LORD YOUNG—I do not know whether I indicated before, when the case was before us on the question of the adjustment of issues, but I do so now, that I think that we have here no case of actionable slander. I think therefore that it is better that I should take no part in the disposal of the present motion. There are two matters of a general nature, and not directly connected with the present action, upon which I should like to say a word. The first is, that when the judge who presided at the trial is to be asked for such a certificate, the motion should be made in presence of the other party. It is an important matter, upon which the other party ought to have an opportunity of saying what he thinks fit. That I think is the usual and proper course.

The only other general remark which I have to make is, that I think the only effect—the only legal effect—of granting such a certificate is to put the question of expenses within the power of the Court. Without the certificate it is out of the power of the Court to deal with the question of expenses. The certificate merely removes that prohibition. I am far from saying that the judge's certificate is not entitled to receive, as I think it will always receive, very great weight.

LORD MONCREIFF concurred with the Lord Justice-Clerk.

LORD TRAYNER was absent.

The Court applied the verdict and decerned against the defender for the sum of one farthing sterling, and found the pursuer entitled to expenses.

Counsel for Pursuer—Kennedy—Gunn. Agents—J. & L. H. Gow, S.S.C.

Counsel for Defender—Dundas, Q.C.—J. H. Robertson. Agents—Simpson & Marwick, W.S.

Saturday, December 16.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

WILSON *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Master and Servant—Negligence of Foreman—Risk Voluntarily Incurred—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* (3).

In an action of damages for reparation under the Employers Liability Act 1880, by a labourer against a railway company, the pursuer averred that on a certain date he was in the defenders' employment, that his duty was to discharge waggons, and that in cases of hampers and such like goods this was done by means of light cranes; that he was about to unload a waggon containing large bundles of soft goods, and "as these were just the sort of goods that required the aid of the crane" he asked the foreman for the use of the crane; that the latter, instead of complying with his request, "peremptorily ordered him to go ahead without the crane;" that the pursuer did so, and succeeded in transferring the first package from the waggon to the platform, but that in attempting to put the second on to the platform the package proved "too heavy and unwieldy, owing not only to its actual size and weight but also to the fact that the centre of gravity was always shifting on account of the nature of the package's contents;" that the pursuer "turned the package up on its end in the customary way in order to move it off the waggon, when, owing to its nature, it yielded, and being too heavy and unwieldy for one man to manipulate," pursuer in attempting to remove it from the waggon to the platform strained and injured his back; that the accident was due entirely to the fault of the foreman in refusing the pursuer the use of the crane, or in not employing another man to assist the pursuer, and that the defenders were responsible for the fault of the foreman, his ordinary or principal duty being superintendence and not manual labour.

Held that the action was irrelevant.

John Wilson, labourer, Glasgow, raised in the Sheriff Court at Glasgow an action for £163, 16s. damages, under the Employers Liability Act 1880, against the Caledonian Railway Company.

The pursuer averred—"(Cond. 2) On 22nd February 1899 the pursuer was in the employment of the defenders as a labourer at their goods station, Buchanan Street Glasgow. (Cond. 3) His duty was to discharge waggons. This is done, in the case of hampers and such like goods, by the aid of light cranes erected on the different platforms or tables by defenders for the purpose. (Cond. 4) On said date pursuer was about to unload a waggon containing large bundles of soft goods, and as these were just the sort of goods that required the aid of the crane, he asked the foreman, Donald MacDonald, to turn the jib of the crane towards the waggon. Pursuer was in the waggon at the time. The foreman, instead of complying with pursuer's request, peremptorily ordered him to go-ahead without the crane, and pursuer, who was bound to conform to MacDonald's order, did so, and succeeded in transferring the first package from the waggon to the platform, but in attempting to put the second package on to the platform the package proved too heavy and unwieldy owing not only to its actual size and weight, but also to the fact that the centre of gravity was always shifting on account of the nature of the package's contents. The pursuer had turned the package up on its end in the customary way in order to move it off the waggon, when, owing to its nature, it yielded, and being too heavy and unwieldy for one man to manipulate, pursuer, in

attempting to remove it from the waggon, to the table or platform of the station, strained and injured his back. Pursuer has been unable to work since the accident, and his injuries will prevent him from working for a long time to come. Indeed, it is problematical whether or not he will ever be able to work, his spine having sustained injury. (Cond. 5) The accident was due entirely to the fault of the said gaffer (to whose orders pursuer was bound to conform, and was at the time conforming), in respect that he wrongfully denied the pursuer the use of the crane that was there for the purpose, and was lying idle at the time. Again, the foreman was in fault in not employing another man to assist pursuer in view of the refusal of the crane, as he well knew the nature of the goods, the difficulties they presented in removal, and the danger arising to a single labourer in attempting to remove them. Defenders are responsible in terms of said Act for the fault of their said foreman, whose ordinary or principal duty was superintendence, and not manual labour."

