tract was to take delivery of the sheep, and pay for them the price which the arbiters might fix, that he was not in a position to do so, and that he is in breach of contract accordingly. Now, it is true that where the term of payment has not come there may be a breach of contract by the person whose obligation is to be performed coming into a position in which he cannot perform it. This may be the case, even although the contracting party's inability may arise and be acted upon by the other party a considerable time before the term for performing the contract arrives. But it is a totally different case where the creditor, on the ground that the debtor is *vergens ad inopiam*, proceeds to act so that it must be rendered impossible for the debtor to fulfil the obligation. I may say in passing that I think it makes no difference that the pursuer sold the sheep by warrant of the Sheriff. It would have been the same if he had sold them at his own hand. His case is that he is entitled to secure himself from loss by the method of taking the sheep and selling them to someone else than his landlord, and that as he has done so, the defender, who was *vergens ad inopiam*, has broken his contract. Now, I cannot see that he has done so. He may have been *vergens ad inopiam*. But if the pursuer chose to act on the footing that because he saw the defender to be *vergens ad inopiam* he was entitled to secure himself as he best could by selling the sheep, I cannot adopt the proposition that he may also claim damages from the defender for breach of contract which he the pursuer has himself made it impossible for the defender to fulfil.

I think the pursuer's proposition is one for which no authority rests in our law. Mr Bell in his Principles, sec. 46, says that a creditor whose debtor is *vergens ad inopiam* may take steps to protect himself, but he says nothing to the effect that he may also claim compensation for the breach of contract. I observe, too, that in the latest edition of that book the passage I alluded to stands without any authority being cited from later decisions with regard to it which at all gives colour to such an idea.

I am of opinion that the judgment of the Lord Ordinary is right and should be affirmed.

LORD YOUNG—I am of the same opinion. The pursuer was entitled to protect himself by withholding delivery of the sheep stock. I think he may be grateful that he has been able to save himself—if indeed he has done so—from loss greater than he would have otherwise incurred. But I think he is not also entitled to damages.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court adhered.

Counsel for the Reclaimer—Lord Advocate — Rhind — P. J. Blair. Agent — William Officer, S.S.C.

Counsel for the Respondent — Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Saturday, November 30.

SECOND DIVISION.

GAVIN *v.* ROGERS & COMPANY.

Reparation—Master and Servant—Onus of Proving Cause of Accident.

A labourer employed in ballasting a ship was injured by the fall of tackling for hoisting the ballast on board, which belonged to his employers and was supplied by them. It was proved that the weight hoisted at the time was about 3 cwt., whereas the breaking strain of the tackling was 10,000 pounds, and that the same tackling had been used for discharging the ship's cargo, and for putting some 350 tons of ballast on board some days before. In the interval the ship had been in the dry-dock. The cause of the tackling breaking was not proved, but from the state of the iron after the accident it was suggested for the employers that while the ship was in the dry-dock, and unknown to them, the tackling had met with a fall which had altered its structure and weakened its bearing power.

Held that it lay with the workman to establish fault on the part of his employers, or of those for whom they were responsible, and that this he had failed to do.

Diss. Lord Lee, who thought the case ruled by those of *Fraser*, 9 R. 896, and *Walker*, 9 R. 946, and was of opinion that the employers were responsible for an accident which happened through a defect in tackling supplied by them, and not shown to have been undiscoverable upon ordinary examination.

James Gavin, labourer, 87 Overgate, Dundee, was upon the morning of 17th March 1888 one of a squad of men engaged in ballasting a ship lying in the Victoria Dock, Dundee. The ballast was hoisted on board by means of a block and tackle, gin, or pulley, the wheel of which was supported by a frame attached to a ring by means of an iron pin round which it could revolve as a swivel. This swivel-pin formed one piece with the ring. As the first bucket of ballast, containing about two and a half cwt., was being hoisted, and when it was only a foot or two from the ground the swivel-pin broke close to the ring, and the wheel fell from a height of about forty feet, and struck the said James Gavin on the head, rendering him insensible. He had only begun to work at the job for the first time when the accident happened. The injuries he sustained confined him to the infirmary for fourteen days, and incapacitated him for some time for regular employment. He accordingly brought an action in the Sheriff Court at Dundee against his employers Messrs W. T. Rogers & Company, stevedores, East Dock Street, Dundee, and W. T. Rogers, the sole partner of the firm, for reparation—damages £50.

