directing the winding-up to proceed under the supervision of the Court.

The petitioners objected to the liquidation proceeding with the respondent Broadfoot as liquidator, on the ground—(1) That being engaged as inspector of poor in a populous district he was unsuitable for the office; and (2) that he had failed when secretary of the company to have registered in the register of mortgages a heritable bond for £2000 which had been granted by the company.

Section 43 of the Companies Act 1862 provides —"Every limited company under this Act shall keep a register of all mortgages and charges specially affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the name of the mortgagees or persons entitled to such charge; if any property of the company is mortgaged or charged without such entry, as aforesaid, being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding £50." It is thereafter provided by the same section that the register of mortgages shall be open to the inspection of the creditors or members at all reasonable times, and provision is made for penalties for refusal of such inspection and for an order on the company to afford it.

It was stated for the respondent Mr Broadfoot —(1) That he was engaged in business as a property agent and accountant in Kilmarnock, and was quite able to undertake the liquidation, being well aquainted with the property; (2) That he was not secretary at the time the bond referred to was granted, and that all that could be alleged against him was that he had not had the bond registered in the mortgage register after he came into office.

At advising—

Lord President—I do not think that any sufficient objection has been stated against the appointment of Mr Broadfoot as liquidator to continue the voluntary liquidation of this company under the supervision of the Court. The only thing which has been urged against him is that he omitted to enter in the register of mortgages the heritable bond for £2000 granted to Miss Finnie's trustees. Now, it is admitted that this bond was granted before Mr Broadfoot became secretary, therefore the duty of so entering it did not, in the first place, fall upon him, and all that can now be said against him is that when he became secretary he neglected to supply this omission. Now, I do not think that in these circumstances Mr Broadfoot would have incurred the penalty provided by the statute for failure to register under this 43d section, and indeed in his case the fault was a very trivial one. In other respects from all that has been stated I think that he is very well qualified for the appointment, as he has acted for three years as secretary of the company.

Lord Deas—No substantial objection to my mind has been stated against the appointment of Mr Broadfoot. From his business as a house-agent, and his acquaintance with the locality, I think he is particularly well suited for the office of liquidator of this company.

Lord Mure—For the various reasons which have been mentioned to us, I think the present secretary is the best man who could be appointed to act as liquidator. He knows all about this property, and also about the affairs of the company from his official connection with it, and I do not think that the mere circumstance of his omission when he became secretary to enter this bond on the register of mortgages should disqualify him from the office of liquidator.

Lord Shand—There can be no doubt of the importance of carefully performing the duty which from some cause or other was omitted here. The utmost care must be taken that the register of securities contains a full and accurate statement of all the transactions of the company, and nothing which we may decide in this case is to be held as diminishing the necessity of keeping up this register with the greatest regularity and care.

Mr Broadfoot's mistake here was in failing to supply what had been omitted by his predecessor, and I do not consider that sufficient to disqualify him from the office of liquidator.

The Court appointed the winding-up resolved on by the company to be continued subject to the supervision of the Court.

Counsel for Petitioner—Wallace. Agents—Bruce & Kerr, W.S.

Counsel for Respondents—Lorimer. Agents—Duncan & Black, W.S.

Tuesday, July 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROONEY *v.* J. & A. ALLAN.

Master and Servant—Reparation—Culpa—*Defective Machinery—Contributory Negligence.*

In an action by a labourer against his employers to recover damages for injury sustained by the breaking of a chain and the consequent fall of a heavy weight upon him, it was proved that the cause of the accident was the defective condition of the chain and that the pursuer had been at the time working immediately below the weight which fell, instead of working, as he might have done, in a place in which he would have been protected from the result of the accident which happened. *Held* that as he was entitled to rely upon the chain being of the proper strength there was no contributory negligence in his working immediately below the weight which fell, and that he was therefore not thereby disentitled to recover damages for the injury he had received.

