opinion of Lord Shand that I think it necessary to advert to one or two points only. As to the nature of the defender's business, there can be no doubt that the defender carried on a large wholesale business, and that his daily bread did not depend upon what he made in the shop in question. That I consider to be a most material point. It is stated in the condescendence both that the defender has a wholesale business, and also that he carries on his trade in other parts of the town. The defender also in his own evidence admits that he has shops in different localities, and he is borne out in this by his foreman, from all which it appears that he is a wholesale trader, and has several places of business. The other point upon which I wish to say a few words is the case of *Duff* referred to by your Lordships. I do not think that there is any difference among us as to the principle of law there laid down. Lord Cowan in *Duff's* case says—"Of the general principle that the destruction of the subject for the purpose for which it was let, by accidental fire, or from other fortuitous events, puts an end to a contract of lease, there can be no doubt. . . . It must always be a delicate task to apply this principle to particular cases, and it comes very much to be a question of degree. If, for instance, the fire had only deprived the tenant of the temporary use of a room, I could not have held him entitled to abandon." And Lord Benholme says—"The only nice point is as to the extent of destruction which entitles the tenant to abandon. Now there was here substantial destruction."

The facts in *Duff's* case were very strong, and influenced considerably the result arrived at by the Judges. There were three floors and attics, and the two top floors and the attics were completely destroyed, while the ground floor was also seriously injured and the building rendered completely useless for the tenant's business, while the cost of the repairs amounted to more than a half of the value of the subjects. Now, these facts are in obvious contrast to the circumstances of the present case. Here the tenant does not appear to have been deprived absolutely of the use of his premises for a single day, while it seems that his business could have been carried on, with some inconvenience and discomfort no doubt, but still could have been kept going, while the repairs were being executed.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and found in terms of the conclusions of the summons.

Counsel for Pursuer—Trayner—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defender—Mackintosh—Wallace. Agents—Dove & Lockhart, S.S.C.

Thursday, December 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'LAUGHLAN *v.* COLIN DUNLOP & COMPANY AND ANOTHER.

Reparation — Master and Servant — Dangerous Machinery—Master's Liability for Negligence of Fellow-Servant of Servant Injured.

In an action of damages at the instance of the widow of a workman who had been killed by an accident (happening prior to the passing of the Employers Liability Act 1880), which took place through the alleged defective condition of plant used in the service of the employer, it was proved that the plant in question had been under the charge of a competent person, and that the employer had provided all sufficient material and appliances for making any repairs which might be necessary. *Held* that, assuming the condition of the machinery to be defective, the employer was not liable in damages, in respect that he had discharged all the obligations incumbent on him at common law.

Servant's Implied Contract to Bear the Risks of Service—Employers Liability Act 1880.

Observed that the effect of the Employers Liability Act 1880 is to alter the rule of the common law by which the servant is held content to bear such risks of the service as the carelessness of a fellow-servant, and that result of the case might have been different if the Act had applied.

This was an action of damages in respect of the death of Michael M'Laughlan, the husband of the pursuer Mrs Helen M'Laughlan. The defenders were Colin Dunlop & Co., ironmasters, and the individual partners of that firm, and James Galt, manager of the furnaces of the firm at Quarter, Hamilton. The pursuer averred that the death of her husband was caused by the fact that a clasp and chain used in the works of the defenders Colin Dunlop & Co., and the breaking of the latter of which caused the accident by which her husband was killed, were not of sufficient strength or efficiency for the purposes to which they were applied, or were otherwise defective in construction or material, and she alleged that the defenders, or one or other of them, or those for whom they were responsible, had culpably failed to supply good and sufficient machinery. The defenders denied fault, and averred that the action was a *damnum fatale* for which they were not responsible.

The death of the pursuer's husband occurred prior to the commencement of the Employers Liability Act 1880 (43 and 44 Vict. c. 42), which came into force on 1st January 1881, and which provides (sec. 1)—Where after the commencement of this Act personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer. . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation

and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. Section 2, sub-sec. (1), provides that the workman shall not be entitled to compensation under the Act unless the defects in the ways, works, &c., "arose from or had not been discovered or remedied owing to the negligence of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