The pursuer averred — "Said gin or

pulley was old, much worn, and of insufficient strength to bear the strain put upon it in the ordinary course of work, and should not have been used. The defenders supply their men with gins and all necessary working plant, and this accident was therefore caused through their carelessness and negligence in thus supplying a gin which through long-continued use or otherwise was unsound and defective, and incapable of bearing the strain to be put upon it."

The pursuer pleaded—"(1) The pursuer having been injured in manner libelled through the carelessness and recklessness of the defenders in employing a defective gin as condescended on, he is entitled to compensation for said injuries."

The defenders denied "that the gin or pulley was old or worn or of insufficient strength. Admitted that the defender William T. Rogers provided the gin and working plant, but that the said sub-contractor John Narey went to the defender William T. Rogers' yard and selected the gin and plant for himself, erected the gin, and put in 350 tons ballast with it previous to the accident happening, and it was therefore through no defect in the gin that the accident happened."

The defenders pleaded—"(1) The injury to the pursuer not having been caused by the fault of defenders, or the fault of those for whom they are responsible, the defenders are entitled to absolvitor with costs."

A proof was allowed, from which it appeared that the gin was in good condition when originally given out to the squad; that its breaking strain was 10,000 lbs., and that it had accordingly given way with a weight greatly within its bearing capacity; that it had been used for discharging over 1000 tons of the cargo, and for putting some 350 tons of ballast into the same ship a few days before, and that the ballasting had been suspended owing to the ship having gone into the dry-dock.

John Masson, stevedore, deponed—"As Mr Rogers' foreman I repeatedly warned Narey and the other sub-contractors that they must satisfy themselves as to the tackle and gear being sound. I took no superintendence of the putting in of the ballast, the sub-contractor looked after that. After being about three days in the dry dock with 300 or 350 tons of ballast on board, the 'County of Roxburgh' was taken out, and the night before the accident I met Narey, or one of his squad—I am not sure which—at the Custom House, and told him that the vessel was coming out of the dry-dock that evening or next morning, and to be ready to resume his ballasting operations. Mr Rogers keeps his pulleys in very good order, and so far as I am aware the pulley that gave way was the best one we had."

James Graham, engineer, deponed—"That ring presents a crystalline appearance, but more so on one side than the other, the appearance of the latter being partly fibrous . . . If a man in taking down the pulley had let it fall on any hard substance that would tend to produce the crystalline appearance on one side. (Q) That is to say, that if the gin when it was being taken down had been let fall upon any hard substance it would have the effect of breaking the bar to the extent where it shows a crystalline appearance, and you infer that it would be hanging by the part which shows the fibrous appearance?—(A) Yes."

The Sheriff-Substitute (CAMPBELL SMITH) on 16th March 1889 pronounced the following interlocutor:—"Finds that on or about 17th March 1888 the pursuer, when working along with a squad doing piece-work at ballasting for and on the employment of the defenders at the harbour of Dundee, was struck on the head by a falling iron pulley and severely injured: Finds that said pulley was the property of the defenders, and that the presumption of law is that the breaking of the swivel of said pulley was due to the negligence or fault of the defenders, and that the evidence led does not overcome this presumption of law: Therefore finds that the defenders are liable to make reparation for the loss, injury, and damage sustained by pursuer, assesses the damages at £35, and decerns against defenders therefor," &c.

The defenders appealed to the Sheriff (COMRIE THOMSON), who sustained the appeal, recalled the interlocutor appealed from, and asssoilzied the defenders, but gave no reasons for his judgment.

The pursuer appealed to the Second Division of the Court of Session, and argued—(1) *At common law*—This pulley was admittedly supplied by the defenders. Employers were bound to supply proper machinery, and to keep it in proper condition—*Murphy* v. *Phillips*, 35 L.J. (N.S.) 477. A pulley which gave way the first time the pursuer touched it must have been defective, and if the accident was caused by defect in the machinery it was not necessary for the pursuer to show the precise nature of that defect. It lay upon the defenders to show that the defect was latent, and could not have been discovered by examination—Lord Justice-Clerk (Moncreiff) in *Macfarlane* v. *Thompson*, December 6, 1884, 12 R. 232. This case was ruled by the cases of *Fraser* v. *Fraser*, June 6, 1882, 9 R. 896, and *Walker* v. *Olsen*, June 15, 1882, 9 R. 946. (2) Under the Employers Liability Act 1880, sec. 2, sub-sec. 1, the master was responsible for the negligence of persons entrusted by him with the duty of seeing that the ways, works, machinery, and plant were in proper condition. Here Masson, the defenders' foreman, should have seen that the gin was in proper condition, and for his negligence the defenders were liable.