Charles Rooney, quay labourer, Govan, raised this action against J. & A. Allan, shipowners, for £195, as damages for bodily injuries sustained through the fault of the defenders

while working in their employment at the unloading of grain from their steamship "Manitoban." The facts of the case as disclosed by the proof are fully given in the findings of the Sheriff-Substitute (ERSKINE MURRAY) as follow:—"Finds (1) that the steamship 'Manitoban,' belonging to defenders J. & A. Allan, was being unloaded at Plantation Quay on 3d March 1882; (2) that the lowest hold of the 'Manitoban' was filled with grain in bulk; (3) that a gang of twenty-two labourers, of whom pursuer Charles Rooney was one, were occupied there filling the grain into sacks, which were lifted to the deck by a wire rope in connection with a winch at the top, each lift consisting of five half-full bags, a weight of about 5 cwts; (4) that there may have been (though this is not quite clear) a slight list on the ship towards the quay, but that, if so, it was not of sufficient extent to be an appreciable cause of the accident that ensued; (5) that the lower hold at the bottom of the ship, below the orlop deck, is divided below the hatchways unequally by the tunnel containing the propeller shaft; (6) that as the grain was gradually removed, the tunnel became uncovered more at one end than the other, as the labourers were working at the end next the engine bulkhead, and had got to the floor at that point with a sloping face of grain up aft; (7) that while at that stage of the unloading it was quite possible for the men loading the bags to work under cover of the orlop deck, it seems that they were working in such a hurry that if they were to have the bags filled in time for each lift it was difficult to take that precaution; (8) that the cause of their working in such a hurry was that they were working by spells, one-half only working while the other half were resting; (9) that that system of working by spells was known to but not sanctioned by their employers; (10) that at that stage of the unloading, when a lift of bags was started from the bottom at one side of the tunnel, whenever it reached the top of the tunnel it naturally swung away to the other side; (11) that therefore, to prevent the lift catching under the orlop deck, it was necessary for the winchman to stop lifting for a minute when the lift had reached the top of the tunnel, to allow it time to steady itself, after which it could be pulled straight up; (12) that as the winchman could not see the lift, a labourer was stationed at the hatch-mouth to act as signalman, whose duty it was to tell the winchman when the bags had reached the top of the tunnel, that he might stop the winch; (13) that to lengthen the wire rope, a chain had been added at the lower end, to which the bags were hooked on; (14) that the evidence, taken altogether, shows that this chain as a whole was sufficient and suitable for the purpose for which it was used; (15) that as regards the particular link that broke, while the evidence is very contradictory, it is clear that it broke at the welding, and, on the whole, that the appearance of the break was not satisfactory, tending to show that the link in question must have been abnormally weak, though able to resist any usual and ordinary strain; (16) that it is not the practice to test such small chains at Lloyds; (17) that defenders' storeman, M'Tavish, was in the habit of examining all such chains when they came in, and had examined the chain in question when it came in last; (18) that on the day in question a lift of five bags was being raised from the opposite side of the tunnel from that on which pursuer was working; but when it reached the top of the tunnel, the signalman on deck neglected to warn the winchman till it had swung under the orlop deck, and had in its ascent jammed under the orlop deck; (19) that the signal not being thus given till it was too late, a very severe strain was thrown upon the chain, which broke, and the lift fell down into the hold from a height of 7 or 8 feet, and struck pursuer, who was working straight below instead of being under shelter of the orlop deck, on the left shoulder, the left side of his neck, the left side of his chest, and the left side of his body; (20) that he was severely injured, his muscles having been much bruised, and he suffered severe pain and received a severe nervous shock; (21) that he was sent to the infirmary, was two weeks in bed, able to go about in six weeks, and six months may be allowed for his entire recovery; (22) that his wages at the time of the accident were about 25s. a week."

