When you consider that the point you have referred to in the passages I have quoted is the starting of the venture or the sailing of the ship, it is clear that there is in the present case a clear averment that matters were wrong when the vessel started on the voyage, and that consequently *Gordon* v. *Pyper* does not warrant this action being dismissed as irrelevant.

There remains the second point, however, as to which the Lord Ordinary says that he agrees with the dictum of Lord Watson in *Gordon's* case, that "even if that allegation had been made"—viz., that the splicing was originally defective—"I should not have been prepared to hold that a mere defect in the splicing of the tackle, which is obvious, constitutes any default of duty on the part of the shipowner if he provides the master and crew with proper materials for correcting the defect in the course of the voyage."

I have no doubt that all that is perfectly sound, but it must be taken *secundum subjectam materiam*, which is the splicing of a rope. That is a thing within the ordinary education of every seaman, and a defect in a rope is not a structural defect which the crew could not be expected to put right for themselves. Here the pursuer says that he fell down the hold, not because there were no hatches, but because the hatches were off, and the reason which he alleges for that is this, that "the forward thwartship beam was bent and twisted, with the result that the centre fore-and-aft beam, which is interposed between the two thwartship beams, was too short and would not catch in the socket in the forward thwartship beam."

I am not giving any opinion whether these defects could be put right by the crew. All I do say is that it is not a defect which, like the splicing of a rope, is self-evident — to be capable of immediate removal. Therefore I think that this is not a matter which can be disposed of on relevancy. It may well be that the case may afterwards be found to fall within Lord Watson's dictum, but that will depend on the facts. Where the matter is not, as the pursuers stated, self-evident as capable of cure by the crew, it is not, I think, necessary as matter of pleading that he should aver that it was not so capable.

I think, therefore, that the interlocutor of the Lord Ordinary should be recalled, but of course all such questions as contributory negligence must remain open, for I cannot help thinking that there are many actions where pursuers come into court hoping that juries will find in their favour and disregard the rule of law—a perfectly sound rule of law—that a man must take the risks of the employment in which he is engaged.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship. If it turns out that there was a ship's carpenter on board who was competent to mend this hatch, and that there was material on board for mending it, the defenders would not be liable.

I say so not on any specialities applicable to ships but on general grounds, for if an employer provides competent material and proper use is not made of it by his servants, that is a fault on the servants' part for which the employer would not be liable.

I agree in thinking that this is a case for inquiry, and that proof should be allowed.

LORD KINNEAR—I am satisfied that the facts here must be ascertained in the ordinary way before the question of responsibility can be decided.

The Court recalled the Lord Ordinary's interlocutor and ordered issues.

Counsel for the Pursuer and Reclaimer—Watt, K.C.—Munro. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—Ure, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, November 21.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

CONVERY *v.* LANARKSHIRE TRAMWAYS COMPANY.

Foreign—Reparation—Conflict of Laws—International Private Law — Lex loci delicti commissi—Action in Scotland by Domiciled Irishman for Solatium.

A domiciled Irishman living in Ireland raised an action in a Sheriff Court in Scotland against a tramway company operating there, to recover damages, by way of solatium, for the death of his son, who had been killed, he averred, by their negligence. The law of Ireland recognising no claim for solatium, the defenders pleaded, *inter alia*—(1) The action is irrelevant; (2) no title to sue.

Held that the pursuer's remedy was regulated by the *lex loci delicti commissi* irrespective of his domicile, and an allowance of issues *granted.*

Kendrick v. *Burnett*, November 17, 1897, 25 R. 82, 35 S.L.R. 62, *explained and distinguished.*

Expenses—Appeal for Jury Trial—Summar Roll Discussion—Preliminary Pleas—Allowance of Expenses in Interlocutor Deciding Preliminary Pleas.

In an action of damages for solatium in which the pursuer had appealed for jury trial, the defenders pleaded, *inter alia*, no relevant case and no title to sue. After a discussion in the Summar Roll, the Court, in the interlocutor repelling the preliminary pleas, *allowed* the pursuer the expenses of the discussion.

On 28th March 1905 James Convery, Maghara, County Londonderry, Ireland, raised an action in the Sheriff Court of Lanarkshire at Hamilton against the Lanarkshire

Tramways Company, carrying on business at Power Station, Edinburgh Road, Motherwell. In it he sought to recover a sum of £1000 as reparation and solatium for the death of his son, Andrew Convery, who had died from injuries received by being run over by an electric car at Wishaw on 29th October 1904, the car being the property of the Tramways Company.

