Tuesday, March 13.

FIRST DIVISION.

[Lord Johnston, Ordinary.

WOOD & COMPANY *v.* A. & A. Y. MACKAY.

Contract—Reparation—Breach of Contract—Implied Warranty—Supply of Rope Slings by Shipowner to Stevedore—Accident through Defective Rope Sling to Stevedore's Employee—Liability of Shipowner.

Shipowners, following a general custom, supplied to the stevedore the rope slings required for unloading their vessel. A sling broke and caused injury to be done to one of the stevedore's employees, who recovered damages from him under the Employers' Liability Act. The stevedore brought an action against the shipowners to recover the damages paid and the expenses.

Held that the shipowners did not warrant the rope slings, which were no part of the ship's permanent equipment, but supplied them only to the approbation of the stevedore, and consequently that the shipowners were not in breach of contract and must be *assoilzied.*

Mowbray v. *Merryweather*, [1895] 2 Q.B. 640, *distinguished.*

Dictum of Lord Young in *M'Gill* v. *Bowman & Company*, December 9, 1890, 18 R. 206, 28 S.L.R. 144, *approved.*

Relief—Reparation—Negligence—Contract—Action of Relief by Stevedore against Shipowner—Damages Paid to Stevedore's Employee Injured through Defective Rope Sling Supplied by Shipowner—Competency.

A stevedore, from whom one of his employees, injured through the breaking of a rope sling, had recovered damages under the Employers' Liability Act, brought an action of relief against the shipowner who had supplied the rope slings. *Held* that, assuming (what the Court held was not the case) the shipowner might be liable in damages for breach of contract as having warranted the rope slings, the action of relief was not the stevedore's competent remedy, inasmuch as the employee's claim was based on the negligence of the stevedore, without proving which he could not have succeeded, and the stevedore's claim against the shipowner was based on contract, and there could be no relation between them.

Ovington v. *M'Vicar*, May 12, 1864, 2 Macph. 1066, *approved* and *followed.*

Burrows v. *Marsh. Gas and Coke Company*, L.R. 5 Exch. 67, 7 Exch. 96, *commented on* and *distinguished.*

Mowbray v. *Merryweather*, [1895] 2 Q.B. 640, *commented on.*

Expenses—Disallowance of Expenses on Ground of Unsatisfactoriness of Witnesses.

The unsatisfactoriness of the witnesses in a cause is not a ground for refusing the successful party his expenses.

On 4th June 1904 Wood & Company, stevedores, London, raised an action against A. & A. Y. Mackay, shipowners, Grangemouth, to recover, with expenses, £200, or alternatively £73, 19s. 9d., and £17, 16s. 2d., being one-half of the amount which one of their employees, Mellish, had recovered from them under the Employers' Liability Act as damages for personal injuries in an action by him in Southwark County Court, and one-half of their expenses in defending such action.

Wood & Company had been employed by A. & A. Y. Mackay to unload the latter's vessel "Thomas Haynes" in the Thames. In the course of this operation one of the rope-slings which had been supplied by the shipowners broke, the load was precipitated into the hold, and Mellish, who was at the work in the employment of Wood & Company, was injured.

The pursuers pleaded—"(1) The pursuer having suffered loss and damage as the result of breach of contract on the part of the defenders, the defenders are liable in payment of damages. (3) Alternatively, the pursuers having paid to the said James Mellish the whole amount of any claim competent to him in respect of his injury, the defenders, who were liable as joint delinquents jointly and severally with the pursuers in respect of such claim, should be ordered to make payment to the pursuers of the sum second concluded for with expenses."

The defenders pleaded—"(1) No title to sue. (2) The pursuer's averments are irrelevant. (3) The pursuers' averments so far as material being unfounded in fact, the defenders should be assoilzied."

A proof was taken, the import of which is given in the opinion of the Lord Ordinary (JOHNSTON) and of the Lord President.

On 8th June 1905 the Lord Ordinary assoilzied the defenders and found no expenses due to or by either party.

