accident occurred had already begun; because the Lord Ordinary says he thinks that it would be an absurdity to hold that an order should be—if the statute is to apply—repeated from time to time. So far I agree. But when his Lordship goes on to say:—"The intention of the statute it seems to me is that when one workman is placed at the disposal and under the lawful orders of another, and is doing his duty conformably to these orders, if injury to him results through the negligence of that superior workman, then the master and not the superior workman—which would be a very empty form of remedy—the master himself is liable." I think that he leaves out altogether the concluding words—"and the injury resulted from his having so conformed." I think it is important to note the difference between the phraseology of the second and third sub-sections. When a man is a superintendent then no more is necessary except that his negligence should be while in the exercise of his superintendence. In other words, for every fault of a foreman *qua* foreman which causes an accident the master is liable. But when the superior workman is not a foreman but only *propositus ad hoc*, then there must be not only his negligence causing the accident while so *propositus* but the injury must result from the workman having conformed to his order. If the learned Judge's view as stated were right there would be no difference between the second and third sub-sections, and the last words of the third sub-section would be unnecessary.

Now, what is the real meaning of the words "the injury resulting from the workman having so conformed"? The expression "results from" seems to me to connote cause and effect, and therefore to point clearly to something more in an order than a mere order to do his duty. When I say cause I do not necessarily mean proximate cause. I agree to the distinction which has been taken in some of the cases, that the *causa* need not be the *causa causans* but may be a *causa sine qua non*. But still the conforming to the order must be a *causa*, and an order of that sort must be, I think, to a certain extent specific or particular. It need not be in writing, it need not even be in words—a sign might do. It need not be expressed; it might be implied from a course of proceedings. But it must, I think, be specific or particular in this sense, that within its scope it supersedes the exercise of the workman's own private judgment and discrimination, and substitutes for it the behest of the person to whose directions he is bound to conform; and then the accident must be due to the workman conforming to that behest in at least the sense that if he had not so conformed it would not have happened to him.

I believe there is no reported case under this section of the statute in which these requisites have not been fulfilled in the facts proved. The larger proposition put by the learned Judge, viz., that it is enough if the accident happen through the negligence of the superior workman while the inferior is working under directions according to the ordinary methods of the employment, is, for the reasons I have given, in my opinion an unwarranted extension of the statutory provisions, and is, I think, unsupported by authority.

On the view generally of the meaning of the section I would cite the opinion of Lord Young in *M'Coll* v. *Black & Eadie*, where he says — "According to the contention of the pursuer, as that contention strikes me, wherever there is a foreman, then there is liability on the part of the master. That view is extravagant. Such is not the case provided for by the statute, which contemplates a particular order given by a foreman, and injury resulting from a workman's having conformed to such particular order."

It is true that Lord Young was in the minority, but one of the majority of two allowed an issue because he held there was

a relevant case at common law, and although Lord Rutherfurd Clark indicated that he thought the pursuer might recover under the statute he did not indicate that the view of the law laid down by Lord Young was wrong.

Lord Young repeated this view in *Flynn* v. *M'Gaw* — "No doubt the language in the Act of Parliament is very loose and general language, but I cannot read that language as meaning that whenever the master has appointed one of the workmen as foreman over the others, and the foreman gives a perfectly general order to his men to go on with their work, that the master shall be responsible for any accident which may happen in the course of the work." These cases were decided on relevancy. I turn to those in which the facts had been ascertained.

In the first place, that there must be an order expressed or implied and not merely a non-interference of the superior workman is directly settled by *Sweeney* v. *M'Gilvray* (14 R. 105).