Argued for defenders—This was an important case as regarded the *onus probandi*. It was not enough for the pursuer to say that the pulley broke, that he was injured, and that therefore the defenders were liable in damages. Masters did not warrant the sufficiency of their machinery. It lay with the pursuer to show wherein blame was attributable to the defenders.

It lay with him to aver and to prove that proper examination had not been made; and further, that examination would have revealed the defective state of the pulley. This had not been done. On the contrary, the defenders had proved, although the *onus* did not lie upon them, that the pulley was capable of bearing a far greater strain, and was in good condition when it left their possession. It had probably met with a fall since, which had caused lesion by altering the structure of the iron, as spoken to by Graham. Of this fall they knew and could know nothing, neither could their foreman, Masson, who was likewise in no way to blame — *Sneddon* v. *Addie*, June 16, 1849, 11 D. 1159; *Weems* v. *Mathieson*, 4 Macq. 215 (*per* Lord Chancellor Campbell and Lord Wensleydale).

At advising—

LORD JUSTICE-CLERK—In this case the defender is a stevedore, whose business consists in loading and unloading ships. His practice is to let all the work to labourers by contract at so much the ton. The pursuer and certain other labourers were engaged in unloading a vessel which the defender had contracted to unload. One of them was to collect the sum payable to them, and divide it among the whole of them. I think there is no case of independent contract, and that the pursuer and his fellow-workmen are to be taken as employed by the defender as labourers to do his work.

The defender has certain plant which is used by the labourers so engaged. It is his duty to have it suitable and safe for its purpose. On the occasion when this accident happened the labourers were using a pulley belonging to the defender, or rather a wheel with a rope running over it, fastened in a frame on which there is a hook, by which the wheel is hooked over the space above the hold. At the time the defender gave out this pulley for use it appears to have been in good order, and it had been used to raise considerable weights for some time—weights which were largely in excess of that which was on it when the accident happened. After the work had gone on for some time, in which it also bore larger weights, work was stopped for two days, during which the vessel had to be placed in dry-dock. On her being brought back, however, from the dry-dock work was resumed, and with a view to resuming it one of the men removed the pulley from the place at which it had been before the vessel was taken to the dry-dock, and was placed in position for the work at another hatch.

Now, this wheel, the pin of which gave way, and which, as I have said, was in good order when it was issued to the men, had, according to the uncontradicted evidence in the case, a breaking strain of 10,000 lbs. It had been doing heavy work for some time, and it is not suggested that it would not have been fit to carry the 2½ cwt. which was hanging upon it at time of the accident if some injury had not happened to it. It is conceded by the pursuer that it must have been let fall by someone or been thrown down on some hard substance, so that the pin had been rendered crystalline instead of tough in its composition, and had so become liable to give way.

The pin of the swivel broke with a weight of 2½ cwt.—a small weight considering the strain it was constructed to bear. The iron on being examined proved to be in part crystalline, and though a part of it had remained tough, that part was not extensive enough to bear the weight when the crystalised part gave way. It had got into this state after being given out to the workmen, and this, as already said, had in all probability been caused by the carelessness of one of them in letting it fall. The question is whether the defender was to blame for not having it inspected, and so discovering the injury caused by the fall. Now, there are degrees in these matters. If a pulley is to be used for such a purpose as that of lowering or raising men at a mineral pit, or some other purpose which involves great risk in the ordinary use to which the pulley may be expected to be put, a very serious duty is laid upon the person who supplies it to see that it is thoroughly inspected, and at frequent intervals. But here we have no such case. The work in itself was not work in which the lives of those employed were directly exposed to danger if the pulley broke. The pulley that was used had been regularly used for its purposes, and so long as those using it kept within the margin of the weight it was fitted to carry, according to what might have been expected, there was no reason to suppose that any serious danger could exist. Even if it broke, the risk of injury was infinitely less than in those cases where the lives and limbs of men are directly risked in hoists or pit-cages.

