the workman might not know what would be the full development of the injury. He might not know till after six months had elapsed, but I think the answer is that he need not know what is to be the development of the accident, all he needs to know is what he wants at the present moment, for the statute gives him the means of meeting altered circumstances, in that either party is at liberty to apply from time to time as circumstances alter.

On these authorities and in these circumstances I have come to be of opinion that the Sheriff-Substitute was right in this matter and that the first question as stated ought to be answered in the negative.

The second question deals with what is called the "judicial admission" of a verbal claim—whether it having been judicially admitted that in the end of October the appellant made a verbal claim for compensation, such claim satisfied the requirements of the statute. I do not think that that really raised any question at all in this case, for it is also a matter of admission that the so-called verbal claim was no more specific than the written claim, and therefore without deciding anything about verbal or written I am for finding that this is a bad claim for the reasons I have already stated.

The third question is whether the correspondence raised a bar. I do not think it necessary to go into that, for although in some cases persons have been held barred from pleading what they might otherwise have pleaded, there is nothing in this case to furnish ground for such bar. Therefore I am for answering both questions in the negative.

LORD JUSTICE-CLERK—Your Lordship has so fully expressed my views that I do not think it necessary to add anything. When we had the case of *Bennett* before us in the Second Division it was very carefully considered. I agree with your Lordship as to the decision of the House of Lords in reversing the judgment of this Court. The first ground on which we went was there upheld, and though, as your Lordship has said, this Court is not bound to give effect to the views of the House of Lords, as this Court is the final Court of this country for dealing with this matter under the Act, I think we must give weight to the opinion of the highest tribunal in the realm. This Court sitting with Seven Judges may review the judgment of the Second Division; and if I had reason to believe that the Second Division was wrong I should have been quite willing to review its judgment, but I do not see that, and, accordingly, I agree that the questions fall to be answered as your Lordship has proposed.

LORD KINNEAR—I agree with your Lordship on the first question, because I think that question is concluded by authority which, whether it is technically binding or not, this Court ought not to disregard. I express no individual opinion of my own on that question, but consider myself bound to follow the authority your Lordship has explained. On the other questions I agree entirely with your Lordship's conclusion and the reasons you have given for it.

LORD KYLLACHY—I concurred in the second decision of the Second Division on the ground that the matter was settled by authority. I see no reason to change my opinion and agree with your Lordship as to the other questions in the case.

LORD STORMONTH DARLING—I am of the same opinion as Lord Kyllachy.

LORD LOW—I concur with your Lordship in the chair.

LORD PEARSON—I am of the same opinion, but should like to add one word to express my opinion as to the statutory procedure shortly. It was argued for the appellant that there are three stages contemplated by the statute—first, notice of accident; second, claim for compensation; and third, the proceedings before the Sheriff; and that it is not necessary that the claim should be specific until the arbitration is set up and the proceedings, properly so called, are commenced. I think this is an imperfect and therefore a misleading description of what the statute contemplates by way of procedure. I should say that above all the statute regards it as important that the parties should have an opportunity to agree, and so to save all the delay and expense of "proceedings," and I can imagine nothing more likely to deprive parties of that opportunity than that the claim should be in general or ambiguous terms. I am satisfied that the decision we are to pronounce is in furtherance of the main purpose of the statute.

The Court answered all the questions of law in the negative.

Counsel for the Appellant—Watt, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for the Respondents—Scott Dickson, K.C. — Horne. Agents — W. & J. Burness, W.S.

Wednesday, January 9, 1907.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

M'FALL *v.* ADAMS & COMPANY.

Reparation—Master and Servant—Loan of Servant to Perform a Particular Service—Use by Servant of Plant Belonging to Lender—Consequent Accident—Liability of Lender.

A & Company, a firm of engineers, contracted to remove and repair an engine shaft belonging to B & Company. The contract did not specify the mode of operation or contain any provision that A & Company might use B & Company's plant. B & Company instructed one of their men, C, whose work was

suspended by the operations, to assist A & Company, and while doing so he attached the engine shaft to a chain winch which he was in the habit of using. The chain of the winch broke and one of A & Company's employees was injured, who thereafter raised an action of damages against B & Company, averring, *inter alia*, that the chain was obviously unsound and unfit for the work; that throughout C remained the servant of, and subject to control and dismissal by, B & Company; and that it was a custom of trade that in such operations the occupiers of premises gave the use of their plant, and that any of their employees deputed to assist had their authority to use it.