The material facts of the case as they appeared from the proof were these—The deceased was admittedly a steady and respectable man, and was quite sober at the time of the accident. The work in which he was engaged was that of charging a furnace at the works of the defenders Colin Dunlop & Co. In order to do this he had first to fill a barrow with the material for firing the furnace, from bings on the ground near the furnace, then to wheel the barrow on to a cage or platform, which was raised by an engine to the height required for emptying the material into the furnace. The duty of the deceased was to enter the cage with the barrow and ascend with it to this required height, and then empty it into the furnace. The cage was raised by means of a wire rope from which it depended. At the bottom of this rope was an iron clasp or hook, to which the cage was attached by a chain. On the 22d January 1880, immediately after the deceased had begun work, and while he was making his first ascent for that "shift," the clasp gave way, and the cage containing him fell to the ground, with the result that he was almost instantaneously killed. On examination of the broken clasp it was discovered that there had been in it where it gave way a small fracture which appeared to be of some standing, and which some of the witnesses described as a "hairbreadth" crack. There was much conflict of opinion among witnesses of skill and experience as to whether this crack ought to have been discovered by the person in charge of the machinery, some witnesses being of opinion that neither by scraping nor rubbing the clasp could it have been seen, while there was a large body of evidence to the effect that it might have been discovered with due care. The defenders led evidence to show that even had the clasp been quite cut through at that point there was strength enough on the other side of it to have held a far greater weight than was ascending on the occasion in question. There was also found in the clasp another crack, about which it was not clear upon the evidence whether it was of old standing or not. The defenders maintained at the proof that the accident arose from sudden jerk or strain which had snapped the clasp, and might have been caused by the barrow not having been properly placed on the cage, with the result that it struck the uprights through which it had to ascend. The engineman who was in charge of the engine, however, deponed that had this been so he would have felt a jerk at the engine, and that he had not done so.

With regard to the liability of the defenders for the condition of the clasp, it was proved that it and the other machinery connected with the engine was in charge of the engineman, a witness named Brown. He had been seventeen years with Colin Dunlop & Co., but had been only eleven shifts in charge of this engine. His work had principally been in the coal pits of the firm, but he had been ten or eleven years engaged as odd man at a hoist there, and had been six months at a hoist similar to that at which the accident happened. He deponed that he had, according to his duty, examined the clasp carefully with the eye once in every twenty-four hours, and that he had also for several days before the accident tapped it with a hammer. No evidence was led to show that Brown was a careful or skilful person, the defenders relying on his experience and the number of years he had been in the employment of the firm. On the other hand there was no evidence led by the pursuer to show that he was incompetent for the work which he was engaged in doing, and no averment to that effect on record. The clasp had been in use for more than seven years at the time of the accident. A new wire rope had been fastened to it by the blacksmith shortly before the accident. It was proved that this would not tend to injure it, and that the blacksmith who had done the work was a careful workman, and that he had discovered no flaw then.

It was proved that the defenders supplied their workmen with all needful materials and machinery, and that if the engineman asked that any repairs should be done they were done at once.

It was also proved that the kind of clasp used at the time of the accident was in common though not universal use in similar works, and that a new and heavier clasp was introduced after the accident. Mr Dunlop, one of the partners of the firm, was a witness, and stated that he took a general supervision of the works. The defender Galt deponed that he had superintendence over the plant, and that he had instructed the engineman to give this piece of machinery, as well as the rest of the machinery in his charge, a close inspection with the eye once in twenty-four hours, but not to scrape off the rust or tap or rub the clasp in order to look for flaws and cracks. He thought tapping would be useless for the purpose, having regard to the position of this clasp and the kind of iron of which it was made.

The Sheriff-Substitute (BIRNIE) pronounced this interlocutor: — "Finds in fact that the deceased Michael M'Laughlan was in the employment of the defenders as a furnace filler at their furnaces at Quarter: Finds that he was thirty-two years of age, and that his wages as a standing filler were about £3, 12s. 7d. per fortnight: Finds that on 22d January 1880 he was killed by a fall of the cage in which he was standing while ascending the lift: Finds that said cage fell by the breaking of the clasp by which it hung: Finds that there was previous to said breakage a crack of from one-sixteenth to one-fourth of an inch in depth in said clasp at the point of breakage: Finds that this crack ought to have been seen by the defenders, or those for whom they are responsible, but that the breakage did not arise from said crack: Finds that the breakage arose from causes which the defenders were unable to foresee: Finds, further, that the furnaces were under the management of Mr Galt, that the clasp was heated and rivetted by the head blacksmith, and that it was the duty of the engineman and of the deceased to examine it: Finds in law that the deceased was not killed through the fault of the defenders: Assoilzies them from the conclusions of the action: Finds them entitled to expenses," &c.

The Sheriff (CLARK) on appeal recalled the interlocutor of the Sheriff-Substitute, found that the death of Michael M'Laughlan was caused through the fault of the defenders, or those for whom they were responsible, and decerned in favour of the pursuer, with expenses, assessing the damages at £150.