Then as to the point of the order being specific or particular as opposed to general there is the case of *Snowden* v. *Baynes*, 24 Q.B.D. 568, *affd.* 25 Q.B.D. 193. In that case Sellick, a carpenter, had the right to order the pursuer, a labourer, what work he was to perform. He ordered him to work in a certain shed. But he had no power to order, and consequently did not order, the pursuer exactly how to perform his work when he got there. The pursuer went to the shed, where he was joined by Sellick, and while working he was injured through a negligent act of Sellick. Mr Justice Wills, delivering the judgment of himself and Baron Pollock, which held that there was no liability, says—"We think the order which is contemplated by this sub-section must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part—if not, it is not his order at all. Sellick had authority to say, 'You shall do this bit of work or that bit of work,' but not 'You shall do it at this place or that place.'" This seems to me clearly to indicate that the kind of order needed was an order to do the work at this or that place. The point that Sellick had no authority to give such an order is neither here nor there, except as a link in the evidence that no such order was given.

The section was very carefully considered by a very strong Court consisting of Lord Herschell, Lord Lindley, and L. J. Kay in the case of *Waygood* v. *Wild*. The actual point under consideration was whether the expression "resulting from having so conformed" necessitated a *causa causans*, or might be satisfied by a *causa sine qua non*, and the decision was in accordance with what I have ventured to express as my own opinion on that point. But incidentally there are various expressions relating to the order which all seem to point to the construction I am contending for—*i.e.*, a particular as against a general order.

The facts were these. Wild, the plaintiff, was for the time being subjected to the orders of Duplea in a job connected with the erection of a lift. Wild was ordered by Duplea to put a plank across the well of a lift, and it was inferred was ordered to stand on the plank. I get what follows from the judgment of Lord Hershell:—"It must be taken that there was evidence that Duplea, whilst the plaintiff was on that plank, negligently started the lift, the effect of which was that the plaintiff was in the position of having to choose between two alternatives—either to fall down the well of the lift, or to endeavour to catch hold of the rope, which he did, and which carried him up to the pulley and injured him considerably. Therefore this is certain—that he was injured owing to his stepping on the plank, and the lift while he was so standing upon it being started." I beg attention to the next sentence. "That the position which he was ordered to occupy was one of danger if the lift was started while he was upon it, is certain." On these facts liability was held to follow. I think it is clear from the words I have read that the order there was, and was considered by Lord Herschell as, a particular order. And if that is not enough I would refer to a further passage of his judgment when he says—"Now in this case it appears to me that it is quite clear that the injury did result from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go there was guilty of negligence."

Contrast these facts with the present. The only order that can be implied (Garrie in fact giving no order at all) was an order to clear the table of shivers. That might have been done in many positions without any possibility of danger. It might even have been done in this position without danger if the pursuer had not inadvertently put his foot forward between the table and the roller. How can it be said here, as it was said in *Waygood* v. *Wild*, that the injury resulted from the pursuer conforming to an order?

This view is I think strongly supported by a consideration of the criticism which in the same case Lord Herschell makes of *Howard* v. *Bennett*, 58 L.J. (Q.B.) 129. The facts of that case are exceedingly analogous to those of the present, with just the difference which I think to be vital. I quote again from Lord Herschell's opinion—"In that case there were two men working a machine, and it was the duty of one to start it and the other to do certain operations in connection with it. If there was an order given which the man was bound to conform to at all it was an order to put certain calico on to the machine, and that order being complied with and conformed to, the other person started the machine, and so the plaintiff

was injured. It is necessary to state that in order to explain the judgment of the Chief-Justice. He says—'The injury resulted not from the directions given'—'order,' it should be—'but from the machine being set off too soon and at too great a speed.' Now, I must respectfully express my dissent from the view of the Lord Chief-Justice there indicated. Of course it may be that the person who started the machine was not a person to whose orders the plaintiff was bound to conform; but supposing the plaintiff was bound to conform, and that the person to whose orders he was bound to conform in working a machine tells him to put his hand in a certain part of the machine, and then negligently starts it while the man's hand is there, I own I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and his hand being there, the negligence consists in starting the machine whilst his hand is there."

The phraseology several times repeated of "a certain part of the machine" in the mouth of one so accurate in expression as Lord Herschell is inexplicable unless he meant to accentuate the necessary distinction between a general and a particular order.