The defenders denied fault on their part, and maintained that the snapping of the chain was due to the strain put upon it by the contact of the bags with the 'tween deck, which was caused by the negligence of a fellow-workman of the pursuer, viz., the man on the platform immediately above the hatchway, whose duty it was to steady the bags and tackle before they were drawn up, and who neglected to do so. They also maintained that the accident was caused by the fault of the pursuer in not having, as it was his duty to do, taken shelter under the orlop deck when the bags were ascending.

They pleaded—(1) that the accident was caused by the fault of a fellow-workman of the pursuer's; (2) contributory negligence on the part of the pursuer.

The Sheriff-Substitute found, in addition to the findings of fact quoted *supra*, "that the main cause of the accident was the neglect of a collaborateur of pursuer's, the signalman, to warn the winchman in time that the lift was at the top of the tunnel, in consequence of which it caught under the orlop deck; that, on the whole, another cause of the accident must be held to have been the abnormal, though not very excessive, weakness of the link that broke through a latent defect in the welding; that another direct cause of the accident was the contributory negligence of pursuer in working in the open space under the hatch when the lift was going up, when he could have been, if he chose, in shelter under the orlop deck; that therefore in law the defenders are not responsible in damages to pursuer for the result of the accident: Therefore assoilzies defenders from the craving of the petition," &c.

"*Note.*—It is so clear that the main cause of the accident was the neglect of the signalman, and that the signalman was a collaborateur of defenders, in such a subordinate position that the 'Employers Liability Act' no way affects the legal position of parties, that nothing more need be said on this head.

"But the question of defenders' liability in respect of the condition of the link that broke is a much more difficult matter. The evidence is exceedingly contradictory. The Sheriff-Substitute might have, on the whole, been unable to find that any liability in respect thereof attached to defenders, had it not been for the fact that a

proper examination of the link has been rendered impossible by the act of defenders' superintendent stevedore, who flung it into the Clyde. This very indiscreet act shifts the onus of proving its condition upon the defenders, whose chief official thus excluded the possibility of a scientific examination. The Sheriff-Substitute therefore, on this footing, is obliged to hold that on this point the result of the evidence is adverse to the defenders.

"But the fact that the pursuer was guilty of contributory negligence is patent. There was plenty room at the time for him to have been in shelter under the orlop deck, and if he chose, whether from individual recklessness, or from the result of a system adopted by him and the other labourers and not sanctioned by their employers, to give themselves the solace of a rest and a pipe between spells of work—to work needlessly in a position of danger—he is responsible for the consequences. The pursuer also tried to prove that defenders were in fault because, there being a slight list, they had no man at the orlop deck to guide off the bags, but the evidence shows that the list, if any, was very slight, and the diagrams show that it would not have brought the bags under the orlop deck. In such circumstances, no such man at the orlop deck was necessary."

On appeal the Sheriff (Clark) adhered, for the reasons assigned by the Sheriff-Substitute, and under reference to the following note.

"*Note.*—According to the view I take of this case, it is not necessary to inquire what was the actual strength of the chain in question, for the real cause of the accident was the fault of the signalman, who so acted as to cause a strain to the chain which it could not and was never intended to bear. It is perfectly clear that no chain of the ordinary kind would have resisted the strain thrown upon it by the bags being swung under the deck. It may indeed be said that a chain cable of sufficent strength to hold an anchor would not have given way under the strain in question; but apart from there being no obligation on the part of the defenders to provide a chain of this kind, and the obvious inconvenience which would arise from the use of such a chain, it seems clear that if such a chain had been used, it would, instead of breaking, have torn up the deck under which the bags had swung, and in such circumstances would have produced equally serious results to those engaged below. The real cause therefore of the accident seems to have been the fault of the signalman. But if that be so, I see no ground, either at common law or under the recent Act, to subject the defenders in liability. The signalman was not their superintendent, but was a co-workman engaged with the others who was acting as signalman only for the time, and was in the habit of taking his turn with the rest as occasion required. Such a person is not a superintendent under the Act, nor is he a person placed in authority whom the other workmen were bound to obey."