Held that the case disclosed no relevant ground of action against B & Company.

Donovan v. *Laing, Wharton, & Down Construction Syndicate*, [1893] 1 Q.B. 629, *followed*.

Cairns v. *Clyde Trustees*, June 17, 1898, 25 R. 1021, 35 S.L.R. 808, *distinguished*.

John M'Fall, labourer, West Street, Tradeston, Glasgow, raised an action in the Sheriff Court of Lanarkshire at Glasgow against James Adam & Company, timber merchants, Glasgow, concluding for £1000 damages for personal injuries.

The pursuer's averments were as follows —"(Cond. 1) The pursuer, who is thirty-seven years of age, is a labourer in the employment of the Harvey Engineering Company, Limited, Scotland Street, Tradeston, Glasgow, and resides at 174 West Street, Tradeston, Glasgow. The defenders are timber merchants, and carry on business as such at Tradeston Saw Mills, 7 Scotland Street, Tradeston, Glasgow. (Cond. 2) At the date of the accident after mentioned and for a few days immediately previous thereto the said Harvey Engineering Company, Limited, were in course of removing from the defenders' said saw mills to their premises for repair a malleable iron shaft which formed part of defenders' shop shaft for driving the larger framed saws. Said iron shaft before being so removed required to be lifted out of its bed. John Shea, fitter, and John Skilling, apprentice fitter, both also in the employment of the said Harvey Engineering Company, Limited, were instructed by their employers to proceed to defenders' said saw mills and execute the lifting of said shaft and its subsequent removal to their employers' premises. On the night immediately preceding the accident the said John Shea reported to his foreman that he would require some further assistance connected with the operation, and it was arranged that the pursuer should be sent to the job that night. The pursuer started on the job that night at ten o'clock. (Cond. 3) The removal of the shaft by the Harvey Engineering Company temporarily threw off work certain of the defenders' saws, and one of their skilled workmen, named Samuel Hill, who was ordinarily employed thereat, was instructed by the defenders to assist the workmen of the Harvey Engineering Company in the removal. He accordingly helped in the operation. In doing so he remained in the service of the defenders. He was selected and paid by them, and continued to be subject to their control and power of dismissal. (Cond. 4) On or about the 8th day of May 1906, and about six o'clock in the morning thereof, the pursuer was engaged in the said operation along with the said Samuel Hill, John Shea, and John Skilling. They had lifted the shaft out of its bed near a steam winch and chain belonging to the defenders, and the said Samuel Hill proceeded to use the said steam winch for the purpose of raising the shaft up and depositing it on a barrow for removal. For this purpose he attached the chain of the winch to the shaft and set the winch in motion. One end of the shaft had thus been raised several feet above the level of the ground, and the pursuer was in course of putting the barrow in below this end, and had got one wheel under the shaft, when a link of the chain attached to the winch broke, with the result that the shaft, which weighed about 15 cwts., fell on the top of said wheel, rolled against pursuer and then on to his feet. . . . Explained that Hill did not use the winch by the order of Shea, but on his own initiative and suggestion. (Cond. 5) As a result of the said accident the pursuer sustained severe injuries. . . . The pursuer has been crippled for life and will never be able to resume his ordinary employment. Since the accident he has suffered great pain. The sum sued for is reasonable compensation for the injuries and damages sustained and to be sustained by him. (Cond. 6) The accident was caused by the defective condition of the link of the chain which broke. The link was in a worn and unsound condition and was quite unfit for the purpose for which it was used or for lifting weights of any kind. Any reasonable inspection or examination of the chain by a person of skill would have disclosed its condition. . . . (Cond. 7) The accident was accordingly due to the fault of the defenders. The plant in question was supplied by them or by their employee, for whom they are responsible, and it was their duty to inspect it and to see that it was sufficient for the purpose. This duty they failed to discharge, and they are therefore liable in damages to the pursuer. It was within the scope of Hill's ordinary duties to use the said winch, and in any case it was within his right to do so on the occasion in question. It is a general and well recognised custom of trade that when machinery is being removed from premises for repair in this way the occupiers of the premises give the use of their plant for the purpose, and that any employee deputed by them to assist in the operation has authority to use their plant. Moreover, the plant in question was habitually used for lifting much heavier articles than the shaft, and apart from the defect in the chain it was a natural and proper thing for Hill to use it. But even if Hill had no authority to

use the winch on the present occasion it was fault on his part to do so, and for that fault the defenders are equally responsible."

