LORD YOUNG—Perhaps your Lordship would permit me to say—I intended to say it, and I am not sure that I did not—that I desire very emphatically and distinctly to avoid indicating in the least degree an opinion, one way or the other, upon the question of which the arbiter is, in my opinion, the sole judge. If that question were before us we should of course have to consider it, and form an opinion upon it, and give a judgment upon it, but I think it unfit that we, not having jurisdiction, should express even an inclination of opinion upon it. The arbiter may, for anything I know, determine, upon hearing the matter, in accordance with the views which your Lordship has referred to, or against them. He will hear argument, and consider the matter as within his jurisdiction. The question about our interfering with his judgment as extravagant, or pronouncing "yes" to be "no," or "no" to be "yes," is a matter which is not likely ever to arise; but I desire again most emphatically to say that I indicate no opinion, one way or other, as to which is the right view upon the question upon which alone he has, in my opinion, jurisdiction.

LORD JUSTICE-CLERK—May I also add that all I intended to say was to indicate my own doubt or difficulty whether this question, as presented, was not a question outside of the Act of Parliament; and of course I had to go to a certain extent into the facts in order to indicate what was my doubt and difficulty about that. The decision whether it is or is not is of course not before us just now at all.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutors appealed against: Sustain the fourth and fifth pleas-in-law for the appellants (respondents in the Sheriff Court): Dismiss the action, and decern: Find the appellants entitled to expenses in this Court and the Sheriff Court."

Counsel for Pursuers—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for Defenders—D.-F. Balfour, Q.C.—Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Friday, June 17.

SECOND DIVISION.

[Sheriff of Renfrew.

SWEENEY *v.* DUNCAN & COMPANY.

Reparation—Workman Injured by Wrong Order of Foreman—Sub-Contractor—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 3.

A firm of shipbuilders apportioned their work among their various workmen, who again employed labourers to assist in the appointed tasks. One of their workmen, the gaffer of a gang of labourers whom he had engaged, gave a wrong order, which resulted in injury to one of the labourers. In an action of damages by the latter against the shipbuilders, under the Employers Liability Act, sec. 1 (3), *held* that the defenders were not liable, as they had not any contract with the pursuer under which he took service with the foreman.

The Employers Liability Act 1880 provides—"(1) 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 or in the service of the employer nor engaged in his work."

In October 1891 Robert Duncan & Company, shipbuilders, Port-Glasgow, instructed certain fitters in their employment, including Bernard Flannigan, to construct the frames of a vessel. Upon 27th October, Flannigan and five fitter's helpers or labourers, whom he had engaged to help him, were engaged in raising a plate to have holes punched therein. A chain sling was round the plate, and Flannigan took a "cut link" and attached the sling to the chain of the crane. When the plate was slung up by the crane the "cut link" broke and the plate fell upon the foot of Patrick Sweeney, fitter's helper, one of the men working with Flannigan, and crushed it severely.

Sweeney raised an action in the Sheriff Court against Duncan & Company, and claimed damages for the injuries sustained by him.

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage, through the fault and negligence of the defenders, or of those for whom they are responsible, is entitled to reparation therefor. (2) The pursuer having been injured when in the employment of the defenders as a workman, through the fault and negligence of the defenders or of those for whom they are responsible, is entitled to reparation under the Employers Liability Act 1880, section 1, sub-sections 1, 2, and 3."

The defenders pleaded—"(1) The relationship of master and servant not having existed between the pursuer and the defenders, the pursuer is not entitled to reparation under the Employers Liability Act 1880. (2) The pursuer not having been injured through the fault or negligence of the defenders, or of any one for whom they are responsible, the defenders should be assoilzied."

A proof was allowed, at which it was established that it was the practice in the defenders' yard for squads of fitters to take contracts for the framing of vessels, and be paid so much per frame. Each man got his

own labourers or helpers as many as he required, and paid them 7d. per hour. The fitters drew the money from the defenders for what work they had done, paid their helpers and divided the profit among themselves. Flannigan, a member of the squad in question, had engaged Sweeney and four other helpers; and Sweeney deponed that he was the only master he knew. The defenders' foreman Gallacher knew nothing of the helpers. He superintended the work turned out by the fitters, and saw that it was conform to contract, but otherwise he did not exercise any control over the fitters or their helpers, although he would have had power to turn both out of the yard if such discipline had been necessary. It was also proved that a "cut link" should not have been used for the purpose for which Flannigan employed it, but an "S" hook, which Flannigan could easily have obtained.

