

be identical in so far as they depend on one particular plea, and the defence embodied in the maxim *volenti non fit injuria* is the same whether stated by a master against his servant or by a landlord against his tenant. Accordingly the Lord Chancellor (Halsbury) in *Smith v. Baker*, [1891] App. Ca. 337, considering whether a person who knows there is a risk of injury to himself debar himself from any right of complaint if such injury should happen to him, says—"We have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited, but where it applies it applies equally to a stranger as to anyone else."

As to the question of title to sue, I entirely agree with your Lordship. The case referred to as decided by the House of Lords last year (*Cavalier v. Pope*, [1906] A.C., 428) is not an authority for us in so far as it defines the obligations of lessor and lessee. But it is in so far as it deals with matters on which the laws of both countries are the same; and in regard to the question whether a stranger to the contract is in title to sue upon it, I am not aware of any difference between the law of England and our own law, since there is no ground for the plea of *jus quæsitum tertio*.

I therefore agree in the result at which your Lordship has arrived.

LORD PEARSON—I agree in the opinion just delivered. I think that this record contains relevant averments to support a claim of damages for breach of contract at the instance of Robert Cameron. It is an implied condition of such a contract that the premises are in a tenantable condition and will be maintained in that condition. If the tenant complains of a breach of the condition, as it is his duty to do timeously, his course of action must depend very much on the attitude of the landlord. If the landlord disputes the tenant's allegation, then the tenant stays on at his own risk and must himself judge of the necessity for a speedy removal. But if the landlord by himself or his factor acknowledges the defect and undertakes to set it right, then unless the danger is imminent the tenant may without losing his remedy remain for such a time as is reasonable to admit of the landlord fulfilling his obligation. What is a reasonable time is a question which depends on the circumstances of the case, and therefore the facts must be ascertained. But the landlord's liability will really depend, not on his breach of an incidental promise or undertaking to repair, but on his original contract obligation and the alleged breach of it.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff, dated respectively 21st June 1906 and 1st August 1906: Of new sustain the first plea-in-law stated for the defenders in so far as regards the pursuers William Cameron, Mrs Ann McGregor or Came-

ron, James Cameron, and Robert Cameron *qua* tutor of Neil Cameron, and find that they have no title to sue: Of new assoilzie the defenders from the conclusions of the action so far as at the instance of these pursuers, and discern: *Quoad ultra* repel the second plea-in-law for the defenders in so far as directed against the relevancy of the action at the instance of the pursuer Robert Cameron, and appoint the issue or issues proposed for the trial of the cause in so far as laid at the instance of the said Robert Cameron to be lodged within eight days: Find no expenses due to or by any of the parties in this Court or in the Sheriff Court."

Counsel for the Pursuers and Appellants—C. D. Murray—Dallas. Agents—Murray, Lawson, & Darling, S.S.C.

Counsel for the Defenders and Respondents—The Dean of Faculty (Campbell, K.C.)—Wm. Thomson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, January 31.

FIRST DIVISION.

[Lord Dundas, Ordinary.]

MACKENZIE v. STORNOWAY PIER AND HARBOUR COMMISSIONERS.

Reparation — Harbour — Culpa — Ship — Duty of Harbour-Master.

In a harbour used for fishing vessels wintering, a fishing vessel was moored at a place where the bottom fell away quickly. A second fishing vessel, which was waterlogged, was ordered by the harbour-master to be moved to a particular place, but disregarding such order it was brought alongside the first vessel and moored to her. The next day the man in charge of the second vessel came and allowed some of the water out of her, so that subsequently she floated more easily, and doing so did not take the ground at the same time as the first vessel, with the result that straining she capsized and damaged the first vessel. In an action of damages by the owners of the damaged vessel against the Harbour Commissioners, *held* that no fault on the defenders' part was proved and absolvitor granted.

Thomson v. Greenock Harbour Trustees, July 20, 1876, 3 R. 1194, 13 S.L.R. 155, *followed*.