On 30th October 1906 the Sheriff-Substitute (DAVIDSON) allowed a proof before answer.

The pursuer appealed to the Court of Session for jury trial, and the defenders took advantage of the appeal to argue that the case was irrelevant.

Argued for the defenders and respondents — (1) The action was irrelevant. Though Hill remained the general servant of the defenders, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they could not be liable—*Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q.B. 629. There was no averment that Hill had the defenders' authority to use the winch; nor that he used it in the course of his employment; nor that he used it for the defenders' benefit; nor that the defenders contracted to supply the Harvey Company with a winch. The averment as to custom of trade added nothing; custom of trade meant custom of and in one particular trade and not between two different trades. *Pro hac vice* Hill was under the control and in the employment of the Harvey Company—*Rourke* v. *White Moss Colliery Company*, L.R. 1877, 2 C.P.D. 205; *Connelly* v. *Clyde Navigation Trustees*, October 16, 1902, 5 F. 8, Lord Kinnear, at p. 13, 40 S.L.R. 14. (2) In any event it was not a case for jury trial.

Argued for the pursuer and appellant—The action was irrelevant, for Hill remained in the defenders' employment; he was selected and paid by them, and liable to be dismissed by them—*Cairns* v. *Clyde Trustees*, June 17, 1898, 25 R. 1021, 35 S.L.R. 808; *Jones* v. *Corporation of Liverpool*, 1885, 14 Q.B.D. 890; *Anderson* v. *Glasgow Tramway and Omnibus Company*, December 19, 1893, 21 R. 318, 31 S.L.R. 240—and had not expressly or impliedly accepted the Harvey Company as his masters—*Johnson* v. *Lindsay & Company*, [1891] A.C. 371, Lord Watson at 382. It was for the jury to judge whether Hill had implied authority to use what he ordinarily used. That the defenders and not the Harvey Company were the persons who had the power of dismissing Hill differentiated the present case from *Rourke & Donovan* (*cit. supra*). The case should be tried by jury.

LORD JUSTICE-CLERK—I am clearly of opinion that the pursuer here has stated no relevant case.

The facts are extremely simple. James Adams & Company, the defenders, required to have the shaft of one of their machines repaired, and for that purpose they entered into a contract with the Harvey Engineering Company to take it away and repair it. The Harvey Company had no contract with Adams & Company as to how this was to be done, and there was no contract whereby the Harvey Company were entitled to use any of the plant of Adams & Company in doing that work. Now, in the course of the work, Adams & Company allowed one of their men named Hill—"instructed" one of their men it is said—to assist the Harvey Engineering Company's men as might be required. Hill was a sawyer, and had the use in his sawing work of a winch and chain for the purpose of bringing wood to his bench and taking it off. In the course of the proceedings the pursuer says this man Hill used that winch for the purpose of raising the shaft and getting it on a barrow, and in doing so the chain broke and injured the pursuer's feet; and he sues Adams & Company for damages in respect of that injury.

I see no grounds for holding that the defenders are in any way responsible for what happened. They did not supply the crane for doing that work, and in no way guaranteed the crane for such a purpose. The Harvey Company was not entitled to use that crane for that work. Hill used it, and the Harvey Company's men seem to have allowed him to use it; but that is not a matter for which Adams & Company are responsible, for Hill was not then doing Adams & Company's work. He was in their employment no doubt, he was a servant of theirs, but he had been lent to the Harvey Company at a time when his usual work was not in operation owing to the shaft having been taken out and the machine not being in use. He was lent to assist the Harvey Company in doing their work, and it could not be proper for him in doing work for them to use Adams & Company's plant.