Opinion—"The s.s. 'Thomas Haynes,' of Grangemouth, belonging to Messrs A. & A. Y. Mackay, the defenders in this action, after a voyage from Grangemouth to Rostock with coal and from Rostock to Danzig in ballast, sailed from Danzig in December 1903 with a cargo of sugar in bags. She arrived in the Thames on Wednesday, 6th January 1904, and discharged into lighters on 7th, 8th, and 9th January. She carried a cargo of 14,000 bags, each bag weighing about 2 cwt. The discharge was conducted by Messrs R. T. Wood & Co., stevedores, London, the pursuers of the action. About two o'clock on Saturday a rope sling used in lifting the sugar bags broke, and the bags fell on a stevedore, Mellish, engaged in the discharge. He was severely injured, and raised an action in the County Court of Southwark against his employers, Messrs Wood, under the Employers' Liability Act 1880, founding on the 'defective condition of the plant used' in the business of discharging. A jury awarded him £117 damages.

"In point of fact the sling in question had been supplied by the ship, and accordingly the stevedores, Messrs Wood, have now raised an action against Messrs Mackay, the shipowners, to recover the amount in which they had been held liable to Mellish, together with the costs to which they had been put in the Southwark action.

"Alternatively they claimed one-half of the sums they had been compelled to disburse as above, on the ground that in any view the defenders were liable as joint delinquents jointly and severally with them. Without finding it necessary to consider the legal question involved, I have come to the conclusion that I cannot in the circumstances entertain this alternative claim.

"But in determining the question which, under the pursuers' main claim, does arise on the evidence, I have found my task an extremely difficult one by reason of the conflicting evidence. That conflict is so direct and circumstantial that there is no possibility of reconciling the conflicting statements.

"There is, however, one question which emerges clearly enough. The pursuers aver that in terms of their contract and also by the custom of the Port of London, the defenders were bound to supply the tackle requisite for discharge, including slings, and did supply it. This the defenders deny. I hold it proved that the supply of tackle was not mentioned in the letters which constitute the contract for discharge, that there is no general practice of the port, but that the more widely general practice, as stated by the defenders' master, Captain Sim, is that the ship supplies all tackle, including slings, unless there is a stipulation to the contrary; that the ship in the present case acted on that footing, providing, if the evidence for the owners is believed, new rope for the purpose, and supplying the slings without demur or hesitation.

"But beyond that there appears to me to be no escape from the conclusion that there is false evidence on the one side or the other, and I cannot take refuge in any view of the demeanour of the witnesses. I had no ground for suspecting any, though I was favourably impressed with one, viz., the pursuers' witness Fraser. But I must add, that while I cannot look at it as evidence, it does to my mind affect the question of credibility to find from the notes of evidence in the Southwark County Court that the witnesses for the pursuers here gave account in substantial detail as they and their mates had given in the Southwark Court.

"The pursuers' witnesses say that there were no slings ready for them on Thursday morning the 7th January; that slings were in course of making, and that they were made from old rope which had been used in the running gear of the ship and its boats; that they proved so defective that one either broke or threatened to break in the first forenoon; that the foreman stevedore demanded new slings, and was referred from the second officer to the first officer, and by him to the master, and by him to the boatswain (probably a mistake for carpenter), and at last got 9 out of the 20 or 25 slings in all renewed with new rope, which was all the ship had on board; that another sling broke on the forenoon of Saturday 9th January, and a third (which caused the accident) after the dinner hour.

"The ship's witnesses, on the other hand, allege a full supply of new rope; that nothing but new rope was used; that there were no breaks except the break which caused the accident, and no demand to be supplied with fresh slings at any time by the stevedore's foreman. They further challenge the authenticity of the production No. 67 of process, alleged by the pursuers to be the identical rope which broke, and they throw the blame for the accident on deterioration of the new rope supplied by them through the reckless mode of discharge followed by the stevedore's men, particularly at No. 4 hatch where the accident occurred.

