obviously an appropriate question for the jury. But in the speech which we have just heard we have had no analysis of the evidence. On the contrary, the case has been presented as if *res ipsa loquitur* upon the bare fact that there was a drop of 8½ feet from the road to the shore.

In some places there might be particular facts as to local situation which would have aided the jury in arriving at an adverse conclusion, but they had here no case of that kind to deal with, and I think we should not be justified in granting a rule unless we came to the conclusion as matter of common sense that where there was an unprotected drop of 8½ (or for that matter a drop or declivity of any substantial depth) from a road to a shore, there was an obligation upon the local authority to fence the road. To say this would be, in my opinion, to reach a preposterous and unreasonable conclusion, and one which would incidentally lead to the bankruptcy of all the Highland County Councils.

The Court refused the motion.

Counsel for Pursuers—Comrie Thomson—Guy. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Defenders—Asher, Q.C.—A. S. D. Thomson. Agent—John Latta, S.S.C.

Thursday, June 2.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROYAL BURGH OF RENFREW *v.* MURDOCH.

Burgh—Common Good—Harbour—Loan for Benefit of Harbour—Obligation to Repay Loan—Assignation of Harbour Rates in Security—Burgh Harbours (Scotland) Act 1853 (16 *and* 17 *Vict. c.* 93), *secs.* 17, 18, 19, *and Sched. B.*

A burgh which had adopted the Burgh Harbours (Scotland) Act 1853, borrowed a sum of money for the extension and improvement of its harbour, and granted a bond and disposition in security, in the form prescribed by Schedule B of the Act, which contained an obligation to repay the money lent, and assigned the harbour rates in security. The harbour rates proved insufficient to repay the loan.

Held that under the bond and assignation the burgh was bound to repay the money out of the common good.

The Burgh Harbours (Scotland) Act 1853 (16 and 17 Vict. c. 93), upon the preamble that "Whereas the harbour and other dues leviable at the harbours belonging to many of the royal burghs in Scotland have . . . become inadequate for the maintenance of such harbours, and it is expedient that further provision should be made for the extension, improvement, and regulation of such harbours and for the increase of the rates and duties leviable thereat, Be it enacted" . . . Sec. 17. "From and after the adoption of this Act in any burgh, the whole future revenue of the harbour shall be applied and expended by the town council in the maintenance, improvement, and extension of the harbour, and in no way and for no other purpose whatever." . . . Sec. 18. (With rubric "Town Council may borrow money on the security of the rates")—"It shall be lawful for the town council from time to time to borrow for the purposes of extending or improving the harbour, such sum or sums as they shall deem expedient . . . and to assign the rates by this Act authorised to be levied in security of the repayment of the sum so borrowed . . . provided always that intimation shall be given by the town council of their intention to borrow money . . . by the insertion of a notice to that effect, and stating the sum proposed to be borrowed . . . once in a newspaper published in the burgh . . . provided also that the resolution to borrow any sum of money . . . shall be approved of by at least two-thirds of the members of the council who are present" at the meeting, authorising the loan, "and that the whole sums so borrowed . . . shall be applied and expended in the extension and improvement of the harbour, and in no other way and for no other purpose whatsoever." Sec. 19. "The bonds and assignations to be granted for securing the repayment of the sums to be borrowed or advanced as aforesaid shall be in the form of Schedule B hereunto annexed, and shall be signed by the provost or acting chief magistrate of the burgh, and by the treasurer and town clerk at an open meeting of the town council, and two of the councillors present shall sign as witnesses thereto, and such bonds and assignations shall be recorded in the minute-book of the town council . . . and in case of competition, such bonds and assignations shall have priority and preference, according to the dates of such registration, and until repayment of the sums so borrowed or advanced, and interest thereon, such sums, and the bonds and assignations granted therefor respectively, shall form a lien on the rates by this Act authorised to be levied preferable to all other debts and claims against the burgh, and the creditors in right of such sums shall be entitled to receive the same from the town council or their officers out of the first and readiest of such rates."