Upon 4th March 1892 the Sheriff-Substitute (BEGG) found that the accident had occurred through the fault of Flannigan in using a "cut link;" but that the pursuer had failed to prove that the said use, or the accident resulting therefrom, was due to the fault or negligence of the defenders, or of any person for whom they were responsible; he assoilzied the defenders.

Upon appeal the Sheriff (CHEYNE) adhered.

The pursuer appealed, and argued—Both the Sheriffs had decided against the pursuer on the ground that Flannigan had not given any precise order to the pursuer, but merely a general order. But it did not require a precise order to be given in words—it might be implied. In this case the special order was implied because Flannigan attached the defective link to the crane and then began to move the plate. That might be taken by the men under him as an implied order to use the defective link. Sweeney was bound to obey the orders of Flannigan, he was injured by Flannigan's negligence, and therefore the defenders were liable under section 1, sub-sec. 3, of the Employers Liability Act 1880—*Dolan* v. *Anderson & Lyell*, March 7, 1885, 12 R. 804. There were many cases both in Scotland and England where it had been held that a labourer working under a sub-contractor was entitled to claim damages from the sub-contractor's employer—*Millwood* v. *The Midland Railway Company*, December 15, 1884, L.R. 14 Q.B.D, 68; *Morrison* v. *Baird & Company*, December 2, 1882, 10 R. 271; *Brown* v. *The Butterley Coal Company and Others*, December 7, 1885, 53 L.T. Rep. 964; *Charles* v. *Taylor, Walker, & Company*, June 3, 1878, L.R. 3 C.P.D. 492. In another case it had been decided that the employers would have been liable for the foreman's fault if he had really been in fault personally—*M'Manus* v. *Hay*, January 17, 1882, 9 R. 425. With regard to the cases referred to by the Sheriff, it was to be noticed that the opinion of Lord Young in both cases was in the shape of a dissent, and it did not appear that his Lordship held it was necessary for the express command he spoke of to be given by word of mouth—*M'Coll* v. *Black & Eadie*, February 6, 1891, 18 R. 507; *Flynn* v. *M'Gaw*, February 21, 1891, 18 R. 554.

The respondent argued—For the pursuer and appellant to succeed it was necessary for him to show that he was employed by the defenders. Now, it was settled that the criterion of whether the relation of master and servant subsisted between two parties was whether the one had control over the other, so as to impose a duty upon the master to provide for the safety of the servant—*Robertson* v. *Russell*, February 6, 1885, 12 R. 634; *Nicolson* v. *M'Andrew & Company*, July 7, 1888, 15 R. 855. In regard to the case of *Morrison* (cited *supra*), that was a case of relevancy, and it was plain from the opinion of the Lord Justice-Clerk, p. 284, that the only question decided there was whether the pursuer's averment would entitle her to an issue. Here it was shown by the proof that Flannigan was a sub-contractor and not a servant of the defenders in the work he was engaged in when the accident occurred and that Sweeney was engaged by Flannigan and not by the defenders. All the control the defenders exercised through Gallacher was to see that the work was progressing according to the contract between the squad of fitters and the shipbuilders, but they exercised no control or superintendence over the men. Even assuming Sweeney and Flannigan were servants of a common employer, the defenders had not put Flannigan in such a position that Sweeney must obey his orders. No direct orders were given to Sweeney to proceed with this particular work such as Lord Young thought to be necessary in the cases previously cited. Although Lord Young's opinions in these cases appeared as dissents, the Court did not give any opinion upon the question, but sent the cases to trial on the ground that on the pursuer's averments he might prove a relevant case. The defenders were not liable for Flannigan's fault in using "a cut link" as that was not the recognised method of working in their yard, and he could easily have got an "S" hook which would have been quite safe.