I think therefore that neither as to the giving out for use nor as to the inspection of this wheel was there any fault. It was good when given out, and the work to which it was to be applied did not call for inspection while the work was going on. If inspection were called for during such work, I do not see where the duty is to stop. Once given out in a good state a pulley may nevertheless be destroyed at any time by the carelessness of any workman or by a mere accident. Every pulley would, if the pursuer's argument be right, require to be examined every day by persons of skill. If this were to be done ordinary work could not be carried on with regularity. But I go further. I think, on the evidence, that the effects of this fall which this pulley must have received would not have been visible on inspection. In many instances it can be discovered by an experienced man whether iron has become crystalline—as for example, in the case of the axle of a railway carriage. In such a case we are told that tapping with a hammer will indicate to a man of experience whether the iron has become crystalline. But I do not feel able without evidence on the subject—and we have no evidence at all upon it—to say that the same would be the case with such a piece of

iron as the pin of a swivel of small area, and loosely inserted in the base of a hook of a pulley. If that be so, I think it was for the pursuer to prove it. I think that the burden of proving that there was a fault which might on reasonable examination have been discovered rests upon the pursuer. It is for him to prove the fault, and the fault in that view would be failure to inspect or insufficient inspection. In the ordinary case the proof that a latent defect existed in the article which has given way is brought forward by the defender. But I am not prepared to lay it down as a principle of law that there is no *onus* on the pursuer, where a defect in plant is the cause of injury, to prove that if there had been a proper examination the defect would have been discovered. If the fault alleged is that a defect, not in itself the result of negligence of the defender, was not discovered because he was negligent in inspection, I think the pursuer does not prove fault unless he proves that inspection would have disclosed the fault. The pursuer is not entitled to say, "Now, I have proved that there was a defect, and it lies on the defender to show that he could not have discovered it." On the contrary, the pursuer must himself prove both the defect, and that such an examination as might have been expected from an owner exercising ordinary care could have discovered it. Unless he proves this he has not in such a case proved fault, which is what he undertakes to proves by his issue.

In this case I am satisfied that the defect was one for the existence of which, and for the non-discovery of which, the defender was in the circumstances not to blame, and I am therefore of opinion that we should affirm the interlocutor of the Sheriff.

LORD YOUNG—I am of the same opinion, and very much on the same grounds. This case presents an opportunity for an interesting argument upon employers' liability at common law and under the statute, but the whole facts of the case are in a nutshell.

A pulley used by and belonging to the defenders when used by their workmen broke, and one of the workmen was hurt. If a pulley supplied by a person to his servant broke and hurt that servant, I do not suppose it would be contended that that alone would establish fault on the master's part. That the pulley broke may be a material fact in establishing the master's liability to make reparation for the accident, but that fact alone would not be sufficient. There is or is not liability at common law according as the defect or failure to discover the defect—so that such a pulley as in this case may not be used—is attributable to the master's fault or not. If it is attributable to his fault, he is liable, and if not, not.

There is no difference at common law between commercial and domestic cases. We are under the same obligations to our servants that employers are under to their workmen. If a man's carriage is in a defective condition which is attributable to his fault, or if the failure to discover its defective condition is attributable to his fault, he will be liable for an accident to his friend inside or to his footman outside although his own head may be broken at the same time. He will not be liable to his friend or to his servant if he was not in fault in not discovering the defective condition of the carriage. Suppose the carriage had met with a blow unknown to him which had caused the lesion, it would be out of the question to make the master liable. Now, what about the pulley? In its own nature the pulley was a proper pulley for such a purpose as it was here used for. It was habitually used for that purpose; therefore the nature of the pulley is not in question. How, then, is the master to be made responsible for its defective condition? It must be because of some failure by himself, or by some other appointed by him, to make sufficiently frequent periodical inspection. But that would need to be averred and proved, namely, that a master doing his duty properly, and not negligently, would have had such articles periodically tested with such frequency as to prevent the likelihood of such accidents, and that that was not done here. No other ground for liability occurs to me. But how often should the inspection have been made—once a week or once a month? We have no averment and no evidence with regard to this matter. Suppose it ought to have been tested once a week the inspection would not necessarily have prevented the flaw, not unless the examination day had opportunely come round after the fall of a day or two before.

The likelihood is the internal lesion was not observable from the outside, and was caused by a fall. We do not know in whose hands it was when it fell, but whoever it was he said nothing about it. How then was the master to blame? I speak of the common law, and I repeat the observation I made in a previous case, that it is rather a serious matter to impute blame where life has been lost or serious injuries sustained. I am here unable to impute blame to the master at common law.