"To hold the scales between these two sets of partisans is not easy. Counting heads, the ship has it. But after renewed consideration I am unable to give implicit credence to the statements of either side. While I freely admit that I can have no certainty, the conclusion I have come to is this—I do not believe that the rope supplied was new rope, though doubtless the ship took such on board at Grangemouth. I do believe that some new rope was supplied on a second demand, but not enough to replace the whole slings. I do not believe that the discharge was as reckless as the ship's witnesses allege. The state of the tally disproves this, for instead of constant overloading of slings it shows somewhat remarkable regularity. In fact, out of about 700 slingfuls only about 25 exceed the orthodox number of six bags to the sling, and the average is below that number. Nor do I believe that the action of the men forming the gangs below, or of the gangway man or guyman on deck, though their methods were somewhat rough, was as reckless as is represented, *e.g.*, from comparing the depth of the hold with the length of the slings, if there was anything in contact with or chafing on the coamings of the hatches, it is evident it must have been principally the winch chain, and not the sling ropes, as alleged by the ship's witnesses. But I do hold it proved that in No. 4 hold on the forenoon of Saturday, 9th January, there was some overloading prior to the accident, though not such as should have perilled a sling in reasonably good condition.

"In these circumstances I think that I reach a just conclusion by adverting to the responsibilities *hinc inde*, and to the only bit of real evidence other than the tally books, viz., the rope, the authenticity of which, by the way, I see no reason to doubt.

"It appears to me that it was the duty of the ship's officers, if the ship was bound or accepted the obligation, to supply the slings as well as the rest of the tackle, to supply sound slings, and to be satisfied that they were sound before handing them over to the stevedore. I think that no fault

could be imputed to the stevedore or his representative if he accepted them as sound without more than a general examination. But this part of the gear perishes in the using, and I think that on acceptance the duty of watching it and seeing to its continued soundness devolved on the stevedore who used it. His was the duty of rejecting it when necessary in the course of using, and the ship's to replace what was rejected. I think that the case is distinguishable from that of *Mowbray* v. *Merryweather*, [1895] L.R., 2 Q.B. 640. Now here *res ipsa loquitur*. If, as I think, the sling which broke was not new when given out, and probably even then of doubtful sufficiency, it certainly had become wholly insufficient long before the accident occurred. I entirely accept the evidence of Captain Cowie, and I think my own personal examination of the rope would probably have brought me to the same conclusion that the said sling should have been discarded long before it broke. Accordingly, even assuming that there was negligence on the part of the owners in supplying defective ropes, such was not the direct cause of the accident, but the neglect of the stevedore's foreman to reject timeously the rope supplied before it had become hopelessly insufficient.

"I therefore assoilzie the defenders; but in respect of my view of the unsatisfactoriness of the evidence I find neither party entitled to expenses."

The defenders reclaimed on the question of expenses, and the pursuers took advantage of the reclaiming-note to bring under review the Lord Ordinary's judgment on the merits.

Argued for the pursuers—The defenders undertook to supply the rope-slings for the discharge of the cargo, and as the accident to Mellish was due to the defective condition of one of the slings supplied, the defenders were liable to the pursuers in the amount of the damages awarded to Mellish and in the expenses of the action by Mellish. In a contract of sale where the goods were purchased for a special purpose it was an implied condition of the contract that the goods should be reasonably fit for that purpose, and the vendor was liable for the natural consequences of a breach of that condition—*Randall* v. *Newson*, [1877] L.R., 2 Q.B.D. 102; Addison on Contracts, 10th ed., p. 586; and the same rule applied to the contract between the pursuers and the defenders—*Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640; *Burrows* v. *Marsh Gas Company*, L.R., 5 Ex. 67, 7 Ex. 96. The pursuers' liability to pay damages to Mellish was the natural consequence of the defenders' failure to supply ropes fit for the discharge of the cargo, and therefore the pursuers were entitled to recover the sums paid by them from the defenders—*Mowbray* v. *Merryweather*; *Burrows* v. *Marsh Gas Company*, *supra*. The defenders being aware that the ropes were to be used by the pursuers' workmen were under a duty to take care that the ropes were in a fit state to be used without risk or danger to the workmen. They had failed in their duty and were liable for the injury to the pursuers' workman which resulted from their negligence—*Heaven* v. *Pender*, 11 Q.B.D. 503; *Traill* v. *Actieselskabat Dalbeattie, Limited*, June 7, 1904, 6 F. 798, 41 S.L.R. 614. The present action was based on breach of contract and could not be considered as an action of relief. On the question of the liability of the defenders jointly with the pursuers, *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited*, June 5, 1894, 21 R. (H.L.) 39, [1894] A.C. 318, 31 S.L.R. 937, was cited, but this argument was not pressed.