"*Note.*—That the pursuer's husband met his death in consequence of the fall of the cage in the defenders' work admits of no doubt. The question is, whether in the circumstances of the case the defenders are liable therefor? Now, the defenders were bound to have supplied proper machinery for the raising and lowering of the cage while it was being used by the pursuer's husband. It appears from the evidence that the proximate cause of the fall of the cage was a fracture of the clasp by which it was attached to the rope worked by the engine. On this clasp there was a crack to the extent of half the depth or thickness of the clasp on one of its sides. It is now proved beyond all doubt that the defenders, or those for whom they are responsible, ought to have noticed this defect before the accident occurred. Whether or not this defect was the actual cause of the fracture of the clasp is the question really involved. If there were no evidence in the case beyond the mere facts themselves, the presumption would be that the crack was the real operative cause. And that is the pursuer's case. Against this it is maintained for the defenders that, notwithstanding the existence of that crack, what remained sound of the clasp had strength sufficient to support the weight of the cage and its contents without excessive strain. I do not think the evidence sufficient to warrant that conclusion. It depends mainly on the opinions of three witnesses for the defence, and they were certainly wrong (as the additional evidence now shows) in maintaining that the crack was of such a nature that it could not have been seen before the accident occurred by the use of ordinary means. Now, if they were wrong on this important point, considerable doubt is thrown on their judgment in other respects. When asked how, if the crack was not the cause of the breakage, the fact is to be accounted for, they suggest that it might have arisen from a sudden jerk suffered by the clasp through the cage having come in contact with the sides of the tower in which it worked, or by a 'kank' in the chain producing a similar jerk. These are mere theories, and there does not seem any reliable evidence in support of them. It is clearly proved that if a sudden jerk of this kind had taken place the man working the engine above must have been conscious of it, and yet he distinctly swears that nothing of the kind occurred to attract his attention, but that the first intimation of the accident was the crash at the bottom. It is also observable that if the cage had come in contact with the sides or any part of the tower, the jerk so caused must have left some mark on the materials with which it came in contact. There is no evidence of this, and it cannot be doubted that if such had been the fact it would have been clearly brought out by the defenders. It is further remarkable that if a thing of this kind had really occurred it would almost certainly have occurred on some occasions at least before. Yet there is no evidence to show that such an occurrence ever took place. In these circumstances it seems to me that in a case of this kind a jury would hold that the defenders have entirely failed to give any reasonable explanation of the cause of the accident other than the existence of the crack, the non-discovery of which, and the continued use of the clasp after such crack is proved to have existed, form a serious fault on the part of the defenders. I may add that the pursuer was willing to have tendered additional evidence, if that were thought necessary, as to the cause of the accident suggested by the defenders being insufficient. I do not think it, however, necessary to involve them in this further expense, as there seemed to me sufficient materials in the proof to fix fault on the defenders on any reasonable construction.

"As to the amount of damages, I have endeavoured to fix these having regard to the age of the pursuer's husband and the amount of his earnings for some time before the accident occurred. It is always difficult to gauge matters of this kind, but it seems to me that £150 is a sufficient and yet not excessive amount to award."

The defenders appealed to the Court of Session.

Argued for them—The evidence showed that there was no fault. Even if there were fault, it was the fault of the engineman, a fellow-servant of the deceased, for whom the defenders were not responsible. The defenders were guilty of no personal negligence—indeed it was proved that the engineman was supplied with all the tackle he needed, and that any repairs he required to be done were done at once. The case fell under the rule of *Wilson* v. *Merry & Cunningham*, May 29, 1868, 6 Macph. (H. of L.) 84, 40 Jur. 486; *Reid* v. *Bartonshill Coal Company*, June 17, 1858, 20 D. (H. of L.) 13. The pursuer had not shown the person in fault to be unfit for the duty to which he was appointed.

Argued for pursuer—This was a case in which the defenders' machinery had entirely broken down while being used for the purpose for which they supplied it, and it lay upon them to explain the breakdown. They had to discharge the *onus* of showing they were not in fault—*M'Aulay* v. *Buist & Co.*, December 9, 1846, 9 D. 245; *Scott* v. *London Dock Company*, 1865, 3 Hurl. & Col. 596; *Fraser* v. *Fraser*, June 6, 1882, 9 R. 896; *Walker* v. *Olsen*, June 15, 1882, 9 R. 946. (2) On the question whether the fault was that of a fellow-servant for whom defenders were not responsible, the case was distinguishable from that of *Wilson* and others cited. In these cases the defenders had recognised their obligation to show that the person whose act had caused the mischief was a fit person for the work to which he had been put. Here the defenders had entirely avoided leading any proof to that effect. The *onus* was on them to do that when the pursuer showed, as had been done, that the accident had been caused by his negligence in not discovering the bad state of the clasp. A pursuer could be expected to show nothing more or better to prove incompetency than the fact that the person had caused the accident, and it then lay on the other party, and was eminently in a master's power, to show that the person was competent—*M'Aulay* v. *Brownlie*, March 9, 1860, 22 D. 975 (Lord Curriehill's opinion). The defenders were at least liable for the negligent system of inspection in their works, which had been proved. (3) In any