I understand that my learned brother Lord Darling relies on the case of *Millward* v. *The Midland Railway Company*. The only question that could be raised in that case was whether there was evidence on which the verdict of the jury could be supported. In that case the plaintiff had been crushed by the falling of frames which he was helping to unload. I see no reason to doubt the verdict given, because it was quite fair to infer that the boy in helping to unload the frames stood at the particular place where he did by Hicks' order, and that the particular place was a place necessarily dangerous if the operation of untying was negligently performed, just as the plank was a place necessarily dangerous in *Wild* v. *Waygood*. Further, the negligence might have been held to be in the order itself—*i.e.*, to untie, without at the same time retying. Without the evidence, which the report does not give, it is speculation to guess which ground the jury may have gone on. But either was sufficient, and neither transgresses the canons I have laid down, or involves the wider proposition contended for by my learned brother. I do not find in the judgment of Mr Justice Mathew any trace of the wider proposition. If it is there, then it is overruled by *Lumsden* v. *Haynes*, which is a judgment of the Court of Appeal.

I do not think it is necessary to scrutinise the directions which the defenders' counsel asked the learned Judge to give. The second was obviously wrong, and indeed was given up by counsel at your Lordships' Bar. The first, in my view, was substantially right; although I think the word specific is not as good as particular; and, further, I think that the point to be left to the jury, after adequate explanation, should be in the words of the statute whether the injury did result from his having so conformed. But I think it unnecessary to say more, because if the views I have expressed are right there must be a new trial, both in respect that the jury were misled by the directions given them, and that there was in fact no evidence to support the verdict given.

LORD M'LAREN—I do not think that the verdict can be supported except on grounds consistent with the opinion of the presiding Judge as expressed in his direction to the jury, and if we think that the direction goes beyond the statute it follows that there should be a new trial.

I understand Lord Stormonth Darling's view of the statute leads to the result that where a workman is bound to conform to the orders of a superior workman the responsibility of the master is practically the same as if the man was acting under a superintendent. This is practically the effect of the theory of "implied order" as enlarging the effect of the statute.

Now, there are several answers to this interpretation of the statute. The first is that the words of the statute seem to have been carefully chosen and exclude this interpretation. The word "orders" is used, and that is a word of various meanings. It is sometimes used as implying co-ordination—that one man may be under the orders of another—but it is also used with the signification of a direction, and the words of the statute, "orders or directions," show that that is the true meaning. This is, I think, the proper answer; there must be an order given having the force of a direction in order to exclude the defence of common employment. Further, it is a condition that the injury must have resulted from obeying that direction, and of course if no direction is given this condition cannot exist.

Then, further, if you are to imply a direction (and I do not say there are no circumstances in which an order would have to be implied), the only direction I could imply in this case is that the inferior workman was to clear the machine, having due regard to his personal safety. I cannot imagine an order being implied to clear the machine without that proviso as to his safety being also implied. If there was negligence in the case I think it was partly the act of the pursuer himself. If the injury which he sustained had been to his hand my opinion might have been different, but the injury in this case was to his foot, and was due to the pursuer carelessly putting his foot in the way of the rollers instead of standing clear of the machine. It was also a negligent act to start the machine without warning; but then that was the negligence of a fellow-servant.

With all respect to my learned brother, I think the notion of an implied order obliterates the distinction between the superior

workman and the superintendent. In my view, to say that there was an implied order is just another way of saying that no order was given, and that the accident was not the result of conformity to an order.

LORD KINNEAR—I also agree with all that your Lordship has said, and I have little to add. I think it is common ground that the action and the verdict can only be supported in virtue of the provisions of sub-section 3 of the first section of the statute. Now that sub-section has been judicially considered both here and more frequently in the courts in England, and I cannot say that there appears to me to be any doubt as to the true construction of it—at any rate with reference up to a certain point. It is well settled that to give an injured workman the benefit of this provision of the Act it is necessary that three things should be proved, viz., (1) that the injury was caused by the negligence of a servant in the service of the same employer; (2) that this negligent servant was one to whose orders the workman was bound to conform and did conform; (3) that the accident resulted from his having so conformed. The difficulty that has arisen in several other cases as well as in this one is as to the precise significance of the second and third of these propositions. The question comes to be what is meant by conforming to an order, and what is meant by proving that the injury resulted from so conforming. It is on these points that the present bill of exceptions has been brought.

