curred that this explosion took place and the man was killed. Therefore that element which the presiding Judge seemed to think of so much importance and urged upon the jury, seems to me to be rather a misleading consideration. Then his Lordship further directs the attention of the jury very much to the position of Neish, as being a person to whom the defenders had delegated their whole power, authority and duty. These again, I must say, appear to me to be rather misleading words. I think it is very difficult to know precisely what they mean. I should be inclined to use much more simple words in describing the relation of the defenders and Neish, namely, that under their general manager, Jack, Neish had the entire superintendence of this pit, and when you have said that, I think you have said all that is necessary to describe Neish's position.

Leaving out of view, therefore, the consideration that the scaffold had been erected before the deceased came to the work, and viewing Neish as in the position that I have now described, as a sub-manager under the general manager, Jack, the question comes to be whether the presiding judge in suggesting to the jury that under such circumstances Neish and the deceased did not stand to one another in the relation of fellow workmen, engaged in the same common employment, gave what is a good direction in point of law. I humbly think it is not. It may be that the direction which the presiding Judge gave is capable of various constructions, and that I may be ascribing to it more precision in this matter than was intended; but if that be so, I am afraid that only suggests another fault in the direction—that it is of uncertain meaning and therefore misleading. But of one thing I am quite sure, that it did lead to this result that the jury returned a verdict in favour of the pursuer upon the footing that the defenders were in law answerable for the fault of Neish, and that they were led to return that verdict by the direction of the presiding Judge. In these circumstances I see no alternative but to sustain this second exception and appoint the case to be tried over again.

Lord Curriehill—Your Lordship has expressed what is entirely my view of the case.

Lord Deas—I am in the same position. I entirely concur in the result at which your Lordship has arrived and in the grounds on which your Lordship has arrived at that result.

Lord Ardmillan—If the law in this case was rightly laid down, I think we cannot disturb this verdict; but the question of law, of course in relation to the proved facts instructing the position of Neish, is delicate and important. The general rule of law is now settled by decisions of the highest authority. A master is not responsible to a servant or workman for injury caused by the fault of a fellow-servant or fellow-workman engaged in a common work. In the case of a stranger injured by the fault of a servant, two maxims apply; the one is, "*Qui facit per alium facit per se*," the other is, "*Respondeat superior*." The act of the servant is regarded as done by the master's order or authority, and for that act the master is responsible. This is settled both in our law, and in the law of England. There are many decisions recognising and enforcing such liability. But the law is different when both the parties—the party causing and the party receiving the injury—are in the same service, in the same employment, and engaged in a common work. In such circumstances, the rule is "*culpa tenet auctorem*;" but the maxim "*respondeat superior*" is not a maxim in the law of master and servant, and is not generally applicable to such a case,—I say generally, because I think there may be an exception; and such an exception has, on more than one occasion, been pointed out by Lord Colonsay. Of course, if the master has not been careful to employ a sufficiently qualified person, he is liable, for that would be a failure in his own duty. But apart from that, I am of opinion that, where the person whose fault caused the injury was in the position of a proper representative of the master, having a general superintendence and a governing authority, acting for the master in regulating and controlling the whole operations; and where such a person fails to supply to subordinate workmen the sufficient apparatus for their safety, which the master was bound to furnish, then the master may be liable for the fault of such a person, even though the party injured was also in his employment. The question of the master's responsibility for such a person really representing himself, is, I think, settled against the master by decisions in this Court, and is not yet decided in the House of Lords; and in my humble opinion it is exceptional, and does not fall within the general rule to which I have adverted as settled upon the highest authority. With this view of the law, I think the facts proved here in relation to the position of Neish are exactly as your Lordship in the chair has stated. It is quite plain—it was admitted in argument, and could not be denied—that if the man next below Neish in authority, whose name is Bryce, was in fault, the defenders are not responsible. It is quite certain that there was a man above Neish in authority, interposed between Neish and the employers, namely, Jack. It is also clear, upon the evidence, that one of the defenders, Mr Robson, a partner of Merry & Cunningham, was frequently personally present, taking a personal charge of much of this business, and therefore, I think, applying the law to these facts, Neish was not an agent representing the landlord, but was a superior servant in the employment of the landlord, and not even the highest servant in the series of servants employed in that work. In that position of the facts, I think the law has been imperfectly and inadequately stated by the Judge, and so stated as tending to mislead the jury, because the result to which I arrive is, that if the jury had been rightly instructed and had rightly understood the position of Neish, they could not have found the defenders liable. I therefore agree with your Lordships that we should sustain that exception, and appoint the case to be tried again.