event the defender Galt was liable. He was responsible for a thorough examination of the machinery, and for a careful examination into the conduct of those who had charge of any part of it. If he had discharged himself of this liability the accident would not have happened.

At advising—

LORD YOUNG—This is an action of damages by a widow on the ground that her husband while in the employment of the defenders Messrs Dunlop & Co. met with the accident which caused his death, owing to the deficient condition of certain parts of their machinery, for the sufficiency of which she says they are responsible, and she seeks to make liable also the general manager of the works. The accident occurred in January 1880. The Sheriff-Substitute has found that the man was killed by the fall of a cage in which he was standing at the smelting furnaces while he was in the act of being elevated in it to the platform of the furnace; he finds that the cage fell by the breaking of the clasp by which it hung. The ground of action averred on record against both parties is as follows:—"The said clasp or hook, chain or belt, were not of sufficient strength or efficiency for the purposes to which they were applied, or were otherwise defective in construction and material, and through the culpable neglect of the defenders, or one or other of them, or of others for whom they are responsible, in failing to supply good and sufficient gearing and apparatus the death of the said Michael M'Laughlan was occasioned." The clasp which gave way is the clasp to which the chain is attached for winding-up, and so far as Dunlop & Co. are concerned there is no question that they did everything that was incumbent upon them as employers to supply sufficient machinery, abundance of good material, and a sufficient staff of workmen. Had the accident occurred subsequent to the date of the Employers Liability Act, then Dunlop & Co. might have been liable if it occurred as the Sheriff-Principal has found — that is to say, by reason of defect in the condition of the machinery or plant connected with or used in their business. But the accident occurred prior to the passing of the Act, and is not affected by its provisions, and so falls to be determined at common law. And by common law—taking the case of the master—he is certainly bound to take all proper measures and precautions to supply all proper machinery, and to have it properly cared for by competent servants in course of usage. But he does not guarantee it. He is only liable if defect in it is attributable to any fault of his. The question was fully considered and decided here and in the House of Lords in the case of *Wilson* v. *Merry & Cunningham*, from which I shall read a passage from the Lord Chancellor's opinion, which I think must be instructive in regard to what was formerly the law, and to a great extent is so now, except in so far as modified by the Employers Liability Act. After stating the general rule of law from the opinion of Lord Cranworth in the previous case of *Reid* v. *The Bartonshill Coal Company*, he says—"I would only add to this statement of the law that I do not think the liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow-workman, but the case of a fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule itself must stand on higher and broader grounds. As is said by a distinguished jurist—'*Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus*' (Donellus de Jure Civ. i. 9, c. 2, n.). The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is in my opinion bound to his servant to do in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has in my opinion done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master,"—and then he goes on to the particular question of the case before him. Now, undoubtedly there is no allegation on record that Dunlop & Co. in any respect failed to supply proper gearing or a proper service of workmen to look after the condition of it. And their liability being at common law, and not under the statute, it is clear that there is no action against them. The Sheriff-Substitute has found—and accurately so—by the same interlocutor that "the clasp was heated and rivetted by the head blacksmith, and that it was the duty of the engineman and the deceased to examine it." He has found also that there was a flaw in the clasp—that is to say, an examination after the breakage indicated to skilled people that there had been a crack of some depth in the clasp at the point of breakage. According to some of the evidence, there was such a flaw as might have existed without being discovered by ordinary care, but I think it rather appears that if the rust had been rubbed off, and it had been minutely examined, the flaw might have been detected. The Sheriff-Substitute thinks it was strong enough still, and that the breakage is not attributable to the flaw; but as to the detection, he thinks the evidence is, that if sufficiently and carefully examined it might have been detected. Now, the people engaged in the work—the engineman and the deceased, who was in the habit of being raised by the cage and chain—had the duty of examining them. There was a blacksmith's shop, and abundance of materials of every description, and if they had chosen to make an inspection all materials and appliances were there at hand for putting it right. And so with respect to Dunlop & Co. there is not alleged, and there is not in the evidence, any ground of action; and in respect to the manager, it is not according to allegation or evidence that it was the duty of

the manager to examine the clasps. Therefore I agree with the Sheriff-Substitute that it was the duty, not of the general manager, but of the engineman, who was the manager in that particular place. The general manager had a more comprehensive duty. I am therefore of opinion that the case fails also with respect to the general manager, and so I think the Sheriff's judgment should be recalled and decree of absolvitor pronounced.