The pursuer pleaded — "The pursuer having been injured through the fault of said foreman, for whom defenders are responsible, in terms of said Act, is entitled to decree, with interest and costs as craved."

The defenders pleaded—"(1) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action."

On 13th July 1899 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Finds that pursuer has not stated facts and circumstances relevant and sufficient to support the petition: Therefore dismisses the action, and decerns; and before disposing of the question of expenses, orders the cause to the procedure roll of next Court-day (18th inst.) with reference to the Workmen's Compensation Act, sec. 1, sub-sec. 4."

Note—"The pursuer avers that he has suffered from an accident occurring in the course of his employment at Buchanan Street Railway Station. He brings this action under the Employers Liability Act. He has, in my opinion, failed to make out a relevant case, in respect that on his own showing he took the risk of lifting a heavy load by which his back was strained. He asked that the crane should be used, but the gaffer told him to go on without it, and without more ado he did so. As in *Crichton* v. *Keir*, 1 Macph. 407; *M'Gee* v. *Eglinton Iron Co.*, 10 R. 955; *Fraser* v. *Hood*, 15 R. 178, &c., this I think makes his claim untenable. He was not obliged to lift the package without help, or without the crane, and he was presumably as well acquainted with its weight and his own powers as the gaffer MacDonald.

"Probably the pursuer is entitled to compensation under the Act of 1897, which by sec. 1 (4) may be assessed in this action. I delay making any finding as to expenses that the pursuer may move accordingly, if so advised."

On 26th July 1899 the Sheriff-Substitute found the defenders entitled to expenses, the pursuer not having moved under sec. 1, sub-sec. 4, of the Workmen's Compensation Act 1897.

The pursuer appealed, and argued—The order of the foreman to the pursuer to remove the bundles from the waggon without the use of the crane was an order to remove by an unusual method. The giving of this order was therefore an act of negligence on behalf of the pursuer for which the defenders were liable under sec. 1, sub-sec. (3), of the Employers Liability Act 1880. The mere fact that the pursuer undertook the work in knowledge of the risk incurred did not preclude him from recovering if he did not voluntarily undertake the risk—*Smith* v. *Baker*, L.R. [1891], A.C. 325. Proof ought therefore to be allowed.

Counsel for defenders were not called on.

LORD JUSTICE-CLERK—I do not think that there is here any relevant case. The pursuer says that having a particular piece of work to do he asked for the use of a crane, but the foreman said, "No, go on without the crane." The pursuer does not say that he told the foreman that he thought it would be dangerous if he had not the crane, and he proceeded to lift the packages. It does not seem to me that this is a relevant case. It does not seem to me that this is a kind of action which is to be taken as imputing any blame of any kind to the superintendent. When anyone has to exert himself in lifting heavy packages, it is for him to judge, when he tries to lift the package, whether he can move it. He must know of himself whether he is able to do it or not; and very often in such cases a man believes he is able to effect some particular thing, until, owing to some cause—it may be to the state of his health—he may find on some particular morning that he is not able to do it, and if he persists in attempting to do it he may rupture some part of his body. Anyone knows that who has suffered from lumbago. A very slight exertion will then suffice to rupture a ligament, which at other times would not have that effect. So far as I can see, the pursuer's case comes to this, that it is the duty of the superintendent—such a superintendent as fell within the Employers Liability Act—to see that everything which comes out of a waggon is not too heavy for a man to remove from that waggon without assistance. I cannot assent to that. I cannot say that it is negligence not to supervise to that extent. I think that in such work as moving sacks or large packages in a waggon, workmen must judge for themselves, when they come to try it, whether the sacks or packages are such that they cannot move them without excessive exertion, and if they cannot then they must apply for assistance. I cannot hold here that there was negligence on the part of the superintendent simply because he required these things to be moved without assistance. I think it would be a waste of time to allow a trial in such a case as this, where, this man being

told to move these packages, made no remark, and did not suggest that there was anything likely to cause danger. He tried to do the work, and according to his statement he did it, but in doing it he injured himself. In these circumstances I think that the case is hopeless. I have seldom seen a case which was more clearly so in my view.