Lord President—We therefore sustain the second exception. The rule which was granted, I think, is not in the roll to-day; but in respect of the judgment which has been pronounced upon the bill of exceptions, we discharge the rule.

Agent for pursuer—T White, S.S.C.

Agent for defenders—John Leishman, W.S.

MATHIESON *v.* WEEMS.

(*Referred to in opinion of Lord President in the preceding case of* Wilson *v.* Merry and Cunningham, *reported in* 4 *Macqueen, p.* 215. *Not reported in Court of Session.*)

Reparation—Culpa—Master and Servant—Insufficient Machinery. A master held responsible

for the death of a workman, the accident causing death being due to the insufficiency of some machinery provided by the master.

This was an advocation from the Sheriff-Court of Renfrewshire. The interlocutor of the Lord Ordinary (KINLOCH), pronounced on 4th January 1859, was as follows:—"Finds it proved in point of fact—1st, That the deceased son of the pursuer was killed whilst working in the defender's employment on or about the 12th day of November 1855; that at the time of his death he was residing with the pursuer, his mother, and was her chief support; 2d, that the death was caused by a cylinder of nearly two tons in weight, which was suspended perpendicularly, and under which he was working in the course of his employment by the defender, falling on him and instantaneously killing him; 3d, that the fall of the cylinder and the consequent death arose in consequence of the defender not having taken due precaution to insure the safety of the workmen employed by him in connection with this cylinder, and of the apparatus for suspending the same being defective and insufficient, more particularly inasmuch as the hoop and bolts, used as parts of the said apparatus, were in the circumstances insufficient for the due suspension of the cylinder, and the lifting chain was attached to the hoop in an unskilful and insufficient manner. In these circumstances finds, in point of law, that the death of the pursuer's son was occasioned by the fault of the defender; and that the defender is, in respect thereof, liable in damages to the pursuer."

This interlocutor was adhered to by the First Division of the Court on 17th February 1860.

LORD DEAS delivered the leading opinion.

LORD DEAS—This is a narrow case. But I arrive at the same result with the Sheriff and the Lord Ordinary.

The advocator (defender in the Inferior Court) is a plumber and tinsmith. He has a foreman in each of the two departments of his business. But he is himself a man of skill in both departments. When personally present he does not rely upon the skill of his foremen but on his own skill. He gives the orders, and they act upon them, or cause them to be acted on. As regards the heating cylinder which fell upon Mathieson, the deceased, it was a patent invention of the advocator's own. He had also invented the mode of soldering the pipes together, which resulted in the accident. That mode consisted in suspending the cylinder perpendicularly on a triangle, with a winch and chain, so that it could be lowered or raised, and the soldering effected by dipping the pipes, at its lower end, into the metal pot, in place of turning that end of the cylinder uppermost and pouring the solder from above. What peculiar advantage this plan had to compensate for its greater danger I inquired in the course of the debate, but was not informed. The proof is silent on that point. A further part of the plan was to fill a portion of the tubes with sand, to prevent the solder from entering them; and this, again, induced the necessity of persons going under the cylinder to pick out the sand, so far as it adhered, between the tubes—a work in which Mathieson was engaged when he met his death, and which work would have been quite unnecessary had the simple plan been taken, which has since been adopted, of using metal plugs in place of sand. All the above arrangements were the advocator's own. There was nothing unlawful in them, although, so far as we see, they afforded no such important advantages as to justify an unusual risk of human life. At all events they were new, and the advocator, in adopting them, was bound to use such precautions as to exclude all risk of the apparatus giving way and killing the persons who had to work under the cylinder. He is responsible if he was careless, and he is equally responsible if his plan was simply unskilful—for no man is entitled to make experiments without the skill necessary to conduct them with safety to human life. Gross negligence is not necessary to liability.