On July 3, 1905, Æneas Mackay Mackenzie, salvage contractor, The Slip, Stornoway, raised an action against the Stornoway Pier and Harbour Commissioners to recover the sum of £200 as loss and damage suffered by him through the alleged total loss of his fishing vessel "Flying Venus."

The defenders, *inter alia*, pleaded—" (2) The pursuer not having suffered any loss through any fault of the defenders, the

defenders ought to be assolizied from the conclusions of the summons."

The Stornoway Pier and Harbour Commissioners were incorporated by and acted under the Stornoway Harbour Order 1865 (confirmed by 28 and 29 Vict. cap. 76), the Stornoway Harbour Order 1881 (confirmed by 44 and 45 Vict. cap. civ), and the Stornoway Harbour Order 1892 (confirmed by 55 and 56 Vict. cap. cciv). The harbour-master was Captain Morrison, and his deputy Peter Macpherson.

The circumstances of the case are given in the opinion of the Lord Ordinary (DUNDAS), who on 14th March 1906, after a proof, pronounced an interlocutor finding that the pursuer had failed to prove that he had sustained any loss through the defenders' fault, sustaining their second plea-in-law, and assolizieing them.

Opinion.—"The pursuer is a salvage contractor in Stornoway, and the owner of various vessels and fishing-boats. One of his fishing-boats is named the 'Flying Venus.' On 7th or 8th January 1905 this boat, while laid up for the winter in a berth in Stornoway Harbour, sustained injuries for which the pursuer holds the defenders, the Stornoway Pier and Harbour Commissioners, to be responsible. The defenders are a statutory corporation. Their constitution and powers are described in a general way upon the record. Some of the articles contained in their bye-laws were specially referred to by counsel. By article 4 it is provided that 'all vessels coming into the harbour shall be subject to the control of the harbour-master as to the place of mooring or anchoring; . . . and should the master or other person in charge refuse or delay to shift such vessel as directed by the harbour-master, the harbour-master shall have power to cause such vessel to be shifted at the cost of the master or other person in charge.' Article 12 provides that 'Every vessel at the quays shall be attached and fixed by substantial hawsers, tow-lines, and fasts to the dolphins, moorings, buoys, or mooring posts.' Article 19 gives power to the harbour-master in case the master of any vessel in the harbour does not, upon the former's demand, unloose or slacken the ropes or chains by which the vessel is fastened, to cut any such rope or chain. Article 22 provides, *inter alia*, that the skippers of fishing-boats within the harbour 'shall be bound implicitly to obey the orders of the harbour-master as to the berthing, mooring, unmooring, or removal of such boats, and shall be bound, so long as the boats are afloat, to have on board a sufficient crew to receive and execute such orders.' The defenders are expressly empowered to levy rates, *inter alia*, 'for every herring or fishing vessel or boat wintering or laying up alongside a quay—per month, 5s.' It seems that they have been and are exceedingly slack as regards enforcing payment of these rates; but the point is, in my judgment, of little or no importance in the case.

"It appears from the proof that fishing-boats entering Stornoway Harbour to lay

up for the winter are in use to go and moor up at any vacant berth they choose without making application to the harbour-master. If the latter orders them to move they must do so; but if he makes no objection they remain in the berth of their choice. About September 1904 the 'Flying Venus' took up her place for the winter in a berth in the inner harbour at the extreme upper end of Cromwell Street Quay, which was shown on a chart. The bottom there falls away at a considerable slope outwards from the quay wall. The origin of this accident to the 'Flying Venus' was that another fishing-boat, the 'Victoria,' was brought by those on board her, in a waterlogged condition, alongside the 'Flying Venus' and firmly lashed to her, as well as secured by fore and aft hawsers to the quay. This occurred on the evening of Friday, 6th January 1905. No one was at the time on board or in charge of the 'Flying Venus.' On the night of Saturday, 7th, or the morning of Sunday, 8th January, the 'Victoria' took a determined list to port, fell over, and dragged with her the 'Flying Venus,' which was capsized, filled with water, and received injuries as to the extent of which the parties are at issue. The fault or negligence of the defenders in this state of matters is not readily apparent. But the pursuer explains that the harbour-master was well aware that the berth in question, though safe for a single boat, was a dangerous one, in respect that if a second boat should moor alongside the first comer there would, owing to the sloping contour of the bottom, be grave risk unless proper precautions were taken of such a falling off occurring, as did in fact occur; and that the harbour-master, having this knowledge, was in fault 'in allowing the "Victoria" to take up and retain the position she did in the harbour and to be secured as aforesaid to the "Flying Venus," or otherwise in failing to prevent the "Victoria" from taking up or at least from retaining said position.'