At advising—

LORD JUSTICE-CLERK—The facts in this case are, shortly stated, these—The defenders, who are a firm of shipbuilders, have a practice of giving out to men employed in their yard certain portions of the work which has to be done in building a ship. The matter is arranged in this way. These men who agree to do this particular kind of work, receive a certain fixed sum of money for each piece of the work which is done. They engage others as labourers or helpers at what terms they can; in this case these helpers were engaged at a rate of 7d. an hour. The result of the whole arrangement is, that these men who have arranged with the shipbuilders to get the work done were engaged in a speculation. What they were to receive was a fixed sum, and if they had laid their calculations properly, and nothing happened to upset them, then they would make a profit, but

if, on the other hand, they could not get labourers at the price they had calculated on, or from some other cause, it might be that instead of making a profit they might sustain a loss, but still they had to pay these helpers the wages agreed upon. The man Flannigan was one of a gang of men who had agreed to do a certain piece of work for the defenders under the conditions I have noticed, and the pursuer Sweeney was one of the helpers engaged by Flannigan. So far as I can see, there was no engagement by the defenders of the pursuer; there was no contract of employment between the defenders and the men engaged by Flannigan to help him in his work.

There is no doubt that this accident happened to the pursuer through Flannigan's fault, but the question we have to consider is whether the pursuer stands in such a relation to the defenders that they are liable for Flannigan's fault. I hold on the evidence that the pursuer was not a servant of the defenders, and therefore that he is not entitled to recover damages from them under the Employers Liability Act. I further hold that Flannigan alone engaged the pursuer for the work at which he was unfortunately injured, and that the defenders had not responsibility for Flannigan's fault.

I wish to add with respect to one argument that was submitted to us, that no doubt the defenders were entitled to oversee the work of Flannigan's gang while it was going on, but only by virtue of the right which everyone has to see that any work which is being done for him is done in a proper way. They were entitled to send anyone they chose to inspect the work, both as regards the work itself and as regards the proper care of the defenders' property, but that inspector had no control over the contractor or his workmen in the ordinary course of the work; all that he was entitled to was to oversee their proceedings to see that the work was being done according to the terms of the contract, and without injury to the defenders' property or premises. I think the interlocutor of the Sheriff is right and should be affirmed.

LORD YOUNG—I have been looking at Lord Justice Brett's judgment in the case of *Charles* v. *Taylor, Walker, & Company*, and have been struck with one sentence in it—"It is not for us sitting as Judges to criticise the law, but we must sometimes look out for the principles upon which it is founded. Many views upon the subject before us have been expressed, they are certainly not identical although they may not be inconsistent with each other."

The present case was put by Mr Rhind, and very properly put by him, as being solely under the Employers Liability Act. That necessitates that the relation of employer and defender should be established between the defenders and the pursuer, before the pursuer can recover any damages from the defender. That is made quite clear by the provision in the Act that in the cases provided for us, exceptions to the general rule of law, that where personal injury is caused to a workman, 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. Now, that is an essential to any action under the statute. The reason of the statute was to alleviate certain hardships which were supposed to have arisen from the legal results of applying the common law in cases where the relation of master and servant had existed. It was a remedy for hardship.

The class of cases, to remedy the hardship of which the Act was passed under which it is sought to bring the present case, is that provided by the 3rd sub-section of the 1st section of the Act—[*Here his Lordship read the sub-section*].

The facts of the present case are put thus—Flannigan who was the gaffer of the squad, committed a fault, and the pursuer, who was one of the squad, suffered from that fault. The pursuer in his evidence says that Flannigan was the man who employed him and he knew of no other employer. If Flannigan was the employer, then he was undoubtedly liable. The pursuer however says that under this rule of the statute the defenders are responsible for Flannigan. Why? Because the defenders put Flannigan over the pursuer as a foreman, or other superior, and he was bound in his duty to the defenders to obey his orders. I do not think the defenders put Flannigan over the pursuer. I do not think that the defenders had any contract with the pursuer under which he took service with Flannigan. If that fails, everything fails. That is sufficient for the decision of the case, and I think the appeal ought to be determined.

I only desire to add that in the question of the kind of orders given to which obedience is due, I see nothing to induce me to alter my opinion as previously expressed.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court adhered to the Sheriff's interlocutor.

Counsel. for the Appellant — Guthrie Smith— Rhind. Agent—William Officer, S.S.C.

Counsel for the Respondent — M'Clure. Agent—Drummond & Reid, W.S.