The pursuer averred that the accident was caused through the fault and negligence of the defenders, or of their servants, for whom they were responsible, in driving the electric car in a reckless and careless manner and at an excessive rate of speed, and in failing to keep a proper look out, and in not giving the deceased warning of the approach of the car. He made no averment of his having been dependent on the deceased man or of any patrimonial loss.

The defenders, *inter alia*, pleaded—"(1) The action is irrelevant. (2) No title to sue."

On 13th June 1905 the Sheriff-Substitute (THOMSON) allowed a proof before answer, and on 23rd June the pursuer appealed to the First Division of the Court of Session for jury trial. The case was sent to the Summar Roll for the discussion of the question of relevancy and title.

Argued for the defenders and respondents—By the law of Ireland there was no obligation on a son to support his father, and the doctrine of solatium being based on such an obligation did not obtain in Ireland. Though the case of *Goodman* v. *London and North-Western Railway Company*, March 6, 1877, 14 S.L.R. 449, turned on Lord Campbell's Act 1846 (9 and 10 Vict. cap. 93), sec. 3, which provided that all such actions must be raised within twelve months of the death of the person in respect of whose death they were brought, still the case set forth the principle that the law of the *forum* and the law of the *locus delicti* must coincide in affording the remedy sought. Here the injury, consisting of wounded feelings only, was purely personal, and was suffered in Ireland. The claim, moreover, was put forward by one domiciled in Ireland, where the law did not recognise the alleged injury as a wrong, and the law of the domicile of one who seeks reparation must recognise the claim—*Kendrick* v. *Burnett*, November 17, 1897, 25 R. 82, 35 S.L.R. 62; *Rosses* v. *Bhagdvat Sinhjee*, October 29, 1891, 19 R. 31, 29 S.L.R. 63. *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860, had decided that solatium could not be sued for apart from patrimonial loss, of which there was none here; and *Darling* v. *Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31, 29 S.L.R. 910, that it was a peculiar remedy which should be kept within very strict limits. The action was irrelevant and should be dismissed. (The cases of *Eistend* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, 7 S.L.R. 638; *Joseph Evans & Sons* v. *John G. Stein & Company*, November 17, 1904, 7 F. 65, 42 S.L.R. 103, were also cited.)

Argued for the pursuer and appellant—The action was good, irrespective of the *lex domicilii*, if admited by the *lex fori* and the *lex loci delicti*. These laws, *i.e.*, the law of Scotland, concurred in allowing the remedy. The case of *Eistend*, *ut supra*, was distinguished by the fact that the obligation arose out of a contract, and that of *Kendrick*, *ut supra*, by the fact that the delict occurred on the high seas, and the *forum* was only attained by the use of arrestments. The principles governing the present case were set forth in *Horn v. North British Railway Company*, July 13, 1878, 5 R. 1055, 15 S.L.R. 707. The action was relevant.

At advising—

LORD PRESIDENT—The point in this case is a very sharp one. The late Andrew Convery was killed by an electric car belonging to the Lanarkshire Tramways Company in Wishaw. The present action is at the instance of the father of the deceased man, on the allegation that the accident was due to the fault of those for whom the defenders are responsible. The pursuer is an Irishman, and does not allege that he was in any way dependent on his deceased son, and accordingly he is met with the pleas that the action is irrelevant and that he has no title to sue. The meaning of these pleas is that as he cannot on his own showing have any claim except for *solatium*, and as that is not given by the law of Ireland to a father for the death of his son, this action cannot be maintained against the defenders.

The point, so far as I know, is not covered by Scottish decision, and though the cases quoted at the bar dealt with the law round about it, none dealt directly with it. There is, for instance, the case of *Greenhorn* v. *Addie* (17 D. 860), with which your Lordships are familiar, but there this actual point was not raised. Indeed, the only case where anything was said that really touches the point is that of *Goodman* v. *The London and North-Western Railway Company* (14 S.L.R. 449), though even there the decision of the case did not turn on this point. The point in *Goodman* was that a pursuer in an action raised in Scotland in respect of an accident in England had no right of action when there was no liability in the place where the accident occurred. The accident had taken place in England, and it was admitted that if the action had been brought in England the pursuer could not have recovered damages owing to the terms of Lord Campbell's Act (9 and 10 Vict. c. 93), because the time limit imposed by that Act had expired before the action was raised. So the point came to be, could the pursuer by founding jurisdiction in Scotland succeed in recovering damages for an accident which occurred in England when no action would have lain in England. But Lord Shand makes an observation which, though a mere dictum, and accordingly to be read *secundum subjectam materiam*, yet, when examined with its context, makes it plain that his Lordship had this very point clearly in view. What his Lordship says is—"But just as the *lex loci contractus* must be

applied in reference to the terms and effect of the contract for the purpose of ascertaining whether liability exists, so I think the *lex loci* must be applied with reference to the acts committed in order to ascertain whether there be liability." The *intuitus* of that was whether you could have liability in Scotland for an act committed in England. But there is no doubt that the proposition is wider and covers the present case. That, however, alone would not be sufficient as an authority, as the dictum was *obiter*.