The pursuer appealed to the Court of Session, and argued—The *onus* of proving the sufficiency of his tackle was on the master, which the defenders here had failed to discharge—*Walker* v. *Olsen*, June 15, 1882, 9 R. 946. If the master himself be in fault, he cannot excuse himself by saying that another servant was in fault also—*Fraser* v. *Fraser*, June 6, 1882, 9 R. 896; Ward on Master and Servant, 781.

The defenders replied—It was only when tackle gave way in the ordinary course of work that the presumption was against the employer. Here there was more than that.—*Walker* v. *Olsen*, *supra*.

At advising—

Lord Young—This is an action against a company of shipowners by a quay-labourer for damages for injuries sustained in consequence of a load of grain having fallen upon him from a link in the chain by which it was being raised giving way while he was working in the hold of a ship belonging to them. He says the chain was defective, and that the defenders are responsible for that defect, and therefore for the injuries sustained by him. The Sheriff-Substitute, before whom the proof was taken, finds on this point of the sufficiency of the chain, "that the evidence taken altogether shows that this chain as a whole was sufficient and suitable for the purpose for which it was used, that as regards the particular link which broke, while the evidence is very contradictory it is clear that it broke at the welding, and on the whole that the appearance of the break was not satisfactory, tending to show that the link in question must have been abnormally weak though able to resist any usual or ordinary strain." There is a good deal that is confused and contradictory in this language, but it is to the effect that the chain was defective at the place where it broke, and in his note he explains that he "might have on the whole been unable to find the defenders liable for the sufficiency of the link had it not been for the fact that a proper examination of the link has been rendered impossible by the act of defenders' superintendent stevedore, who flung it into the Clyde. This very indiscreet act shifts the *onus* of proving its condition upon the defenders, whose chief official thus excluded the possibility of a scientific examination. The Sheriff-Substitute therefore, on this footing, is obliged to hold that on this point the result of the evidence is adverse to the defenders." The only thing that is clear hereis that he is satisfied that the link was defective at the place where it broke, and that it broke in consequence of that defect. But then he is of opinion that the pursuer is barred from insisting in his action because he voluntarily and rashly exposed himself to danger. On that point he expresses himself thus:—"But the fact that the pursuer was guilty of contributory negligence is patent. There was plenty room at the time for him to have been in shelter under the orlop deck, and if he chose, whether from individual recklessness or from the result of a system adopted by him and the other labourers, and not sanctioned by their employers, to give themselves the solace of a rest and a pipe between spells of work—to work needlessly in a position of danger—he is responsible for the consequences."

Now, it is undoubtedly true that a workman will not recover for injuries sustained by him in consequence of any fault on the part of his employer if the danger arising from that fault was patent—was seen—so that he was guilty of negligence and rashness in encountering it—and if this case is within that rule, the Sheriff-Substitute is right. But in the first place it is necessary to determine whether the defect in the link (for the link is just the chain) is a defect for which the

defenders are responsible. It is my opinion that it is. I think it was for the supervising servant to see that the chains when given out were in proper condition, that is, in a condition in which they could be used with safety, and therefore that the employer was responsible for a chain unfit to be given out because in a condition unsafe for use; and that leads directly to liability here, unless the pursuer be barred by contributory negligence on his own part. The Sheriff-Substitute's view is that he was guilty of contributory negligence in not taking shelter under the orlop deck when the load was ascending. I am not of opinion that this was contributory negligence. It is true that he might have taken shelter, and would not have sustained the injuries which he did though the chain had broken; but I do not think that failing to take refuge under the orlop deck was rashly encountering a seen danger. If the bags were being raised by a chain sufficient to bear them there was no seen danger. It cannot be predicated of a labourer that he is acting culpably and rashly so as to be precluded from recovering damages for injury, if an accident happen in consequence of the defective state of his master's machinery or tackle which he has had no opportunity of examining.