"At this point I must advert, for the purpose of clearing it out of the case, to an earlier episode in the career of the 'Flying Venus,' which bulks considerably in the proof. On 14th December 1904 she was lying, as already explained, in the berth in question. A fishing-boat called the 'Missionary' came alongside, and was secured to the 'Flying Venus' by lashings amidships, as well as to the quay, and then listed over and capsized, thus inflicting upon this unfortunate boat a disaster similar in mode and result to that which she sustained later on in the affair of the 'Victoria.' . . .

"I must now turn to the evidence upon which the charge of fault and negligence on the part of the defenders is said to be supported. The pursuer and his witnesses agree in stating that the berth is a perfectly safe one for a single boat to occupy; but I think that this statement, in order to its perfect accuracy, must be qualified by adding the condition that ordinary and reasonable attention is paid to the boat by its owner or his men at the times when

she is taking the ground. This is, in my judgment, the opinion of the best witnesses upon both sides. The 'Flying Venus' herself lay with perfect safety in this berth during the winter of 1903-1904. The whole evidence in my opinion completely negatives the idea that the berth is in itself dangerous. The question is narrowed to one as to possible danger to a boat safely moored there by reason of the intrusion of a second boat which comes alongside and is lashed to her. It is, I think, proved that it is the custom of fishing-boats in all parts of Stornoway Harbour to lie alongside another boat and lash on to her without consent or permission asked or given. Both Captain Morrison and his deputy, Peter Macpherson, who seemed to me a very good witness, state that there is no danger in this practice either at this berth or at others, so long as the boats are properly lashed, and reasonable care is taken to see at the appropriate states of the tide that they take the ground in a proper manner. If, on the other hand, the fishermen neglect these attentions altogether, accidents may and probably will happen. It is all a matter of reasonable care and attention. Now on 6th January 1905 it appears that the 'Victoria,' having 'fallen off' lower down the harbour, and having been ordered by the harbour-master to remove to 'the beach,' or to a part of the bay called Glumag, instead of obeying the order proceeded to the inner harbour, and moored close alongside and lashed amidships to the 'Flying Venus.' The pursuer's man, Neil McLeod, was not upon the spot when this was done, nor did he visit it during the next day, Saturday. The approximate cause of the accident, which occurred in the night between Saturday and Sunday, is sufficiently obvious. When the 'Victoria' was lashed to the 'Flying Venus' she was full of water, but on Saturday Malcolm Mackenzie, who was in charge of her, came down and let the water out of her by removing the plug, which he then replaced. The result of this was that the lightened 'Victoria' failed to take the ground at the same time as the 'Flying Venus,' but remained afloat and presently capsized that unlucky boat in the manner already indicated. Both Malcolm Mackenzie and the pursuer are clear that this was how the mishap occurred. And in these circumstances the latter alleges that the injury to his boat was caused by the negligence of the defenders or their harbour-master. I confess that I am quite unable to see how this contention can be supported. The pursuer's views as to the duties of the harbour-master are certainly of an extensive character. They appear to me to be arrived at on the basis that all the powers conferred upon the harbour-master are truly obligations, whereas the bye-laws, to which I referred at the outset, seem to impose obligations not upon the harbour-master but upon those in charge of the vessels or boats. I think that Captain Morrison and his deputy Macpherson define with moderation and substantial