Now, with regard to it, I must say that I think the presiding Judge was quite right in refusing to give the directions asked for. The second of these is no longer insisted in; and it appears to me to be directly contrary to the second condition of the statute, and also to embody a view that was expressly rejected in *Wild* v. *Waygood*, [1892] 1 Q.B. 781. The first seems equally objectionable on other grounds. It appears to me that it could not have enlightened the jury, and might indeed have misled them, unless the Judge had gone on to do what the direction does not ask him to do, and had defined by reference to the precise facts of the case what he meant by a "specific order" which the pursuer was bound to obey.

I must, however, state that, with the greatest respect to the presiding Judge, I have to assent to the view that has been expressed of the positive directions which were given by him to the jury. The leading proposition in law which he laid down comes to this, that if the jury were satisfied that the injury arose by reason of the negligence of Garrie, his negligence rendered the defenders liable in the circumstances. And then his Lordship went on to say what was meant by conforming to orders, and his statement was that if Garrie "was in a position of superiority to the injured workmen in the sense that the injured workman was bound to obey his orders, and that if the injured workman was in the course of doing his work, then he was in the sense of the statute conforming to these orders although the orders were not special." Now, I cannot agree with that expression of the law for the reasons your Lordship has given. I think it stops short of what the express words of the statute require. What I think they require I cannot put in better words than those used by Lord Herschell in *Wild* v. *Waygood* [1892]. 1 Q.B. 781, in a passage that has not been already quoted. After pointing out that it is not necessary that conformity to the order should be the *causa causans* of the injury, he goes on to say—"The negligence must be the *causa causans* of the injury, no doubt. That is what gives the right of action, and if the section had stopped there that is all that would have to be proved—viz., negligence, which was the *causa causans* of the injury to the person who suffered. But then the section does not stop there, and undoubtedly something more must be proved. It is not enough to prove that there was negligence in a servant of the defendant which caused the injury, nor that that negligence was the negligence of the person to whose orders the plaintiff was bound to conform, but it must be proved that the injury arose, not alone from the negligence of such a person, but also from his having conformed to the order." Now, it is this last proposition that ought to have been put to the jury here to enable them to arrive at a sound and intelligent verdict. They should have been asked to say not only whether the accident resulted from the negligence of Garrie, but also whether it resulted from the pursuer having conformed to an order of Garrie. The kind of order which Lord Herschell supposed is made quite clear in the passage from his judgment which your Lordship quoted towards the end of your opinion. On looking at the case cited by Lord Herschell—the case of *Howard* v. *Bennett*, 58 L.J. (Q.B.) 129, 60 L.J. 152—it seems clear that if the pursuer had been ordered by Garrie to stand in a certain position towards the machine which placed him in a position of danger if the machine started, and if Garrie, who was in charge of the machine, had then started it and caused the accident, all the conditions of the sub-section would have been complied with. If he were standing in a position of danger, then Garrie's negligence in starting the machine would be the *causa causans* of the accident, but the conforming to the order which placed him in that position of danger would also be a cause, though not so immediate, of the accident; and so the conditions of the statute would be satisfied by the accident being the result of Garrie's negligence and of the workman conforming to his order.

I also agree as to the necessity of having a particular order, in this respect that the injured man must at the time of the injury have been acting in obedience to an order. It is not enough to show that he was acting in the ordinary course of his work, unless it be shown that he was doing so in consequence of an order from the fellow-workman whose negligence caused the injury. I do not think it is necessary that the order

should be given in explicit words, or at the precise time of the accident. I think it might be given without the use of express words at all; but it must be an order the conforming to which places the man in a position of danger, and the circumstances must be such that the negligence of the man giving it so operated as to cause the injury. Further, the order must be such that the pursuer would be entitled to say that it was not as a result of his own judgment and discretion that he got into the position of danger, but as the result of obedience to an order which he was bound to obey, whatever he himself might think was prudent.