Argued for the defenders—The pursuers had ample opportunity of inspecting the slings supplied by the defenders and accepted them. There was no implied condition in the contract that the ropes should be suitable for the discharge of the cargo or for any special purpose. All that the pursuers were bound to supply under the contract were ropes to the satisfaction of the pursuers, and the pursuers' acceptance of the ropes discharged the defenders. The accident to Mellish was due to the pursuers' negligence in not properly inspecting the ropes before or during their use, and was not caused by, nor was it the natural consequence of, the defenders' action in supplying ropes which were found to be defective. *Mowbray* v. *Merryweather*, *cit. sup.*, was distinguishable, because in that case the defendant admitted that he was in breach of his warranty. The pursuers were under no duty to the workmen who used the rope. In *Heaven* v. *Pender* the defenders were liable because they set up a staging in which there was a trap and invited the plaintiff to use the staging—*Caledonian Railway Company* v. *Warwick*, November 26, 1897, 25 R. (H.L.) 1, [1898] A.C. 216, 35 S.L.R. 54; and in the opinion of Esher, M.R., in *Heaven* v. *Pender* an exception was made as to the case where opportunity of inspection was given, and that exception covered the present case. This was an action of relief. But the criterion of the pursuers' liability in the action at the instance of Mellish was their negligence, and the damages were awarded in respect of that negligence, whereas in the present case the only ground on which it was averred that the defenders were liable was breach of contract. Hence as the criterion of liability was not the same in both cases the pursuers could not enforce relief—*Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066.

At advising—

LORD PRESIDENT—The pursuers in this action, Messrs Wood & Company, carry on business as stevedores in London. They entered into a contract with the defenders Messrs Mackay, who are shipowners in Grangemouth, to unload a vessel belonging to the defenders which was in the Thames. In the course of that unloading a rope sling, which was being used to unload the cargo which consisted of sugar in bags, broke, and the sugar bags thereby released

