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.

The petitioner referred to the case of *Symington* v. *Symington*, March 18, 1875, 2 R. (H. of L.) 41.

The respondent argued—In England the rule founded on good reason and on statute was to the effect that where a marriage is dissolved on the ground of the wife's adultery, the Court will not grant her the custody of or access to the children of the marriage—*Bent* v. *Bent and Footman*, July 11, 1861, 30 Matr. Cases, 175. As far as the law of Scotland was concerned there were no instances recorded in which the Court had followed a different rule. Any cases which could be cited were cases where the husband had been in fault.

At advising—

LORD JUSTICE-CLERK—No authority or precedent has been cited to us in support of this application, and I am very clearly of opinion that unless in very exceptional cases access by the wife to her children where the husband has divorced her on the ground of adultery must be left in his own hands. I am of opinion that we are not entitled to interfere with him.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court refused the petition.

Counsel for Petitioner — M'Kechnie — Maclennan. Agents—T. & W. A. M'Laren, W.S.

Counsel for Respondent — Trayner — A. J. Young. Agents—Duncan & Black, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Lord Lee, Ordinary.

NEILSON *v.* THE MOSSEND IRON COMPANY AND OTHERS.

Process—Title to Sue—Trust—Quorum of Trustees.

In an action at the instance of a widow, as one of the executors under her deceased husband's trust-settlement, with concurrence of several of the beneficiaries, against a company in which her husband had been a partner, and against the other executors, to have it declared, *inter alia*, that the executors were entitled to take advantage of the company's provisions of the contract of copartnery, and become partners in place of the deceased, and that by a resolution of a quorum of the trustees, and intimation following thereon, they had become partners—the Court *allowed* a proof before answer, reserving the question of the pursuer's title to sue.

The following narrative of the facts giving rise to this action is from the opinion of the Lord Ordinary:—"The late William Neilson was a partner of the Mossend Iron Company. He died on 24th May 1882. At that date the other partners were the defenders Walter Neilson, Hugh Neilson, James Neilson, and Hugh Neilson junior. The last named partner was admitted in 1875. Prior to that date the partnership had been carried on under a written contract of 1867, the stipulated duration of which expired at May 31st 1873. Subsequently to 1875 it is alleged that the partnership was continued under that contract so far as applicable, or otherwise was carried on under a draft new contract adjusted in 1876, but never executed. The stipulated duration of this contract expired on 31st May 1882.

"By the terms of either contract it appears to have been agreed that on the death of any partner his executors should be entitled to become partners until the final expiry of the contract upon giving a certain notice in writing within two months after his decease, and if they failed to give such notice that they should 'forfeit their right to become partners.' If they declined to become partners, and elected to have the deceased's share paid out, it was provided that they should be paid out according to the 'immediately preceding balance.'

"The deceased William Neilson, by his trust-disposition and settlement, appointed as his trustees and executors (1) his wife, the leading pursuer of this action; (2) his brother Hugh, one of his partners; (3) his son James, another partner; (4) his son-in-law James Thomson; and (5) James M'Creath, mining engineer, Glasgow, and the acceptors and survivors of them, 'the major number of them accepting and surviving and resident in the United Kingdom from time to time being a quorum.' He provided, however, that in all matters in regard to which the interests of any of his trustees as an individual should be in conflict with the interest of any beneficiary, 'and in transactions with partnerships or companies in which they are partners or shareholders,' the vote of such trustee should not be counted, but that the adverse interest of such trustee should not otherwise affect his power to act."

This action was raised by Mrs Neilson, with consent of her children (except Hugh Neilson, a partner of the company, and Mrs Thomson), for declarator that at the date of her husband's death he and his partners in the Mossend Co. were carrying on business under the contract of copartnery of 1867, or otherwise the draft contract of 1875, and in either event for declarator that the pursuer and James Thomson and James M'Creath (as the only trustees qualified to act in question with the Mossend Co.) were entitled under either of these deeds to become partners of the company by intimating their intention in writing to that effect within two months of Mr Neilson's death, and that such notice had been given on 21st July 1882 by authority of the pursuer and Mr M'Creath, a majority of trustees entitled to act, and that in consequence thereof the pursuer and the other trustees and executors became as such partners in the company, and had continued to be so since that date; or otherwise, the action concluded for declarator that the copartnery came to an end with Mr Neilson's death, and should be wound up. There were also conclusions for accounting to the pursuer and other trustees by the partners of the company.

The Mossend Co. pleaded, *inter alia*, no title to sue.

The Lord Ordinary (LEE) before answer allowed a proof of their statements on record to the pursuers and the defenders the Mossend Co.

"*Opinion.*—[*After narrative given above*]—"The present action is founded on a resolution