What change does the statute make? It enacts that the employer shall be liable if an accident happens "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"—that is, any defect due to the negligence of the employer—but the employer was liable at common law for his own negligence in this respect, so that here no change is made by the statute. The only change made by the statute is that the employer is now liable for an accident which happens "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him," whereas under the old common law the master, although responsible for his own negligence, was not responsible for that of an employee employed by him, who was regarded—hardly the Legislature thought—as a fellow-servant of the injured man. The Legislature thought the doctrine of common employment had been carried too far, and therefore made

the master liable for another's negligence if that other was discharging a master-like duty.

That leads me to the question, Was the failure to detect the lesion here attributable to the negligence of an employee employed by the master? Now, what I said about the negligence of the master applies to the employee. If the superintendent had been informed of the fall he might have been to blame for not having ascertained that the pulley had been injured by the fall. He may have been an excellent superintendent, but he was not informed, and I can find no evidence entitling me to impute fault to either the master or his superintendent. I accordingly think the action falls both at common law and under the statute.

LORD RUTHERFURD CLARK concurred.

LORD LEE—The view which I take of this case and of the law applicable to it would lead me to a different result from that at which your Lordships have arrived. I think it unfortunate that the Sheriff has not explained the grounds upon which he recalled the interlocutor of the Sheriff-Substitute, whose findings, though the form of them is doubtless unusual, proceed upon views which are familiar to the law.

I confess that I am unable to reconcile the judgment which is proposed with the case of *Walker* v. *Olsen*, 9 R. 946, and with that of *Fraser* v. *Fraser*, 9 R. 896, both of which cases were, I think, well decided. The facts, so far as ascertained, are clear, and I think there is no difference with regard to them. The accident occurred from the breaking of a piece of iron, which originally was fitted to bear a strain of 10,000 lbs. It broke under the strain of three or four cwt. The precise weight is not of much consequence. The probability on the evidence is, that like the rope in *Fraser's* case, this pulley had been lying about for a few days before it was put in use, that during that time it had received injury, and had become defective without the defect having been discovered. But it was part of the tackling belonging to the defenders, in their custody, and provided by them for the use of the men they employed. The defenders supplied it for the pursuer's use without having examined it, and there is no proof whatever that a reasonable and ordinary examination would not have discovered the defect. In answer to a question of my own, put during the discussion, it was admitted that there is no evidence in the case to the effect that the defect could not have been discovered by examination.

It is said that there was no obligation on the defender to examine the pulley, as it had borne heavy weights before. I think that is not conclusive at all. I think that a man of ordinary prudence would have made provision for the inspection of a pulley, on the sufficiency of which the safety of the men whom he employed to do his work depended. There is no evidence that he had any superintendent. He was his own superintendent. The question is, whether in the absence of any explanation or evidence that the defect was so latent that ordinary inspection would not have discovered it, the defenders are not responsible? The answer depends largely on the question of *onus probandi*, and my opinion is that the defence of latent defect is one which the defender must prove. That is according to well-established practice, and there is nothing to the contrary in the decision in *Weems* v. *Mathieson*, although there is an expression in the Lord Chancellor's opinion which might seem to put the *onus* of proving the negative upon the pursuer.

I agree that the *onus* is always on the pursuer to establish fault as his ground of action, but the *onus* may be shifted by proof of circumstances throwing a burden of explanation upon the defenders. The question, then, comes to be, whether that *onus* has been discharged. In this case I cannot find that this *onus* has been discharged, and my opinion therefore is that the defenders are responsible for the consequences of the accident, which happened through a defect in the tackling supplied by them, and not shown to have been undiscoverable upon ordinary examination.

The Court pronounced the following interlocutor:—

"The Lords . . . Find in fact that on or about 17th March 1888 the pursuer, when working along with a squad doing piece-work at ballasting for and on the employment of the defenders at the harbour of Dundee, was struck on the head by a falling iron pulley, and injured: Find that said pulley was the property of the defenders: Find that the pursuer has failed to prove that the breaking of the swivel of said pulley was due to the negligence or fault of the defenders: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against." . . .

Counsel for the Pursuer—Fleming. Agent—Robert D. Ker, W.S.

Counsel for the Defenders — Graham Murray—Macdonald. Agents—Macpherson & Mackay, W.S.

Saturday, November 30.

SECOND DIVISION.

[Sheriff of Forfarshire.

FLOOD *v.* THE CALEDONIAN RAILWAY COMPANY.

Reparation—Railway—Obvious Danger—Negligence—Verdict Against Evidence—New Trial.

A railway company by agreement with a neighbouring proprietor emptied from their waggons opposite his property quantities of waste-soil. The line was blocked for traffic while the waggons occupied it for this purpose. The first duty of the company's servants was to