fell upon one of the stevedores' workmen named Mellish and injured him. Mellish brought an action against Wood & Company in the County Court of Southwark and recovered damages from them for the injury he had sustained. His action in the County Court was rested, as being for more than the sum of £50 it needed to be, upon the Employers' Liability Act. The present action is an action of relief at the instance of Messrs Wood against the shipowner, upon the ground that it was the shipowner's business to supply the slings of rope for the operation of unloading the cargo, that he did so supply the slings, and supplied a faulty sling, and that the consequent claim at the instance of Mellish, and the damages he had to pay, were the natural result of that fault upon the part of the shipowner. Now, there has been a very voluminous proof, and the Lord Ordinary's judgment not only analyses it but makes considerable comments upon it. I do not propose in any way to go through the proof, but I propose to lay down the various conclusions in fact which I have come to after a careful consideration of that proof. I think, first, that it is proved that by the custom in the trade it was part of the duty of the shipowner here to provide slings made of rope for the discharge of the cargo, and I think it is proved that that was a duty which the defenders in this case entirely knew of and undertook. Secondly, I think it is proved that the actual sling in process is clearly identified as the particular sling which broke. Thirdly, I think it is proved that that particular sling was not a fit sling for the purpose for which it was being used, being obnoxious to a defect which is technically known as short hemp; and fourth, I think that that defect of short hemp is a defect which could have been perfectly well ascertained by an inspection of a quite easy character by anybody who was conversant with the business and knew the quality of rope. Now, the Lord Ordinary, who I think has practically come to the same conclusion on the facts, although he has not perhaps formulated them in such distinct propositions as I have done, disposed of the case thus—He considered that whatever were the obligations originally extant as between the pursuer and the defenders, nevertheless from the nature of the subject, namely, rope, and from the nature of the operation to which that rope was subjected, namely, the using of it in slings for the purpose of discharging a cargo, there was a duty cast upon the pursuer to watch the rope and to note its condition from time to time as the operation proceeded; that if he had done so, inspection would have revealed that there was something wrong; that if an accident happened it was really owing to his own negligence, and that he cannot recover for it. It was very strongly contended that that view of the Lord Ordinary was wrong, and in particular it was contended that it was diametrically opposed to the view of the Court of Appeal in England in the case of *Mowbray* v. *Merryweather*, ([1895] 2 Q.B. 640). That case is not binding on us, but, on the other hand, it is authority which we always treat with great respect, and if the principles laid down in an English case are right we should follow them upon principle against the judgment of a Lord Ordinary which we thought was wrong. Now, no doubt *Mowbray* v. *Merryweather* bears a striking similarity to the present case, although in certain particulars to which I shall advert it is not the same. The facts in *Mowbray* v. *Merryweather* were these. As here, there was a contract between a firm of stevedores and a shipowner to discharge cargo from a ship. The shipowner there had agreed in terms to supply all necessary cranes, chains, and other gearing reasonably fit for that purpose. What broke in that case was a link of a chain of a permanent crane—I take it, an ordinary ship's crane worked with a donkey-engine—and there was an admission that the defect in the chain was of such a kind that it could have been discovered by inspection—that is to say, by the inspection of anybody who knew the quality of iron and could recognise an iron flaw when he saw it. There, as here, the result of the breaking of the link of a chain was that a bale of goods fell upon a stevedore's workman. There, as here, the injured workman brought an action against the stevedore, founding upon the provisions of the Employers' Liability Act. The case then differs a little in this respect, that instead of going to trial, as occurred in the case immediately before your Lordships, the stevedores in the case of *Mowbray* v. *Merryweather* did not contest the action but paid the injured workman a sum which, it was not a matter of controversy, was a perfectly proper sum for them to pay upon the assumption that there was liability, and then they raised, as here, an action of relief in respect of the sum which they had so paid. The Court of Appeal gave judgment for the sum. As I say, that case certainly bears a strong resemblance to the present case, but there are certain points of difference, and one of them crops up at the very outset. You cannot read the judgment of the learned Judges who decided that case without seeing that the whole starting-point of their judgment is that they held that there was a warranty, an implied warranty, upon the supplying of the chain of the crane that it should reasonably be fit for the purpose for which it was supplied. Now, the first question that therefore arises is whether the obligation—I will not use the word "warranty" in case it may not be strictly accurate — which was upon the shipowner here was precisely the same as the obligation which was found to be on the shipowner in the case of *Mowbray* v. *Merryweather*. I am inclined to think it was not, and the distinction arises naturally enough from the distinction of the articles employed. The article in the case of *Mowbray* v. *Merryweather* was part of the permanent fittings of the ship, namely, the chain of the crane, and it was obviously impossible for the firm of stevedores, if they were to use it, to interfere with or do anything with it. Therefore, having regard to the subject material, I think that I

certainly would agree with two things that the English Court there said—namely, first, that from promising to supply the crane on board the ship there was an implied promise also to supply a crane that was fit for the purposes of discharging ordinary cargo—and nobody said that it was anything else than ordinary cargo; and secondly, that having got that obligation there was not necessarily cast upon them a duty of from time to time going and examining this permanent fitting, namely, the crane chain. But here we have to do with a perfectly different article. The articles here are slings made of rope for slinging bags of sugar. Those slings are not part of the permanent apparatus of the ship. As matter of fact they are just bits of rope which are spliced into a loop and are then made up as a sling, and they are really made up of rope *ad hoc*. Now, there is not much evidence as to what the precise custom in this matter is; and although I am prepared to hold, in accordance with the finding I have already expressed to your Lordships, that it is clear that the duty of supplying was undertaken by the shipowner, I think that that duty was not of the nature of an absolute warranty to supply something that would be under all circumstances fit for the work it had to perform, but was a duty to supply slings to the approbation of the person who was to use them. If that is the true view, then I think one comes directly under the authority of a dictum of Lord Young, which has, I think, been several times referred to with approval, delivered in the case of *M'Gill* v. *Bowman* (18 R. 206). That was a case in regard to the fault of a miner's kettle. The actual decision does not touch this point, because it was held in fact there that the accident was not due to the fault in the material at all, but was due to negligence on the part of the person who worked it; but Lord Young, upon a general question which had been argued in the case, dealing with the question of material, says—"If I have painters to work in my house and undertake to supply the ladders to the master's satisfaction, and do so, am I subject to an action by one of the painters if the ladders prove too weak? Surely not. I think that would be an entirely erroneous proposition." I think that is sound law, and accordingly if the true construction of the obligation here was to supply slings to the satisfaction of the other party, then I think the case may be safely disposed of on that ground.