Now, I think the plan followed here was both unskilful and careless. It is very likely that the accident occurred in the way suggested by the reporter to whom the Procurator-Fiscal remitted:—viz., from the screw bolt which broke having been tightened more than it could bear. But as the cylinder was suspended entirely by the chain or hoop which embraced its circumference, it was necessary to screw the bolts very tight to make that chain or hoop cling fast enough to the cylinder, otherwise the hoop would have slipped upwards, leaving nothing above it to prevent it from doing so. There might have been various simple plans taken to obviate this. One, which was immediately afterwards adopted, was easy and palpable—to give the row of rivets which ran round the cylinder immediately above the hoop square heads in place of bevelled heads, and, if necessary, to have made these heads a little thicker, so that they would prevent the hoop from slipping upwards, although it was not so tightly screwed to the cylinder as it must otherwise have been. Another simple precaution would have been, as the Lord Ordinary observes, to have attached the ends of the ascending chain to the ends of the hoop in place of eyes or bands in its intermediate circumference. If the tightening of the hoop was alone to be trusted to, the sufficiency of the strength of the hoop and bolts, as well as of the lifting chain, ought to have been placed beyond all doubt. Another thing appears to me to have been easily practicable—to have had the cylinder so supported from below as that it could not be moved by mere accident. In place of this it is plain that very little pressure was enough to move any one of the blocks aside, and that, if this should happen (as unfortunately it did), the risk was greater than if there had been no blocking, because the cylinder would then come downwards with a jerk and cause a strain upon the machinery which it would not otherwise have been subjected to.

Now the advocator was aware that the cylinder in question, which was about two tons weight, was the heaviest he had ever made. He saw the cylinder after the hoop was put on; he saw it on the Saturday after it had been so far raised on the triangle as to rest on the blocks. He saw it on the Monday morning, when it was further raised to allow the metal pot to be put under it. He saw the sand put in by the men, and the cylinder lowered into the pot, raised again about fourteen inches, and the blocks put in, in which state he left it between 9 and 10, knowing, of course, that the usual picking out of the sand was the next thing to be done. He gave no directions before leaving about the blocking or anything else; and when he returned to the work, between 2 and 3 P.M., the catastrophe had occurred.

It is plain, in these circumstances, that if anybody was responsible for what occurred in the fair and ordinary working of the apparatus, it was the

advocator himself. No blame could, in that view, attach to Love, the foreman of the tinsmiths, who had nothing to do with the construction of the apparatus, and had merely the charge of working it. As to M'Arthur, the foreman of the mechanics, he had, by this time, no charge of it at all. His place was in the other shop, and the fault attributed to him is, not that he failed in any duty of superintendence, but that he ultraneously went into the tinsmiths' shop, and, having ascended the triangle, put his foot on the cylinder to examine it, the consequence of which was the slipping either of one of the blocks from beneath the cylinder, or of the cylinder itself from off the blocks, so that the cylinder came down with a jerk, and, one of the screw bolts having given way, the other blocks were crushed or displaced by the fall of the cylinder, and Mathieson, who was below it at the time, was killed.