But there is much other authority not cited at the discussion of the case. The matter is dealt with by the well-known authors on international law. I can quote conveniently from Wharton's Conflict of Laws, section 475, where the authorities are collected—"By the Roman law, wherever a delict is committed, whether the stay of the delinquent is permanent or transient, there is the *forum delicti*. And the local law applicable is and continues to be that of such special *forum*." The author then goes on to point out that Savigny, almost alone of famous jurists, takes, as he thinks, the erroneous view that "the law of the place of process is to obtain, not that of the place where the delict was committed." Then at section 477 he continues—"Bar distinguishes delicts which call for the restoration or reparation of an injury, and those which call for a fine or penalty payable to the injured party. The first he subjects to the law of the place where the delict was committed. Every person, foreigner or subject, is bound to repair any damage done by him according to the local law." He adds that the same rule applies in the United States.

We have therefore in these passages a satisfactory general statement of the rule in accordance with Lord Shand's dictum, though no doubt he did not lay down the rule with so wide an application.

This would be sufficient to decide the case, but there is more. In English law we get further light on the position of Englishmen under Lord Campbell's Act. In the case of "*The Explorer*" (L.R. 3 A. & E. 289) there is the high authority of Sir Robert Phillimore, and though there is not much said in the judgment, as the point was not the main one in the case, yet the point is decided in terms. Then in the case of *Davidson* v. *Hill* ([1901] 2 K.B. 606), where there had been a collision on the high seas owing to the negligence of a English ship, it was held that the personal representative of an alien seamen was entitled to recover damages. There is, if I may say so, a very satisfactory judgment by Kennedy, J., assented to by Phillimore, J., but too long to quote. He points out, however, that in the case of "*The Bernina*" (1887, 12 P.D. 58; 1888. 13 A.C. 1), which was a case which went to the House of Lords, the point though not raised was necessarily involved in the judgment. One of the two successful claimants there was Habiba Toeg of Baghdad, the mother of Moses Aaron Toeg, who was killed in an accident at sea owing to the fault of a British ship. The lady got her damages, and though her right was not disputed on the ground of the nationality of herself or her son, it was assumed in her favour that in a case of delict the party in fault must pay for it according to the local law.

The only countenance for any other view rests on nothing better than a misunderstanding of a remark of Lord President Robertson's in the case of *Kendrick* v. *Burnet* (25 R. 82). That was a case of a collision on the high seas in which an English ship was at fault. The relatives of the persons killed raised actions against the owners, concluding both for solatium and damages. In the discussion it was assumed that all the pursuers were English, and the Court decided that claims could only be for damages alone and not for solatium, as solatium was unknown to the English law. But after the advising some of the defenders put in a minute stating that the assumption was erroneous, as some of the pursuers were Scotch, and accordingly asked for solatium. The Lord President points out that that made no difference. He says—"I may say at once that, as your Lordships know, I had considered the question which we have now to deal with, the question, namely, of the liability of the party doing the injury, where damage results from a collision on the high seas, and there is a difference between the law of the country of the party doing the injury and the law of the country of the party injured, as to the liability arising from the injury. That question, as I have said, was considered by the Court, and if in the opinion I formerly delivered I did not discuss it, it was not from any doubt on the point, but because, misled by the record, I thought the question did not arise in the circumstances of this case. I may now say that I think the true view of the law where a conflict arises in such a case between the law of the country of the person injured and the person doing the injury is that which is stated in one of the articles of the Antwerp Congress of 1885, and the rule is that to found a claim there must be a concurrence between the law of the country of the injurer and the injured—that the person convened as defender cannot be made liable unless these two factors concur: first, that he is liable to the claim made against him by the laws of his own country, and in the second place that the injured would be entitled by the laws of his own country to what he claims." The article of the Antwerp Congress is as follows:—"L'abordage en plein mer, entre deux navires de même nationalité, est réglé par la loi nationale. Si les navires sont de nationalité différente, chacun est obligé dans la limite de la loi de son pavillon et ne peut recevoir plus que cette loi lui attribue." That is all quite right, but the mistake arises from the idea that Lord Robertson was speaking of the law of the domicile of the pursuer. But he was speaking of no such thing, but of the law of the flag of his ship. Of course when the collision takes place at sea it is difficult to say on what territory the injury occurs.