But I do not propose to stop there, because I think there is something more to be said upon the case of *Mowbray* v. *Merryweather*. This action as raised is an action of relief. Now, relief means of course, that A is bound to relieve B of a liability which has been found against B. Now, what was the liability of B here? What was the liability of the stevedore? The stevedore's liability in the action which was raised against him rested on his want of inspection—that is to say, his negligence, and his negligence alone. It did not rest pon the ground that the rope was *de facto* unfit. It seems to me that that proposition is abundantly clear from two circumstances. In the first place, it is clear from the undoubted law of *Wemyss* v. *Mathieson*, 4 Macq. 215, which is a House of Lords decision and cannot be controverted. That case laid down in most clear terms what has always been considered as law since then, that as between a workman and his employer it is not enough for the workman to say that the employer *de facto* supplied insufficient material or an insufficient machine. He must show that in doing so he was guilty of some negligence. Therefore the workman here could not have recovered against the stevedore unless he showed that as matter of fact there was some fault on the part of the stevedore. The same thing arises upon the Employers' Liability Act. The reason of course why he raised his action under the Employers' Liability Act in this particular case is obvious. He claimed more than £50, and according to the rules of process in England he could not have got more if he had gone to a County Court; whereas raising it under the Employers' Liability Act he could get more, but being under the Employers' Liability Act, he could not recover under the first sub-section unless he could show, over and above the fact that the ways and means were not in proper condition, the further fact that there had been want of due inspection on the part of the master or those whom he put in his place. But as I have pointed out, precisely the same result for practical purposes would have occurred if he had raised his action at common law in the High Court instead of raising his action under the Employers' Liability Act in the County Court. Now, all that therefore comes to this. He could not have recovered unless he had shown that there had been negligence, which negligence in this case everybody knows meant want of inspection on the part of the stevedore. How can it be said that the stevedore, being cast in a suit in which he must have been successful had it not been for his own negligence, can ever recover upon an action for relief against the shipowner against whom he has only got a breach of contract and nothing else? On this matter I confess that I think there is nothing more to be said than has already been said by an authority which is binding on us, namely, by the late Lord President Inglis, when he was Lord Justice-Clerk, in the case of *Ovington*, 2 Macph. 1066. The facts in *Ovington* were these—A workman was killed by the breaking of a chain. His representatives either sued or made a claim against his employer, and his employer paid. The employer then brought an action of relief against the maker of the chain, and sought to have him ordained to pay the sum he had paid to the workman's representatives. The chainmaker was assoilzied in that case upon two grounds. In the first place, the employer came into Court without saying that he had been guilty of any negligence at all, and the Lord Justice-Clerk pointed out that upon his own statement in his own pleadings,