The Act 3 Geo. IV. c. 91 (Sir William Rae's Act 1822) by sec. 11 enacts "That it shall not be lawful for the magistrates or the town council of any burgh to contract any debt, grant any obligation, make any agreement, or enter into any engagement, which shall have the effect of binding them or their successors in office, unless an act of council shall have been previously made in that behalf; and any such contract, obligation, agreement, or engagement, made or entered into without such act of council, shall be void and null as against the common good of the burgh." . . .

Upon 2nd August 1886 the Town Council of Renfrew, after due intimation by advertisement, unanimously resolved to borrow the sum of £1300 from Mr James Murdoch, 2 Lennox Place, Whiteinch, Partick, in terms of the Burgh Harbours (Scotland) Act 1853, for the extension and improvement of the harbour of Renfrew, and minuted their resolution.

Thereafter a bond and disposition in security was executed upon the same day in the following terms:—"The Royal Burgh of Renfrew has this day borrowed the sum of £1300 from James Murdoch, clerk, residing at No. 2 Lennox Place, Whiteinch, Partick, for the extension and improvement of the harbour of the said burgh, which sum we hereby bind the said burgh to pay to the said James Murdoch, his heirs, executors, and assignees, at the term of Whitsunday 1891, within the Council Chambers of the said burgh, with interest thereof at the rate of £4, 10s. per centum per annum from the date hereof, payable half-yearly at the terms of Whitsunday and Martinmas in each year until paid: . . . And we hereby assign to the said James Murdoch and his foresaids the rates authorised to be levied at the said harbour by the Act 16th and 17th Victoria, chap. 93rd, entitled an Act to enable burghs in Scotland to maintain and improve their harbours, in security of the repayment of the foresaid sums, principal and interest, which are herby declared a lien on the said rates: And we consent to the registration hereof for preservation and execution: In witness whereof."

This bond and disposition in security was in the form prescribed by Schedule B of the Act. No interest was paid upon this bond after Whitsunday 1887, and upon 23rd May 1891 the creditor charged the burgh of Renfrew to repay the loan with interest.

A note of suspension of the charge presented by the Magistrates of Renfrew having been passed, a record was made up in which the complainers averred—"The charger's loan in 1886 is the last in date and in ranking of the said loans upon the harbour rates. He was certiorated before and at the time of the loan that his security covered only the harbour rates, and in no way affected the common good. . . . The burgh borrows at the rate of 4 per cent. on the common good. The security over the harbour rates, as in the charger's bond, not being so good, the harbour bonds carry 4½ per cent. The burgh in session 1878-79 promoted unsuccessfully a private bill for power to give the security of the common good in addition to the harbour rates in loans to the extent of £20,000, for the extension and improvement of the harbour."

The complainers pleaded—"(1) The charger's security being limited to the harbour rates, and there being no funds to meet his charge, the complainers are entitled to suspension. (2) The charge being given wrongfully for the purpose of attaching the common good or other funds of the burgh, in and to which the charger has no right, the same should be suspended."

The respondent pleaded—"(2) In respect of the personal obligation of the said royal burgh contained in the bond upon which the charge now sought to be suspended proceeds, the charge, being orderly proceeded, ought not to be suspended, and, in any event, can only be suspended upon caution or consignation of the sum due under the bond. (3) The complainers being bound by the terms of the bond founded upon to repay the sum therein contained, and the term of payment being come and bygone, the charge ought not to be suspended."

Upon 17th February 1892 the Lord Ordinary (STORMONTH DARLING) repelled the reasons of suspension, found the warrants and charge orderly proceeded, and decerned.

"*Opinion.*—The royal burgh of Renfrew is proprietor of the harbour of Renfrew, and in 1875 it adopted the Burgh Harbours (Scotland) Act 1853. The purpose of that Act was to make further provision for the extension, improvement, and regulation of harbours belonging to royal burghs in Scotland, and for the increase of rates and duties leviable thereat. Accordingly it enabled town councils to adopt the Act, and thereupon to prepare a schedule of rates not exceeding the maximum rates appended to the Act, and, on the schedule being approved by the Board of Trade, to exact the rates therein specified. It further provided (sec. 17) that from and after the adoption of the Act in any burgh the whole future revenue of the harbour should be applied and expended by the town council in the maintenance, improvement, and extension of the harbour, and in no other way, and for no other purpose whatsoever. It also, by section 18, enabled the town council, from time to time, to borrow for the purpose of extending or improving the harbour such sums as they might deem expedient, and to assign the rates in security of the repayment of the sums so borrowed. By section 19 it provided a form of bond and assignation, and declared that, until repayment of the sums so borrowed, and interest thereon, such sums, and the bonds and assignations granted therefor, should form a lien on the rates preferable to all other debts and claims against the burgh, and that the creditors in right of such sums should be entitled to receive the same from the town council and their officers out of the first and readiest of the rates.