But then the Sheriff takes a different view as to the cause of breakage. He says:—"According to the view I take of this case, it is not necessary to inquire what was the actual strength of the chain in question, for the real cause of the accident was the fault of the signalman, who so acted as to cause a strain to the chain which it could not and was never intended to bear. It is perfectly clear that no chain of the ordinary kind would have resisted the strain thrown upon it by the bags being swung under the deck."

Now, it does appear to be according to the facts that the bags were caught by the deck, and that the chain broke from the strain when so caught; and if it had been the case that it broke when so held, and that no chain, however strong, or so reasonably strong as to be good enough for the purpose, would have stood the strain, I think the Sheriff's observation would have been sound; but I put it to counsel during the hearing of the case whether there was any evidence that this strain was such as no chain would have resisted, and the answer I got from both sides of the bar was that there was no such evidence. It is, then, not clear that no chain of the ordinary kind for such purposes would not have resisted the strain. A weak chain may well give way when a stoppage like this takes place suddenly, while a stronger one would disengage itself, just as a strong fishing line will free a hook which is caught where a finer one will break. In short, there is no evidence that a proper chain would necessarily have given way; and the chain therefore being defective, I am disposed to attribute the giving way to a strain which it is not proved would have broken any chain whatever.

On the whole matter, then, I am of opinion that the views of the Sheriff and Sheriff-Substitute are not applicable to the circumstances of the case, but that liability is established against the employers by reason of the defective condition of the chain, and that a case of contributory negligence on the part of the pursuer, within the meaning of that doctrine when it operates as a bar to his claim, has not been made out.

Lords Rutherfurd Clark and M'Laren concurred.

The Lord Justice-Clerk and Lord Craighill were absent.

The Court pronounced this interlocutor:—

"The Lords . . . recal the interlocutors of the Sheriff and Sheriff-Substitute appealed against: Find in fact that the pursuer when engaged in the employment of the defenders in unloading the steamship 'Manitoban' was injured by the fall of a sack of grain caused by the breaking of a chain supplied by the defenders for discharging the ship: Find that the chain was defective and unsafe: Find that its defective and unsafe condition is attributable to the negligence of the defenders, and that the pursuer was not guilty of contributory negligence: Find in law that the defenders are responsible for the said injuries, and are liable to the pursuer in damages, and assess the same at £65," &c.

Counsel for Pursuer (Appellant) — Guthrie Smith—Rhind. Agent—W. R. Patrick, Solicitor.

Counsel for Defenders (Respondent)—Mackintosh—Ure. Agent—D. Mackenzie, W.S.

Tuesday, July 17.

SECOND DIVISION.

BOWMAN OTHERWISE GRAHAM, PETITIONER.

(See *Graham* v. *Graham*, December 15, 1881, *ante*, vol xix. p. 207, 9 R. 327.)

Husband and Wife—Wife Divorced on the Ground of Adultery—Access to Children—Jurisdiction.

Where a husband has divorced his wife on the ground of her adultery, the Court will not, unless in exceptional cases, interfere with his discretion in the matter of allowing or refusing her access to the children of the marriage.

Mrs Bowman or Graham was on 31st January 1880 divorced on the ground of adultery. On 20th May 1880 she raised an action of reduction of the decree of divorce founded on averments of collusion and fraud, as well as on a denial of her guilt. After the proof the Lord Ordinary (Adam) assoilzied Mr Graham from the conclusions of the action, and this interlocutor was affirmed by the Second Division on 15th December 1881. She now brought this petition, in which she set forth that she had applied to Mr Graham to allow her access to the children of the marriage at different periods of the year according to any reasonable arrangement that might be made, but that all access had been refused, and prayed the Court to find her entitled to reasonable access to the children of the marriage at such times and in such manner as to the Court might seem meet.

Answers were lodged by her husband, who submitted that having regard to what was proved in the action of reduction as to her conduct, and in the interests of the children themselves, she ought not to have the access to her children as craved.