accuracy the scope of their duties. I cannot suppose that there is any obligation upon the harbour officials to see that in all cases where fishing-boats are lashed together, this has been originally done, and is subsequently continued and maintained, in a safe and sufficient manner. This view seems to me to be contrary to good sense, and it is repudiated by some of the fishermen or seamen who gave evidence. The law of the whole matter is, I consider, nowhere more clearly laid down than in *Thomson v. Greenock Harbour Trustees*, 1876, 3 R. 1194. Lord Ardmillan (p. 1197) says—'I have no doubt that fault or negligence on the part of the trustees or of their servants must be proved. There is no guarantee or assurance of absolute safety. It is not expressed, and it is not implied. The defenders can only be liable if fault or negligence by them or their servants is proved.' In the same case Lord President Inglis (p. 1200) thus expressed himself—'The Harbour Trustees of Greenock, like the managers of any other harbour, provide accommodation for shipping, and invite the masters and owners of ships to occupy that accommodation, and charge them a price for it. The obligation thence arising is not an obligation to insure against accident, but only an obligation to use reasonable diligence to prevent the occurrence of injuries to vessels.' Lower down on the same page his Lordship adds this—'I think, on the contrary, it lies on the pursuer in such an action as this to prove, as matter of substantive fact, that there is negligence upon the part either of the Harbour Trustees or of someone in their employment.' Applying this law to the present case I am unable to see that the pursuer has proved any fault or negligence on the part of the defenders, or of their officials, or that the latter can, upon any just theory, be held liable for the injuries to the 'Flying Venus,' in respect of which damages are claimed.

"In the view which I take of the case it is unnecessary to consider the question of damages. I may say, however, that if I had seen my way to finding the defenders liable, the sum awarded would have been a much smaller one than that which is concluded for in the summons."

The pursuer reclaimed, and argued—The defenders were bound to exercise reasonable care to protect the pursuer, and if they failed therein they were liable in damages—*The Mersey Docks Trustees v. Gibbs*, L.R., 1 E. & I. App. 93, Lord Blackburn at p. 107; *Thomson v. Greenock Harbour Trustees*, July 20, 1876, 3 R. 1194, Lord President Inglis at p. 1200, 13 S.L.R. 155; *Doward v. Lindsay*, L.R., 5 P.C. 338, Sir M. E. Smith at p. 343; *The Moorcock*, L.R., 14 P.D. 64, Bowen, L.J., at p. 69; *The Bearn*, [1906] P. 48, Bargaave Deane, J., at p. 55 and p. 59; *Owners of the s.s. "Toward" v. Owners of the s.s. "Turkistan"*, December 16, 1885, 13 R. 342, Lord McLaren (Ordinary) at p. 344. There was here a special duty on the defenders' harbour-master arising from the character of the berth and from the

knowledge he had of the waterlogged condition of the "Victoria." That duty he had not fulfilled. He had full control of the harbour and should have prevented the "Victoria" being moored to the "Flying Venus," and further, he had failed in his duty of superintendence in allowing the "Victoria" to remain moored to the "Flying Venus." The pursuer at his own hand could not legally cut his vessel clear of the "Victoria."—*Currie v. Allan*, July 17, 1894, 21 R. 1004, 31 S.L.R. 814. Though the Removal of Wrecks Act 1877 (40 and 41 Vict. cap. 16) was permissive, it (sec. 4) laid on the defenders the duty of removing sunk or damaged vessels which might be dangers to shipping—"*The Douglas*," L.R. 7 P.D. 151, Cotton, L.J., at p. 160. That had not been done in the present case, and in this the defenders had failed in their duty and were consequently liable in damages.

Argued for the defenders and respondents—No fault had been proved such as would render the defenders liable. The cases quoted against them were easily distinguishable, as dealing with defective appliances for mooring, unsuitable berths, &c. There was no duty on the harbour-master to follow vessels about or to know that the equilibrium of the "Victoria" was to be upset by the actings of her crew. It was to their carelessness that the injury was due, and for that the defenders were not responsible.