"The burgh of Renfrew seems to have exercised its borrowing power under the Act to the extent of £6500. The respondent's bond for £1300 was the last of those issued, and was granted in 1886, bearing interest at 4½ per cent. It is in the statutory form, is signed and attested by the proper persons, and contains these words 'which sum we hereby bind the said burgh to pay to the said James Murdoch, his heirs, executors, and assignees, at the term of Whitsunday 1891, within the Council Chambers of the said burgh.'

"The question is, does this obligation extend to the whole burgh property (except, of course, such as is specially appropriated to other purposes), or is it limited to the harbour rates?

"In support of the latter view, the complainers are not able to point to any express words of limitation in the statute, but they appeal to its general scope and tenor, and especially to the dedication of the whole future revenue of the harbour to harbour purposes, and the provision that the lenders shall be entitled to get their money out of the first and readiest of the rates.

"In order to test this argument, it is necessary to consider what was the state of the law as regards burghs having a grant of harbour before the passing of the Act. The harbour and its dues formed a part of the common good. The right to levy dues had its counterpart in the obligation to maintain and improve the harbour, but the dues could not be increased without statutory authority, and the burgh could not be compelled to expend its general funds for harbour purposes. If, however, it chose to do so, the debt so incurred was, I apprehend, an ordinary debt of the burgh, and was recoverable out of the common good, provided the proceedings were taken in compliance with Sir William Rae's Act (3 Geo. IV., cap. 91), sec. 11.

"In that state of matters the Act was passed, on the preamble that the dues leviable at many of the burgh harbours in Scotland had, by reason of the change in the value of money and other causes, become inadequate for the maintenance of such harbours. The contemplation of the statute was, not that harbours were a source of revenue to burghs, but that they were either a burden if properly maintained, or if not, that they had fallen into a condition of disrepair. The leading purpose therefore was to improve the harbours, and as a means to that end to raise the rates. It would have been rather surprising if the Act had not taken care to provide that the increased rates should be entirely devoted to harbour purposes. But that seems to me to afford no ground for holding that if a burgh chose to adopt the Act (which it was not bound to do), and chose to borrow money (which it was not bound to do), the common good should be relieved of all responsibility for the money so borrowed. Presumably before the Act was passed the common good derived no benefit from the existence of the harbour. Assuredly after the adoption of the Act it could derive none. But the general prosperity of the burgh might gain largely by the harbour being put into a satisfactory state, and it might be a perfectly prudent act of administration in the true interests of the community to pledge the common good for such a purpose. That was the view of municipal policy which led to the enactment of section 7 of the Public Works Loan Act of 1882, and that was the view which the burgh of Renfrew itself took when it promoted unsuccessfully in session 1878-79 the private bill mentioned in the condescendence. I think the burgh was wrongly advised in supposing such a bill to be necessary, but the mere fact of its introduction is enough to show that in the estimation of the municipal authorities the common good might well be burdened with liability for harbour loans, though it could derive no direct pecuniary benefit from harbour expenditure.