upon the law of *Wemyss* v. *Mathieson*, he had had no liability towards the workman's representatives, and that he need never have paid at all; and therefore it was not a relevant action as against a person with whom the pursuer had a contract to claim as damages something which, upon the pursuer's own showing, he need not have paid. But his Lordship also went further, and said that in any case there could not be an action of relief, because the *criteria* of the two cases were perfectly different. The one rested upon the question of *quasi*-delict, the other rested upon a question of breach of contract. With all that I thoroughly agree, and when I come to *Mowbray* v. *Merryweather*, although I do not say that the judgment is necessarily wrong, there are certain dicta of the learned Judges in it with which I cannot concur. It may be that the judgment is not wrong for quite another reason. One of the learned Judges in that case says that in the case before him the injured workman might have had a direct action against either the stevedore, being the action which he did promote in the County Court, rested upon the Employers' Liability Act, or against the shipowner upon the doctrine of *Heaven* v. *Pender*, and then he applies that by saying, if he could really have had it directly against the shipowner, it is no hardship on the shipowner to say that he must just pay the same in an action of relief as what he would have had to pay if he had to pay it in a direct action against himself. I think it may very well be that there would have been an action upon the doctrine of *Heaven* v. *Pender* (11 Q.B.D. 503) in *Mowbray's* case. I think it equally clear there could not have been an action upon the doctrine of *Heaven* v. *Pender* in this case, because the whole of that doctrine depends upon the article in which the defect occurred being part of what I may call the permanent fittings of the place. In *Heaven* v. *Pender* the facts were that a staging was kept by the dock proprietor for the purpose of painting and otherwise attending to ships which were in his docks, and the accident was caused by the breaking of one of the ropes by which the staging was slung. That staging was just as much a permanent work as the cranes on the quays, the gangways, and so on. Now, the principle of the decision in that case might very fairly be applied to the case of the permanent ship's crane in *Mowbray* v. *Merryweather*, but it cannot possibly be applied to a thing like a rope-sling, which is only provided *ad hoc*, and from time to time. Now, having regard to the resemblance in this respect of *Mowbray* v. *Merryweather* to *Heaven* v. *Pender*, I do not for a moment suggest that the decision arrived at in *Mowbray* was wrong. But there are certain expressions of opinion in that case with which I do not agree. The Master of the Rolls says on page 643—"It is true that he"—that is the injured man—"could not have recovered unless, as between himself and the plaintiffs, the plaintiffs had been guilty of want of care, but the plaintiffs say that as between themselves and the defendant they were not bound to examine the chain, because the defendant had warranted it sound, that they had a right to rely on that warranty, and did rely on it, and the defendant cannot rely on a duty to use due care which was owed, not to him, but to the workman. Therefore they say that all that has happened as between themselves and the workman was the natural result of the defendant's breach of warranty, and they are entitled to recover in this action the amount which they have had to pay as damages to the workman." I cannot agree with that course of argument at all, because I think it obscures the true meaning of consequentiality by the expression "all that has happened between themselves and the workman." There is also another portion of the judgment with which I do not agree, and which I find very great difficulty in understanding, namely, that portion of the judgment where their Lordships profess to prefer the opinion expressed by Baron Martin in the case of *Burrows* v. *Marsh Gas & Coke Co.* (L.R. 5 Ex. 67) to that expressed by the Scottish Judges in the case of *Ovington*. I have already stated what was laid down there. I am utterly unable to see that the judgment of Baron Martin in the case to which I have referred had anything to do with the same class of facts as that dealt with in *Ovington*. The facts in the former case were these—A person contracted with a gas company for the supply of a pipe to convey gas from the main into his own premises. The company supplied that pipe, but there was a leak in the pipe supplied. The consequence was that the premises became charged with gas, and the owner of the premises, having occasion to have some other small job done upon the premises, employed a gasfitter. This gasfitter was not in the service of the company which supplied the pipe, and it was a mere accident that it was a gasfitter who was employed. This man came into the premises and, as I understand, probably noticing a smell of gas, was so foolishly negligent as to carry a naked light. There was an explosion and the premises were wrecked. The action was brought by the owner of the premises against the contracting company for the damages thereby caused, and it was held that he was entitled to recover, the explosion being the natural result of the faulty pipe which was supplied, and that it was no answer for them to say that this would never have happened if it had not been for the negligence of the other person who was on the premises. That seems to me a perfectly right judgment, and I agree with every word that Mr Baron Martin said in that case; but what application that has to the question raised in *Ovington* I confess I am entirely unable to discover. In order to make it an analogy to *Ovington*, the action ought not to have been at the instance of the proprietor of the premises. It ought to have been at the instance of the injured man, who I suppose for the moment to be a servant of the