LORD YOUNG—I also am of the opinion that there is no relevant case stated here under the Employers Liability Act. I, however, appreciate the kindness of the Sheriff-Substitute in calling the pursuer's attention to the Workmen's Compensation Act, and asking him whether he should not make a claim under that statute, the amount of any such claim, if a right to claim is established, to be determined in this process. Of course the only answer to a claim under the Workmen's Compensation Act would have been that the accident was owing to the pursuer's own fault, because the Railway Company are the undertakers, and as such and as employers would have been liable for an injury occurring to a workman while working in their service in or about the railway, which the pursuer apparently was. The pursuer, however. said he had no intention of making any claim under that Act. The Sheriff, I think, considerately asked that question before determining the question of expenses, and I see no alternative here but to dismiss the present appeal with expenses.

LORD MONCREIFF—I am also of opinion that the Sheriff's judgment should be affirmed. I do not think that this case raises any question of difficulty in regard either to the application of the case of *Smith* v. *Baker* or as to the provisions of the Employers Liability Act of 1880, because I think that the pursuer's own statement has put him out of Court. He says that he moved the first package from the waggon to the platform in safety, and then when he comes to describe the accident he says that it was not only the weight of the second package which proved too much for him, but the peculiar way in which it was packed. The centre of gravity appeared to shift as he moved it. That was not a thing which the foreman could be presumed to have known or anticipated. The accident was really due to the peculiar kind of package which was being moved by the pursuer, the centre of gravity shifting and overpowering him, and leading to the injury. I think there is quite sufficient ground for dismissing the action as irrelevant.

LORD TRAYNER was absent.

The Court dismissed the appeal, of new dismissed the action, and decerned.

Counsel for Pursuer — Watt — Findlay. Agents—Patrick & James, S.S.C.

Counsel for Defenders—Guthrie, Q.C.—King. Agents—Hope, Todd, & Kirk, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, December 5.

(Before the Lord Justice-Clerk.)

H. M. ADVOCATE *v.* COLQUHOUN.

Justiciary Cases—Embezzlement — Indictment—Relevancy—Knowledge of Partner of Firm's Possession—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. c.* 35), *sec.* 8.

The Criminal Procedure (Scotland) Act 1887, sec. 8, enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done . . . 'knowingly' . . . or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which according to the existing law and practice its insertion would be necessary in order to make the indictment relevant."

An indictment set forth that the accused, or the firm of which he and his brother were sole partners, having received certain sums for investment, he did embezzle the same.

Objections stated in respect (1) that possession by a firm was not relevant to infer criminal responsibility to account against a partner; and (2) that the firm's possession was not alleged to have been known to the accused, *repelled,* and *held* that the word "knowingly" must be implied in pursuance of sec. 8 of the Criminal Procedure (Scotland) Act 1887, so as to infer that the accused was aware of the firm's possession.

Justiciary Cases — Embezzlement — Indictment—Specification.

An indictment bore that certain sums alleged to have been embezzled had been received by the accused "either in money or in cheques." Objection on the ground of insufficient specification *repelled.*

Justiciary Cases—Embezzlement — Indictment—Latitude of Time.

An indictment bore that the accused had received various sums on certain specified dates between November 1892 and June 1899, and that on said dates, or between said dates and 1st August 1899, he had embezzled the same.

Objection to the latitude of time, *repelled,* in respect that it had not been stated at the first diet; but *opinion* (*per* Lord Justice-Clerk) that in the circumstances the latitude was reasonable.

David Turnbull Colquhoun was indicted before the High Court of Justiciary on 5th December 1899. The indictment bore "that you, or the firm of J. & D. T. Colquhoun, of which James Colquhoun, then writer, Glasgow, and you, were sole partners, having in the office of the said firm in St Vincent Street, Glasgow, or elsewhere in