Now, it certainly cannot be assumed that the cylinder would have given way at that particular moment had M'Arthur not put his foot on it, and he ought undoubtedly, before doing so, to have warned Mathieson to remove from under it. Had he given this warning his anxiety about the apparatus would have been praiseworthy rather than blameable; for a link of the double chain had given way on the previous Saturday, and it is plain enough that there were misgivings among several of the workmen about the sufficiency of the apparatus, although they made no open complaint. But I cannot think that the advocator was entitled to rest contented with such a degree of strength and security in the apparatus as would be barely sufficient, if nothing occurred to cause any of the blocks to slip from under the cylinder, or the cylinder to slip from one of the blocks, either of which occurrences might happen at any moment, considering the nature of the blocking, the use of which he had sanctioned. Blair, one of the advocator's mechanics, says that when the advocator spoke to him about the accident, the day after it happened, "I said he had himself to blame for it, as I had told him, when making the previous heater, that the bolts were too weak." If either the bolts had been strong enough, or the blocking had been sufficient, the accident would not have occurred, notwithstanding of M'Arthur putting his foot on the cylinder. M'Arthur could hardly be expected to anticipate that the blocking would slip from under the cylinder, as it seems to have done, for Love, the foreman of the tinsmiths (who had no interest to misrepresent the matter, but rather the reverse), speaking to the moment immediately before the accident, says, "*I saw the blocks on my right canting inwards.*" It is plain to any one that if the cylinder had been resting on a solid basis—for instance upon tresses and cross beams of sufficient strength—a body like the cylinder, of two tons weight, could not have been moved in any degree by the simple act of a man putting his foot on it. If the advocator had directed that the workmen should never go under the cylinder, except when it was so supported, there would have been less room to attribute to him personal neglect in that matter, whatever might have been his responsibility for the faults of others. But, as I have already observed, he gave no direction on this subject, although he was quite aware of the careless manner in which the blocking was usually managed. Even if he had given such directions, I think he was not entitled to be so niggardly of the strength of the suspending apparatus as that it should be sufficient only when the cylinder was in a state of rest; and, upon the whole, I am of opinion that the deceased's death falls properly to be attributed, not to rashness on the part of M'Arthur, but to personal fault or negligence on the part of the advocator. As regards the amount of damages, I see no reason to disturb the assessment of the Sheriff, concurred in by the Lord Ordinary.

Weems appealed, but the House of Lords, on the 31st May 1861, dismissed the appeal, and adhered to the interlocutor of the Court below.

Friday, May 31.

DAVIES & CO., *v.* BROWN & LYELL.

Reparation—Decree in absence against a party who had, after the Summons, but before Decree, paid the debt. B. & L. brought an action against D. for a sum of money. D. paid the debt and a sum of expenses. Some days after, the agent of B. & L. took decree in absence against D. Held, in an action of damages at the instance of D. against B. & L., D. averring that the defenders had acted maliciously and without probable cause, (1) that D. was entitled to an issue, (2) (dub. Lord Curriehill) that the issue must contain malice and want of probable cause.

The pursuers of this action were S. P. Davies and Co., merchants and commission agents in Dundee, and Samuel Pingilly Davies, sole partner of the firm, and the defenders were Brown & Lyell, provision merchants there. Davies averred that on 6th September 1866 he bought a quantity of flour from the defenders at the price of £51. The price was not paid on delivery. Shortly after, Davies went from home in the course of business, and during his absence the defenders, on 19th Sept. 1866, brought an action against Davies & Co. in the Sheriff Court of Forfar for payment of the said price. Davies, on his return, called on the defenders on 28th Sept. and paid them £51 for the flour, and a sum of £2, 13s. 8d. for lawyer's expenses. Davies farther averred—Cond. 7—Notwithstanding the settlement of the defenders' claims against the pursuers, and of the said action and expenses thereof as aforesaid, the defenders, nearly a week afterwards, and on or about 3d October 1866, most wrongously, maliciously, and without probable cause, through their agents, Messrs Paul & Thain, solicitors, Dundee, made a motion in said action, before the Sheriff, in a court held by his Substitute, within the Court-room at Dundee, for decree in said action against the pursuers, S. P. Davies & Co., in terms of the conclusions of said summons. No notice whatever of this motion was sent to the pursuers by the defenders or their agents, and consequently no appearance was made for them in Court, and the Sheriff accordingly pronounced decree in absence against them, in term of the defenders' motion, and of the conclusions of the summons, finding that the present pursuers were due money to the present defenders, and adjudging payment thereof. The said decree wrongously, illegally, maliciously, and without probable cause, obtained by the present defenders against the present pursuers, was subscribed by the Sheriff-substitute presiding in the said Court, and entered upon the records thereof in the usual way. As the records of the Sheriff-court are public documents, and patent and open to the inspection of everybody, the said