victed of robbery and of theft, are crimes of an heinous nature, and severely punishable." In the minor, one of the panels was charged with both crimes thus libelled, the second being "aggravated as aforesaid." The other was also charged with both, the second being "aggravated by your having been previously convicted of theft." It was objected for the second panel that the aggravation stated in the minor did not correspond with that set forth in the major, which major should in order to cover such a minor have contained words such as "or one or other of them." Lord Craighill sustained the objection, and the Depute-Advocate struck out of the libel the convictions said to be applicable to the second panel. Both panels were found guilty as now libelled, by a verdict of the assize, and were each sentenced to undergo penal servitude for seven years.

Counsel for H. M. Advocate — Henderson (A.-D.)—Gillespie.

Counsel for the Panels—Galloway.

Wednesday, December 28.

GLASGOW CIRCUIT.

[Lord Craighill.

H. M. ADVOCATE *v.* M'INTOSH.

Libel—Locus—*Latitude.*

Objection to the latitude taken in the specification of *locus* in case of theft, it being further alleged that the person upon whom the theft was said to have been committed was at the time in a state of intoxication, *repelled.*

John M'Intosh was served with a copy of an indictment charging him with the crime of theft, in so far as on the 15th of October 1881, or one or other of the days of that month, he had stolen a silver watch, the property of Daniel Cameron, pattern weaver, "in or near Ingram Street, East, Glasgow, or elsewhere in or near Glasgow to the prosecutor unknown, from the pocket, person, or custody of the said Daniel Cameron, then and now or lately residing in or near East John Street, Glasgow, while the said Daniel Cameron was in a state of intoxication."

The diet was called on the 28th December, when the panel objected to the relevancy of the libel, in respect that the latitude taken by the prosecutor in his specification of the *locus* of the crime was excessive, and prejudicial to his defence. This had been determined by authority —*H. M. Advocate* v. *Fraser*, September 16, 1881, 4 Irv. 99—and that ruling was clearly the only fair ruling, since, if this form of libel were sustained, it would not be possible for the panel to establish any defence of *alibi* he might have, if he were in truth anywhere in Glasgow, a district extending to many square miles.

The Depute-Advocate replied that the libel was in the form sanctioned by usage and by authority—Hume, ii. 214—where it was impossible for the prosecutor to have more precise information owing to any such circumstance as was here alleged to be constituted by the intoxication of the person from whom the article produced was said to have been stolen.

LORD CRAIGHILL—With regard to the *locus*, the objection is taken that "elsewhere in or near Glasgow, to the prosecutor unknown," is taking too great a latitude. I do not think it is in the circumstances. I have known a *locus* of the whole orbit of a Circuit being taken. If the prisoner is desirous of setting up an *alibi*, he can still do so, by proving that he was not in the original place libelled as the *locus*, and if, at the same time, the prosecutor proves that the article was taken in some place other than the original place libelled, but which was in the prosecutor's knowledge, then the charge will fail.

His Lordship sustained the relevancy of the libel, and the panel pleading "not guilty," was remitted to the knowledge of an assize, found guilty, and sentenced to be imprisoned for a period of eighteen months.

Counsel for H. M. Advocate — Henderson (A.-D.)—Gillespie.

Counsel for the Panel—Galloway.

COURT OF SESSION.

Tuesday, January 17, 1882.

FIRST DIVISION.

[Sheriff-Substitute of Banffshire.

STEUART *v.* DUFF.

(*Ante*, p. 16.)

Process — Appeal — Reponing — Sheriff Courts (Scotland) Act 1876 (39 *and* 40 *Vict. cap.* 70, *sec.* 20)—*Expenses.*

A defender in the Sheriff Court having appealed to the Court of Session against an interlocutor decerning against him for a sum of money and expenses, in respect he had "failed to appear either by himself or his agent at the diet of proof fixed for this day, and no reason was stated why no appearance was made,"—the Court in the special circumstances of the case reponed him against this decree, and having disposed of the merits of the case at the same hearing adversely to the appellant, did not find him liable in any separate expenses on account of the preliminary step of reponing.

This action (which was previously reported, *ante*, p. 16, Tuesday, 25th October 1881) was raised in the Sheriff Court of Banffshire by Major L. D. Gordon Duff of Drummuir against Andrew Steuart, Esq., of Auchlunkart, to have the defender ordained to join with the pursuer in clearing out certain ditches specified in the prayer of the petition. The action was founded on the terms of a decree-arbitral pronounced in 1846 in a submission to which the defender and the pursuer's predecessor in the estate of Drummuir were both parties.