In conclusion, I should only like to observe that the Employers Liability Act puts the matter on another footing, not on any different view of the legal principle which governed the relation previously, as stated in the passage I read from Lord Cairns' opinion, but on grounds of policy and expediency, viz., whether it is not more fitting that all the risks incident to a more or less dangerous trade, though not attributable to the trader's fault, should be borne by him. Now, by the law, irrespective of the statute, that is the result to which it will always be brought ultimately. He who carries on a trade will always—speaking from what may be called the political economy point of view — be brought in the last resort to bear the risks incidental to it. But the principle of the common law was founded on the terms of the contract between the parties. They were at liberty to regulate the matter of risk as they pleased. They might contract that the servant should take all risks, with right of action against anyone who was directly to blame for his injury, wages of course being in consideration of this arrangement; or wages being less, the master might undertake to guarantee the servant against all risks. It is all a matter of contract and consideration of wages. The principle of the common law was that a contract should be implied where none was expressed. If the parties had not expressed their mind on the subject, it was to be implied, and the implied term was that the servant should take all the risks incidental to the ordinary conduct of the trade, of course with recourse against anyone in fault towards him. But the Act has put this to a certain extent on another footing, and put directly on the master the risks incidental to his trade. But the case being under the common law, must be ruled by the common law. I am therefore for recalling the Sheriff's judgment and assoilzieing both defenders.

Lord Craighill—In this case the pursuer seeks damages from one or other of the defenders for the death of her husband, which was caused by an accident while working at the defenders' furnaces by the breaking of the clasp which attached the cage, in which he was being elevated, to the chain by which it hung. It is said that the flaw in the clasp which caused it to give way was such as could have been discovered by ordinary care. In regard to the existence of the flaw, I agree with the finding of the Sheriff's interlocutor, but I differ from him in finding that fault was thereby chargeable against the defenders. I need not explain the grounds on which I have reached this conclusion. The law applicable to the case is that which prevailed before the passing of the recent Act. The law on that point has been settled since the case of *Wilson* v. *Merry & Cunningham*, and I think that case is applicable here. But the general manager also is brought in, and liability sought to be established against him. It would undoubtedly be the case that if it were shown that he had a duty of inspection in reference to this material he would be liable. With regard to that I confess I have had some doubt whether it might not reasonably have been maintained in the circumstances that he had such a duty. But as my opinion in that matter has not gone beyond a doubt, I do not feel called upon, or indeed entitled, to dissent from the opinion of Lord Young.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I concur in the result arrived at by your Lordships, on the ground that fault has not been made out against either of the defenders, and that being so, and the accident having occurred prior to the passing of the Act, I have no doubt on the legal question. I am gratified to think that this is perhaps the last case which we shall have to consider under that aspect of the law.

The Court sustained the appeal and assoilzied the defenders.

Counsel for Pursuer (Respondent)—Brand—Sym. Agent—Thomas Dowie, S.S.C.

Counsel for Defenders (Appellants)—Trayner—Readman. Agent—Alex. Morison, S.S.C.

Thursday, December 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

LITTLE & CO. *v.* DONALDSON BROTHERS, *et e contra*, AND LITTLE & CO. *v.* HAY & SONS.

Ship — Charter-Party — Freight — Deviation — Breach of Contract—Unforeseen Circumstances —Stress of Weather.

D., of Glasgow, entered into a contract of affreightment with L. & Co., of Glasgow, whereby the latter agreed to carry from Barrow to Glasgow a certain quantity of iron, and that their steamers for the purpose should proceed with all convenient speed to Barrow to load, and that the first of them should be in Glasgow harbour on the 12th or 13th, and the last not later than 14th October, "unforeseen circumstances excepted." One of the steamers provided by L. & Co. to carry out this contract sailed from Glasgow on 11th October for Dublin with a cargo of coals, and was then to go to Barrow for the iron, and thence to Glasgow. She was detained by violent storms between Glasgow and Dublin, and between Barrow and Glasgow, and only reached Barrow on 17th October, and Glasgow on 26th October. In an action by L. & Co. for freight, and a counter action by D. for breach of contract caused by delay—*held* that the question not being one of deviation from a voyage agreed on, but of contract to be at a certain place at a certain time, "unforeseen circumstances ex-