I do not think it necessary to go further or deeper into the requirements of the statute. It is enough to say that I think the jury were not directed to a consideration of the main point in the case, inasmuch as they were not directed to consider whether the injury did or did not result from conformity to an order that was given by Garrie. There is enough of evidence, I think, to justify the jury in finding that the accident was caused hy the negligence of Garrie, and that the pursuer was bound to conform to Garrie's orders, but I do not think there is evidence that Garrie gave any order which placed the pursuer in a position of danger, and it follows that there can be no evidence that the injury resulted from the pursuer having conformed to such order.

LORD STORMONTH DARLING—As your Lordships are deciding that there is to be a new trial, it is undesirable to comment more than is absolutely necessary upon evidence which must be gone over again before another jury. But it is right that I should accept my share of responsibility in connection with the former verdict, for although your Lordships have not held that I ought to have given either of the directions which I was asked by the defenders' counsel to give, I cannot help feeling that the view which I then took, and still take, of the meaning of sec. 1 (3) of the Employers' Liability Act must have had something to do with the result. I need not say that, in so far as my view differs from that of your Lordships, I must necessarily hold it with great distrust. But I think I should be pusillanimous if I did not state it.

My view, then, shortly is this—The Act is a remedial Act, intended to mitigate in favour of workmen the severity of the doctrine of *collaborateur*. It should therefore, where any doubt exists, be read favourably to the application of the remedy which the Legislature intended. By the third sub-section the employer is made responsible to a workman for the negligence of a fellow-workman when three things combine—(1) that the injured workman is bound at the time of the injury to conform to the orders or directions of his fellow-workman; (2) that he does so conform; and (3) that the injury resulted from his having so conformed. The first thing to be proved is that the workman in authority was guilty of negligence; until that is done the other three conditions of liability do not arise. The negligence may be connected with the order which results in the injury, or it may not; it may be altogether unconnected with it, except in so far as an arbitrary connection is brought about by the statute requiring, on the one hand, that the injury should be caused "by reason" of the negligence, and, on the other hand, that the injury should "result" from conformity to the order. But essentially and in themselves the negligence and the order are quite distinct. You have first, then, to prove, under the Act, negligence on the part of the man whom I may call the "gaffer," and next you have to prove, apart from the Act, that the injured workman was not guilty of contributory negligence, for unless contributory negligence is negatived you need not even consider the question of conforming to orders. At the trial I made that clear to the jury, and I have no doubt they concluded, as they were entitled to conclude, that they were dealing with a negligent gaffer on the one hand—negligent in respect that he started this machine without warning—and a non-negligent labourer on the other—non-negligent in respect that he had no reason to expect that the machine would be started without warning. I do not understand your Lordships to hold that the jury in so holding were going against the weight of evidence, but if you do I respectfully dissent. Then came the crux of the case—Was the injured man acting under orders? It was not alleged that there was any specific order, or any order in words, or any order even by sign or gesture, to do the work of clearing off the shivers at any prescribed place or in any prescribed way. But I confess I thought, and I still think, that if the man was doing his appointed work in a way that had been followed before without objection on the part of the gaffer, and in which there was no neglect of his own safety so long as the machine remained at rest, then he was in a reasonable sense conforming to the gaffer's orders. I think that the requirement of conforming to orders was not intended to exclude the claim of an injured workman, innocent of any contributory negligence, merely because the negligent gaffer abstained from giving an express order as to where his subordinate was to stand, or how he was to do his work, at the moment of injury. I think that the requirement was intended to meet the case of a disobedient or heedless workman not doing his work, or doing it in a careless way.

In the case of *Millward*, 14 Q.B.D. 68, it was held that the order need not be in express words but might be implied from the circumstances; and the implied order there was merely to assist in the operation of unloading three iron frames from a van, one of which fell on the plaintiff and injured him, the untying of one of the strings which held the frames being done by the plaintiff himself without any express order from the vanman. L. J. Matthew (then J.) said, at the foot of p. 70—"The plaintiff

was doing what, according to the evidence, it was the ordinary course of business for him to do in unloading similar goods. Is it necessary in order that the sub-section may apply that an order should be verbally given to a man to do what it is the ordinary course of his duty to do every day in the week?" To that question, when applied to the present case, I answer "no"; and it is because I fear that your Lordships' judgment in holding that the order must be as your Lordship has put it "particular" will be taken as meaning that the order must be express and precise, and the scope of the sub-section may thus be restricted within narrower bounds than the Legislature intended, that I venture to think that this verdict should stand.