LORD PRESIDENT—In this case I am perfectly satisfied with the Lord Ordinary's interlocutor. He has so well and carefully explained the grounds of his judgment in his note that I find it necessary to say very little more. I think he lays down the law as deduced from the case of *Thomson v. Greenock Harbour Trustees* (1876, 3 R. 1194) quite correctly, and the English cases that were cited to us do not in any way conflict with it. These cases were cases where harbour authorities were held liable for negligence in failing to supply necessary materials or appliances, such as sufficient ropes for the buoys and such like, or else in allowing the bottom of the dock to be in an improper condition. These decisions were obviously right, but they do not apply to the circumstances of this case. In dealing with a rule of duty it is always necessary to consider its application with reference to the place where the circumstances have arisen. It would be absurd to treat Stornoway—a harbour where fishing-boats are in the habit of wintering—in the same way as a regular harbour equipped with wharves and quays, where vessels are in the habit of unloading, and are coming and going every day. Here the allegations do not amount to a charge of negligence in connection with the condition of the berth. The negligence alleged against the harbour-master is that he allowed another vessel to come to the berth. Now, I do not think it has been proved that allowing the second vessel to occupy the berth was absolutely dangerous, although perhaps it was not expedient to have the two vessels moored

in that position. Still, as I have said, I do not think there was any absolute danger. On the contrary, the "Flying Venus" seems to have lain in that position quite safely so long as the moorings were so adjusted as to make the two vessels take the ground at the same time. But the real *causa proxima* of the accident was the act not of the harbour-master but of a member of the crew of the "Victoria" in taking out the plug and allowing the water to escape, and so altering the condition of her buoyancy as to upset the equilibrium of the two vessels. To put a duty on the harbour-master to find out such a thing—and that within an hour or two hours after it had happened—would be absurd. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN—I am perfectly clear that no fault is attributable to the Harbour Commissioners of Stornoway or to their harbour-master for allowing the owners of the "Flying Venus" to locate her where they did for the winter. It is to be observed that the owners or master of the "Flying Venus" placed her there notwithstanding their previous experience, which showed that a certain amount of danger might arise from the character of that berth. The proximate cause of the injury to the "Flying Venus" was that the "Victoria," being in a disabled and waterlogged condition, was brought in and moored alongside her. This of itself would probably have done no harm, but at low water one of the crew of the "Victoria" removed the plug and allowed the water to flow out of the ship. When the tide rose the "Victoria," being more buoyant, dragged the "Flying Venus" with so much force that she fell over and some of her planks were loosened.

Now, in my view, these facts disclose a strong case of negligence against the persons navigating the "Victoria," but no case of negligence against the harbour-master. To make that out it would be necessary to show that the harbour-master ordered the "Victoria" to take up the position which she did, or at all events approved of her doing so. The facts are that the harbour-master ordered the "Victoria" to go to Glumag Bay on the opposite side of the town, but that she failed to do so, and took up her position alongside the "Flying Venus." Now, it cannot be said that a harbour-master is not only to give the proper order, but that he must compel obedience to that order. To enable him to discharge such a duty it might be necessary that he should have at his call a force of marines. In my view his duty is to give the right order and to afford such assistance as may be necessary for its execution, but the actual execution of the order is the business of the persons in charge of the vessel. If the vessel disobeys the order then the responsibility is with her owners and crew and not with the harbour-master. I therefore agree with your Lordship that the Lord Ordinary's interlocutor is right and should be affirmed.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—M'Lennan, K.C.—Orr Deas. Agent—Alex. Ross, S.S.C.

Counsel for the Defenders and Respondents—Wilson, K.C.—Horne. Agents—Henry & Scott, W.S.

Tuesday, January 15.

SECOND DIVISION.

(Before Seven Judges.)

CAMERON'S TRUSTEES v. CAMERON.

Donation—Delivery—Recording in Register of Sasines—Bond and Disposition in Security—Bonds and Dispositions in Security Taken by Father in Favour of Himself as Trustee for Children—Is Recording of Bonds by Father Equivalent to Delivery to Children—Co-Trustee.