person on the premises. I feel constrained to say that not only do I think the judgment of *Ovington* perfectly right in itself, but I think it is utterly untouched by the authority with which in the English Court it was supposed to be inconsistent. The result of the application of these principles is not doubtful. Here the whole gravamen of the charge against the stevedore lay in his own negligence. Without that negligence the charge could not have prevailed, and accordingly, whatever may be the damages for supplying a faulty rope, assuming that the contract is different from what I have suggested it is—that is to say, assuming the contract is to provide a sound rope—whatever the measure of damages may be between the injured man and the party primarily liable, it cannot be the measure of damages in an action of relief where the criterion of liability is something perfectly different, and depends on the negligence of the party who is making the claim in the action of relief.

Accordingly I am of opinion that the defender is entitled to prevail.

The Lord Ordinary has deprived the defender of his expenses upon what I confess seems to me a somewhat novel ground—the unsatisfactoriness of the witnesses. I do not find any reason for that ground, and I am not aware I ever saw it before. In a case of this sort, according to the usual rule, I think expenses must follow the result. The only thing I would say now in regard to the subject of expenses—and I say it of set purpose, in order that the Auditor may take heed to it—is that I think that here there was not the slightest justification for printing the proof in the proceedings in the action before the County Court. It is not evidence and never could be.

LORD M'LAREN—Supposing there was a relevant claim in this case, it seems perfectly clear that the criterion of liability would not be the same in this case as it was in the action against the stevedore. If the rope had given way the first time it was tried, then probably the criterion would have been the same, because then the rope would be fairly proved to be insufficient for the purpose, and the question would be, was there fault solely on the part of the shipmaster who supplied the rope—on the theory that the stevedore was entitled to trust to his assurance—or were they both negligent in having used the rope which both were bound to examine, and yet which neither of them did in fact examine. But then this sling did not give way until it had been in use for a considerable time. The unloading of the vessel extended over a period of two days, and it appears from the evidence that these slings do wear out very quickly under the stress and jerks to which they are exposed, that in point of fact several of them had given way while in use, and that this was an accident that did not surprise anyone. That being the state of the facts, it is quite conceivable that the County Court Judge, or the jury, might have been well founded in holding that there was negligence on the part of the stevedore in using a sling which was insufficient—using it after it had ceased to be sufficient—and that he was liable for reasons which did not necessarily involve liability on the part of the shipmaster who supplied the slings. But I think the key to the solution of this question is that the shipmaster in supplying the sling is not held to give a warranty as to its sufficiency. If it were a contract of sale, then the common law, which has now been embodied in the Sale of Goods Act, provides that he is held to warrant that the article supplied is fit for the purpose; but I am not prepared to extend that principle to the case where, under an executory contract, the person for whose benefit something is to be done undertakes to supply materials. I think this case is quite in the same region as the case put by Lord Young of a householder agreeing to give the use of a ladder to a painter. In such a case he might warrant, but he does not necessarily warrant, the sufficiency of what he supplies; but he must act in good faith and with reasonable care. I see no reason to doubt that in this case the mate who supplied the slings did act with reasonable care, that he supplied what, according to his information, had been purchased from a good firm, and that from his own knowledge he had good grounds of believing them to be good and sound slings. That evidence has not, in my judgment, been displaced by anything in the case, and I have come to the conclusion that there is no legal ground of responsibility affecting the shipowners, because I think their servants are not proved to have been guilty of any negligence in the duty they had undertaken, which was only to furnish slings such as they believed to be sound, but without necessarily warranting them.

LORD KINNEAR—I agree in all respects with your Lordship in the chair.

LORD PEARSON—I concur.

The Court pronounced this interlocutor:—

"Adhere to the said interlocutor in so far as it assoilzies the defender from the conclusions of the summons: *Quoad ultra* recal the said interlocutor: Find the defenders entitled to expenses both in the Inner and the Outer House, and remit," &c.

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