But that which Lord Robertson means and the Antwerp Congress says gives no countenance to the view that when a collision occurs between two Scotch ships through the fault of one of them, what a pursuer on the other would recover by way of damages would depend on whether he was English, French, or Scotch.

These remarks of Lord Robertson's are the sole foundation for the quite erroneous view that has been put forward, and there is no trace in the great authorities that the law of the pursuer's domicile has anything to do with it.

I therefore hold that the preliminary pleas should be repelled and the action take its ordinary course, which will be an allowment of issues.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the defenders' preliminary pleas-in-law, Repel said pleas and appoint the issue or issues proposed for the trial of the cause to be lodged within eight days: Find the pursuers entitled to expenses of the discussion in the Summar Roll, and remit," &c.

Counsel for the Pursuer and Appellant—Burt. Agents—M'Nab & MacHardy, S.S.C.

Counsel for the Defenders and Respondents—Horne. Agent—Patrick & James, S.S.C.

Wednesday, November 29.

FIRST DIVISION.

TAIT (TOWN-CLERK OF MOFFAT), PETITIONER.

Burgh — Police Burgh — Town Council — Absence of Quorum through Resignation of Councillors — Petition by Town-Clerk — Procedure — Town Councils (Scotland) Act 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 36, 38, 58, 61, 66, 71, *and* 113—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 17, 25, *and* 26,

A police burgh was governed by a town council consisting of nine councillors, including a provost and two bailies. In November 1905 there fell to be elected four councillors, but no nominations being lodged, no election took place. Thereafter three of the remaining five councillors intimated their intention to resign, with the result of leaving, when their intention should be given effect to, no quorum of the council, which under sec. 71 of the Town Councils (Scotland) Act 1900 consisted of three. Attempts were made to hold a meeting of the council, but the councillors who had intimated their resignation refused to attend, and the business of the burgh was in consequence brought to a standstill.

The town-clerk presented this application, in which he craved the Court either (1) to appoint a special election of seven councillors to be held in manner provided by the Town Councils (Scotland) Act 1900, sec. 36, or (2) alternatively to declare that the burgh was without a legal council, and to remit to the Sheriff of the county to proceed with an election in the manner provided by the Burgh Police (Scotland) Act 1892, secs. 25 and 26, and by the Town Councils (Scotland) Act 1900.

The Court *appointed, hoc statu*, a special election of seven councillors to be held.

The Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 113, enacts—"Wherever it has, from a failure to observe any of the provisions of this Act or any other Act, or from any other cause, become impossible to proceed with the execution of this Act or any part thereof, or wherever difficulty or dubiety exists as to the procedure to be followed in any case, or where any case arises in connection with the election of councillors or magistrates not provided for by this Act, it shall be lawful for the town council, or any seven electors or householders within the burgh, . . . or the town-clerk, to present a petition in manner provided by section 17 of the Burgh Police (Scotland) Act 1892, and the same procedure shall follow upon said petition, and the court to whom the same is presented shall have the same powers as is provided by the said section in regard to applications presented thereunder."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict, cap. 55), sec. 17, enacts—"Wherever in any burgh in existence before the passing of this Act, and which thereafter continues to be a burgh, or in any burgh the boundaries of which have been determined in terms of this Act, it has, from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act, the following provisions shall have effect—(1) It shall be lawful for any seven householders within the burgh to present a petition to the Court of Session, or to the Sheriff Court, setting forth the failure which has taken place to observe the provisions of this Act, or any other Act, or other cause which has made it impossible to proceed with the execution of this Act, and praying the Court to pronounce an order in terms of this Act as hereinafter mentioned. . . ."

William Tait, solicitor, town-clerk of the burgh of Moffat, presented a petition to the Court, in which he stated—"That the burgh of Moffat is a police burgh, originally formed in the year 1864, under the provisions of the General Police and Improvement (Scotland) Act 1862, and is governed by a town council, consisting of nine coucillors including a provost and two bailies. The burgh is not divided into wards. At and for some time subsequent to the first Tuesday of November, in the year 1904, the full number of the town council and