The Court of Session having, as previously reported, by interlocutor of 20th October 1881, refused an appeal by the defender, under section 40 of the Judicature Act, as incompetent, the Sheriff-Substitute, by interlocutor of 16th November following, assigned the 5th of December as a new diet for parties to proceed with the proof allowed by the "interlocutor of 22d January last." On 1st December Mr Steuart's local agent wrote to the agents of Major Duff as follows:—"My client instructs me not to lead any proof here, and I think it right, therefore, to apprise you of this. Ever since last enrolment I have been writing him for instructions regarding the proof, but only this morning have received a note containing above instructions. I presume it will be well to let the Sheriff know, and I have requested Mr Hossack to do so. You understand Mr Steuart's instructions to me are not to represent him at the proof."

Major Duff's agents replied to this in the following terms:—"We are favoured with yours of date, and relying on your assurance that the pursuer is not to adduce any evidence at the proof we have countermanded the witnesses for whose attendance we had previously arranged."

On 5th December the Sheriff-Substitute, "in respect the defender failed to appear either by himself or his agent at the diet of proof fixed for this day, and no reason was stated why no appearance was made, on the motion of the pursuer decerns against the defender for the sum of £5, 13s. 9d. sterling, and finds the defender liable to the pursuer in expenses of process."

Against this interlocutor the defender appealed to the Court of Session.

The Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70) provides, section 20—"Where in any defended action one of the parties fails to appear by himself or his agent at a diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the Sheriff to proceed in his absence, and, unless a sufficient reason shall appear to the contrary, he shall, whether a motion to that effect is made or not, pronounce decree as libelled, or of absolvitor, as the case may require, with expenses." . . .

The appellant argued—Under section 20 of the Sheriff Courts Act 1876 it was optional to the Sheriff to proceed with the cause or not. The defender was entitled to be reponed against this decree, in respect that the original allowance of proof having been limited to certain specific averments, he had no other mode of appealing for a wider allowance of proof than by allowing decree to pass by default, as he had done. He then stated, on the merits of the case, his objections to the validity of the said decree-arbitral.

The respondent replied—The terms of the Act were imperative, and the Sheriff had no alternative but to act as he did. The appellant could not reach the merits of the case unless finally reponed, and the Court would not so repone him without very special cause shown, and upon payment of expenses.

Authorities—*Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660; *M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085.

At advising—

LORD PRESIDENT—This action was originated in the Inferior Court by Major Gordon Duff for the purpose of compelling the defender Mr Steuart to join with him in clearing out certain ditches, all in terms of a decree-arbitral pronounced in the year 1846 in a submission to which the pursuer's predecessor and the defender were parties. The defender, besides a preliminary plea, which was very properly disregarded by the Sheriff-Substitute, assailed the decree-arbitral on a variety of grounds, and the Sheriff-Substitute having considered the closed record, "before answer allows to the defender a proof of the averment contained in the fifth article of his statement of facts, and to the pursuer a conjunct probation." That article was in effect a statement that the parties had departed from the decree-arbitral and agreed to set it aside. When that interlocutor was pronounced, Mr Steuart applied for leave to appeal to the Court of Session under section 40 of the Judicature Act, leave being necessary because the action contained no pecuniary conclusion. Leave was given, but the defender failed to avail himself of it within the prescribed time, and the appeal was refused by us as incompetent. Then the matter went back to the Sheriff Court, and the Sheriff-Substitute of new appointed a diet of proof. When the day arrived, appearance was made for the pursuer, but none for the defender, who was to lead in the proof. In these circumstances the Sheriff-Substitute, "in respect the defender failed to appear either by himself or his agent at the diet of proof fixed for this day, and no reason was stated why no appearance was made, on the motion of the pursuer decerns against the defender for the sum of £5, 13s. 9d. sterling, and finds the defender liable to the pursuer in expenses of process,"—that sum of £5, 13s. 9d. having been ascertained to be half the expense of clearing out these ditches. Now, this interlocutor was not one pronounced *causa cognita*, but by default, apart from the terms of any Act of Parliament, and the first question which necessarily arises is, whether Mr Steuart should be allowed to be reponed, for till that be decided we cannot touch the merits of the case. Reference was made to the 20th section of the Sheriff Courts Act of 1876, which requires the Sheriff to pronounce such a decree—it leaves him no other alternative—and the Sheriff-Substitute here quite rightly pronounced decree by default. But that interlocutor will not prevent this Court, if they see fit, from reponing the defender, and recalling the interlocutor, so as to enable him to discuss the case here on its merits. This case is a peculiar one, and I am not indisposed to grant Mr Steuart a recal of the decree in order to see if anything can be made of the case as it stands. I should not be prepared to do that in ordinary circumstances, except upon condition of his paying expenses, but as I think Mr Steuart is quite wrong on the merits of the case, it seems to me to be hardly worth while to divide the case into two bits, thus making two separate awards of expenses against him. Let us consider, then, that this decree has been recalled, and Mr Steuart reponed, and let us look how the case stands on its merits. There is no proof of averments on either side. There can now be no proof—that is Mr Steuart's own doing, for he ought to have led in the proof, and must now be held to stand *pro confesso* as regards the facts in dispute upon this record.

[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