"Neither do I think that the provisions in the statute for assigning the rates in security of harbour loans necessarily or even naturally imply that no other fund is available for repayment. Where a harbour authority has no property except the works and the rates which they produce (as in the case of the *Elgin and Lossiemouth Harbour Company*, 6 R. 987, and the *Greenock Harbour Trustees*, 15 R. 343), the fund for repayment and the subject of security may be one and the same. But in such cases the document granted to the lender is simply an 'assignment,' not as here 'a bond and assignation.' The case is very different where the harbour belongs to a body like a burgh having other funds of its own. The natural meaning of binding a burgh to repay money is that the existing town council and their successors in office are to make forthcoming the whole available property of the burgh, and there is nothing inconsistent with that in assigning a particular portion of the property of the burgh as a security to the lender. I think it would require either express words, or (to use Lord Eldon's classical phrase) 'implication plain,' to limit the effect of general words of obligation. Admittedly the statute contains no such express words, and the implication seems to me to be all the other way.

"I assent to the complainers' argument that the respondent's bond derives its whole efficacy from the statute, and that apart from the statute it would not be in a form to bind the burgh or to affect the common good. But the bond is in the form prescribed by the statute, and the whole question is as to the effect of a bond so conceived. In the solution of that question it is of no moment to say that it is not in the form prescribed by the earlier Act of 3 Geo. IV. c. 91.

"I am therefore of opinion that the charge was orderly proceeded, and that the note of suspension must be refused, with expenses."

The complainers reclaimed, and argued—They had not intended to pledge, nor had they in fact pledged, the credit of the burgh. In borrowing as they had done, they had acted as Harbour Trustees dealing with a special fund—the harbour rates—quite separate from the common good. The bond was not in the form employed when the credit of the common good was pledged, nor had a formal Act of Council been passed as required by Sir William Rae's Act. The bond was in the form prescribed by the Act of 1853, which throughout its provisions contemplated harbour rates, and harbour rates alone. Had these rates yielded a surplus, the common good could not have been bene-

fitted. The import of the personal obligation was merely to make the harbour rates forthcoming if extant.

Argued for the respondent—The question was simply whether a royal burgh possessed of ample funds, which had borrowed money upon a personal obligation to repay, was to be relieved of that obligation because the additional security of the harbour rates had failed, and because the purpose of the loan was to benefit the harbour. The argument of the complainers, if given effect to, would render the clause prescribed by statute, which contained a personal obligation, an empty form. In cases where only the harbour rates were assigned in security, no personal obligation was granted. The loan had been made by virtue of the 18th section of the 1853 Act, whose requirements had been complied with. It was unnecessary to attend to the requirements of Sir William Rae's Act, although these had in fact been practically complied with—*cf. Leslie* v. *Magistrates of Dundee*, December 2, 1840, 3 D. 164.

At advising—

LORD PRESIDENT—The bond out of which this dispute has arisen was granted by the burgh of Renfrew in terms of the Burgh Harbours Act of 1853. That bond is printed, and it is acknowledged to be in conformity with the schedule prescribed in the Act of 1853. It, like the schedule, consists of two operative clauses, and two only. One is—"We"—being the Magistrates—"hereby bind the said burgh to pay to the said James Murdoch" the sum borrowed, and so on; and the second clause is—"We hereby assign to the said James Murdoch the rates authorised to be levied at the said harbour" under the statute named.

Now, it cannot be disputed that, occurring anywhere else, the plain legal effect of the words—"We hereby bind the said burgh"—these words being used by the Magistrates, the proper custodiers of the burgh estate—is to bind the whole burgh estate.

But then it is said that occurring as these words do in this statutory form, they must be held to have some meaning different from and short of their proper and natural legal import. I am decidedly against that contention. I assent to the reasoning of the Lord Ordinary. His Lordship has first considered how the matter stood before the Act of 1853, and then what effect the Act of 1853 has upon a bond so conceived, or rather I should say upon words so conceived. There is no doubt that prior to the Act of 1853—and I take leave to say since the Act of 1853 also—a bond granted in the terms I have read would unquestionably have affected the last shilling of the burgh's property, the only condition of that being, what really does not weaken the general force of the statement, that the burgh complied with the requisite formalities which entitle it to affect the common estate, including among others the provision of the Act of Sir William Rae.