Held (diss. Lord Kyllachy) that the recording in the Register of Sasines by a father of bonds and dispositions in security taken in his own favour as trustee for his children (where the money invested was his own, and where the bonds were kept and occasionally uplifted and reinvested by him), did not operate a delivery of the bonds to the children so as to give them an indefeasible right to the sums for which the bonds were granted, and so as to put it out of his power to revoke the trust.

Held further, in the case of another bond, otherwise in a similar position to the above, that no distinction was caused by the fact that it was taken in favour of another person as well as the father as trustees, the other person having been left in ignorance of the existence of the bond which was recorded at the instance of the father alone.

Gilpin v. Martin, May 25, 1869, 7 Macph. 807, 6 S.L.R. 518, *doubted*.

Edmond v. Magistrates of Aberdeen, November 16, 1855, 18 D. 47, 3 Macq. 116, *distinguished*.

Donald Cameron, who was twice married, died on 27th February 1905, survived by two of the three children of his first marriage, viz., Christina Campbell Cameron and Donald John Cameron, and by his widow, to whom he was married in 1888. The other child of the first marriage, Alexander, the elder son, died intestate and unmarried on 1st March 1900. There were no children of the second marriage. By a trust-disposition and settlement which was executed on 19th February 1901 he conveyed to trustees his whole means and estate, heritable and moveable, for the trust purposes therein mentioned, and, *inter alia*, after providing an annuity of £100 to his said wife during her widowhood and granting her the life-

rent use of his household furniture for the same period, he directed his trustees to hold, apply, pay, and convey the residue of his estate equally to and for behoof of his said two surviving children and their respective lawful issue.

Questions having arisen as to certain sums contained in bonds and dispositions in security, a special case was presented to the Court in which the trustees acting under the trust-disposition and settlement were the first parties, the surviving children the second parties, and the widow the third party.

The special case set forth—"The said Donald Cameron at his death was possessed of £3168 of miscellaneous moveable estate, £750 of heritable estate, and £7000 money due under bonds and dispositions in security. In addition there were two sums of £1000 each contained in the two bonds and dispositions in security after mentioned, taken in name of the said Donald Cameron as trustee for behoof of his said daughter. Subsequent to his second marriage the said Donald Cameron on five separate occasions lent money on heritable property and took the bonds and dispositions in security therefor in trust for behoof of certain of his children. Three of these bonds and dispositions in security were repaid to the said Donald Cameron during his life as trustee therein mentioned, and were discharged or assigned by him as such trustee, but the two for £1000 each before mentioned were undischarged and in existence at his death. The circumstances attending the creation of these trusts are as follows:—

"I.—*Bond for £1200 over Subjects in Largs.*

"At Martinmas 1889 the said Donald Cameron lent £1200 to William Whitelaw, restaurateur, Glasgow, on the security of a property forming numbers 21 and 23 Bath Street, Largs, and took a bond and disposition in security therefor. The bond bears that the money was borrowed and received from the said Donald Cameron, and that at his request (testified by his subscription thereto) the said William Whitelaw obliged himself to repay the amount borrowed to 'the said Donald Cameron and John Cameron, wine and spirit merchant, London Road, Glasgow' (his brother), 'and the survivor of them, and the heir of the survivor, as trustees and trustee for behoof of the said Donald Cameron in liferent, and Alexander Cameron, Christina Campbell Cameron, and Donald John Cameron, his children, and the survivors and survivor of them jointly, with the issue *per stirpes* of any of them who may decease in fee, and to the assignees of said trustees or trustee,' and disposed the security subjects to 'the said Donald Cameron and John Cameron, and the survivor and the heir of the survivor as trustees and trustee foresaid.' The bond, which contains a clause consenting to registration for preservation and execution, is dated the 12th, and was recorded by the truster's law agent in the appropriate Register of Sasines in terms of the destination therein on 14th November 1889. The