I would only add that cases falling under this sub-section of the Employers' Liability Act must now be considered as involving too much metaphysical refinement to make them suitable for jury trial.

Counsel for the defenders, while admitting that following the general rule the expenses of the previous trial and the discussion on the motion for a new trial should be reserved, moved for the expenses of the discussion on the bill of exceptions. He referred to *Macdonald* v. *Wyllie & Son*, December 22, 1898, 1 F. 339, 36 S.L.R. 262; and *Henderson* v. *Russell*, October 22, 1895, 23 R. 25, 33 S.L.R. 14.

The LORD PRESIDENT stated that the Court would consider the point, and subsequently, the case having been put out in the single bills, intimated that after consultation with the Judges of the Second Division, the opinion of the Court was that there appeared no reason to depart from the practice of the Court as established by the Second Division in *Macdonald* v. *Wyllie & Son*, that there was no distinction to be drawn between cases where a new trial was allowed on the ground that the verdict was contrary to evidence and cases where a new trial was allowed on a bill of exceptions, and that the expenses of the discussion on the bill of exceptions would accordingly also be reserved.

The Court allowed the exceptions, made the rule absolute, set aside the verdict, and granted a new trial, reserving all questions of expenses.

Counsel for the Pursuer—J. C. Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—G. Watt, K.C.—Constable. Agents—Simpson & Marwick, W.S.

Thursday, November 23.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

TURNER *v.* SELKIRK'S TRUSTEE.

Process—Reclaiming Note—Assignation of Decree—Assignee Sisted as Pursuer along with Original Pursuer—Interlocutor Pronounced on Withdrawal of Reclaiming Note.

The pursuer in an action for payment having obtained decree in the Outer House, the defender lodged a reclaiming note. Subsequently the pursuer assigned his right under the decree, and his assignee was sisted as pursuer along with the original pursuer.

The defender, desiring to withdraw his reclaiming note, moved the Court to refuse the reclaiming note. The original pursuer thereupon moved the Court to recal the interlocutor of the Lord Ordinary, and of new grant decree in similar terms in favour of his assignee.

The Court *refused* the reclaiming note.

In an action at the instance of James William Turner, writer, Greenock, against Thomas Landells Selkirk, chartered accountant, Glasgow, sole accepting trustee acting under the trust-disposition and settlement of the deceased James Landells Selkirk, concluding for payment of a sum of money, the Lord Ordinary (ARDWALL), on 2nd March 1905, decerned against the defender in terms of the conclusions of the summons, and found the pursuer entitled to expenses.

On the same date the defender lodged a reclaiming note against this interlocutor.

Subsequently the pursuer assigned his right under the decree to one Farmer, and on 25th October 1905 Farmer was sisted as pursuer in the action along with the original pursuer.

On 23rd November, in the Single Bills, counsel for the defender stated that the defender desired to withdraw his reclaiming note, and moved the Court to refuse the reclaiming note and adhere to the interlocutor of the Lord Ordinary.

Counsel for the pursuer Turner moved the Court to recal the interlocutor of the Lord Ordinary, and of new grant decree in terms of the conclusions of the summons in favour of the pursuer Farmer.

The Court pronounced this interlocutor—

"The Lords, on the motion of counsel for the defender and reclaimer, refuse the reclaiming note for him, and decern: Find the pursuers entitled to additional expenses since the date of the interlocutor reclaimed against, and remit," &c.

Counsel for the Pursuer Turner—D. Anderson. Agent—A. C. D. Vert, S.S.C.

Counsel for the Pursuer Farmer—J. A Christie. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender — Findlay. Agents—Gill & Pringle, S.S.C.