On these grounds, and having in view the decision in *Donovan* v. *Laing, &c., Construction Syndicate*, [1893] 1 Q.B. 629, which I am quite unable to differentiate from this case, and which was decided by a strong Bench, I am of opinion that this case is irrelevant. I think it is distinguishable from the case of *Cairns* v. *Clyde Navigation Trustees*, 25 R. 1021. I remember that in that case, which had been before a jury, Lord Trayner in giving the leading opinion was careful to distinguish between *Donovan* and *Cairns*. The Clyde Trustees in that case kept the control of their employee and the crane in their own hands. The crane was worked for them and by them, and the only control the stevedores had over it was to require it to do their work, but in bringing the crane to the proper place to carry on the loading or unloading the Clyde Trustees kept it absolutely under their control. The Clyde Trustees could fix the man to work that crane; they alone could use it Of course if the stevedores made a complaint about a man he might be changed, but he could be changed by the Trustees only if they thought proper. Therefore I do not think that case has any application at all. I am satisfied that the pursuer has not stated a relevant case. He has attempted to make the case stronger by saying—"It is a general and recognised custom of trade that when machinery is being removed from premises for repair in this way the occu-

piers of premises give the use of their plant for the purpose." Except that he uses the words "custom of trade," that statement does not seem to me to aid the pursuer. That it is quite common for the occupiers of premises to give the use of their plant if necessary or advisable for the purpose of removing machinery which is to be repaired, no one can doubt for a moment. But it surely must be a matter of arrangement between those who own the premises and machinery and those who do the work. To bring such a thing under custom of trade would be very difficult; it must depend on what is arranged between the repairers and those to whom the premises belong. I therefore think we ought to dismiss the action as irrelevant.

LORD STORMONTH DARLING—I am of the same opinion, and on the same grounds.

I think the case must be governed by substantially the same principles as were given effect to in *Donovan* v. *Laing Construction Syndicate*, [1893] 1 Q.B. 629, which is a decision of high authority by a Bench consisting of Lord Esher, M.R., Lord Lindley, then Lindley, L.J., and Lord Bowen, then Bowen, L.J. It was a pure case of the loan of a crane and a workman to work it by one employer to another employer who was engaged in a work on the premises of the first. So is this, except that there is no averment here, as there was in *Donovan's* case, that the lender's plant was included in the loan, or that there was any arrangement for the workman using that plant in the work of the person to whom his services were lent.

I think therefore that the case lacks the essential elements for raising liability on the part of the defenders.

LORD LOW—I am of the same opinion. I should have been prepared to hold that the action was irrelevant even if there had been no authority on the question. But I agree that the case of *Donovan* v. *Laing Construction Syndicate*, [1893] 1 Q.B. 629, is practically indistinguishable, and that it is a case of very high authority indeed. I observe that Lord Bowen, then Bowen, L.J., there stated the law with his accustomed precision. He said—"The question is not who procured the doing of the unlawful act? but depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago in *Sadler* v. *Henlock*, 1855, 4 E. & B. 570, in the form of the question—"Did the defendants retain the power of controlling the work? Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. . . . It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do."

Now, if for Jones & Co. we substitute the Harvey Engineering Co., it seems to me that these remarks are directly applicable to the present case.

As to the use of the winch, it is no doubt common enough for a party upon whose premises work is being done by another to supply any plant which is required if he has plant suitable for the purpose. In some cases where the work cannot be done without plant, it may be the custom of trade that the employer shall supply what plant is necessary. For example, I rather think that where stevedores are employed to load a ship it is generally understood that the ship shall supply the necessary ropes and windlass. But the present case is clearly not of that description. It is not said that any plant was required, and as I read the pursuer's averments, the winch was used simply because it occurred to Hill that the operation would be thereby facilitated. That action on Hill's part can, in my judgment, in no way render the defenders liable.

The Court recalled the interlocutor appealed against and dismissed the action as irrelevant.

Counsel for the Pursuer (Appellant)—Constable—Hendry. Agents—Cowan & Stewart, W.S.

Counsel for the Defenders (Respondents)—Morison, K.C.—Paton. Agents—Wallace & Begg, W.S.

Wednesday, January 9.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

DUNN *v.* THE NATIONAL AMALGAMATED FURNISHING TRADES' ASSOCIATION AND OTHERS.

Process—Proof or Jury Trial—Discretion of Lord Ordinary Overruled—Action of Damages for Procuring Wrongful Dismissal—Disputed Relevancy of Averments—Proof.

In an action by a workman for damages, for having procured his wrongful dismissal from his employment, brought against (1) A and B, two members of a trade association, as individuals, and (2) the trade association and certain of its officials as representing the association, the latter defenders maintained, *inter alia*, that the record contained no relevant averments from which it could be inferred that the association was responsible for the acts of A and B, by whom the pursuer alleged his dismissal had immediately been procured.

The Lord Ordinary (Salvesen) having allowed issues for the trial of the case by jury, the Court, in the circumstances, recalled his interlocutor, disallowed the