When the Act of 1853 was passed it no doubt provided for certain rates being levied on the harbour, and the rates being applied in a particular way, and for publication being made of the accounts of the harbour, other persons than burgesses being interested in seeing that the recipts of the harbour were properly applied, and the disbursements made in accordance with the general interests which are attended to by this Act of 1853. But the Act of 1853, when it comes to deal with the subject of borrowing money, recognises this separate fund arising from the dues, and it authorises the magistrates when they borrow money to assign those rates in security of the loans. That is given effect to in what I have called the second clause of the statutory form—the right which is to be granted when money is borrowed. There is an assignment of the rates. But then the statute says you are not merely to assign the rates, you are to bind the burgh in payment of the money.

Now, the contention of the reclaimer is that those words are to receive no effect whatever—that is to say, they say that the legal effect of this instrument, composed as it is of two parts—one a personal obligation and the other an assignment—is to be just the same as if it consisted of but one of them—that is to say, an assignment and no personal obligation.

The Legislature is familiar with appropriate forms of giving a creditor that amount of right over his debtor, because in numerous Scottish and English Harbour Acts there are provisions for the document which is given to the creditor containing simply an acknowledgment that his money has been received, and an assignment of the rates. That is the sort of case which occurred with reference to the Elgin and Lossiemouth harbour, which is mentioned by the Lord Ordinary here. There the style was:—"We," the magistrates, "in consideration of the sum of advanced to us by , do hereby sell, assign, and make over to the said aforesaid the harbour and other works and rates," &c.

Therefore if that thing is to be done, and a limited right to be conferred upon the creditor, then the Legislature does not bring in absurdly inappropriate words of obligation upon the burgh, but simply confines itself to what is the latter part of his bond.

Now, it appears to me that we should be treating *pro non scripto* the words which the Act of Parliament has ordered shall be put into this bond if we were to give effect to the reclaimers' contention. It appears to me, it being admitted that the legal result of those words used elsewhere is to bind the common good, that no other legal effect is intended by those words when they occur in this statutory form.

I have only to add as regards Sir William Rae's Act,—and this is quite a separate matter—that the provisions of Sir William Rae's Act have been complied with in the present instance. It may be that the Act of 1853, by prescribing certain formalities which are to be gone through, covers the same ground as Sir William Rae's Act, and

supersedes those provisions in Sir William Rae's Act; on the other hand, it may be that in prescribing those forms, which may still hold, the Legislature did not intend to abrogate or affect the provisions in Sir William Rae's Act. Whichever alternative is taken, I do not think it is of the least importance here, because Sir William Rae's Act has been complied with: There has been an Act of Council on the behalf of Mr James Murdoch in this form. Therefore I do not think the question arises. It would seem to be difficult to comply with the Act of 1853 without complying with the Act of 1822; but upon that I do not pronounce, because there seems to me abundant and clear ground for decision apart from that altogether.

LORD ADAM—The 18th section of the Burghs Harbour Act empowers councils, for the purpose of extending and improving harbours, to borrow money, provided certain intimation was given and certain procedure gone through, and the 19th section provides the form in the schedule appended thereto which may be granted for the money the magistrates are authorised to borrow, and it is not disputed that the various formalities or requisites which the Town Council had to go through as specified by the Act have been fulfilled. It is not disputed that the bond which has been granted to the respondent for the money borrowed from him is exactly in terms of the schedule appended to the Act, and which the Act authorises should be granted for the sum so borrowed. That being so, it appears to me that all we have to do is to apply our minds to the construction of this bond and disposition in security as we would in the construction of any other bond and disposition in security granted for borrowed money, and which the granters of the bond were lawfully entitled to borrow. It appears to me as plain as words can be that the royal burgh of Renfrew bound and obliged themselves to repay at Whitsunday 1891 the sum which they borrowed from this gentleman. It is not disputed that this is a bond good in form and well executed, and the effect of the obligation is to make the common good liable for this loan. And all that is said against putting the ordinary construction on it is that besides the authority to borrow and the obligation to pay, the Magistrates are to give a preferable security over certain rates, and we are asked to say that where security is given the security is to control the words of the bond, and that the creditor in the bond has no other right or no other fund to look to than these rates so given to him in security. It would require a great deal of argument to persuade me that that is the sound construction of this bond. I think it is not the sound construction. There is here an obligation, validly entered into by the Magistrates of the burgh of Renfrew to repay this sum, and the assignation of the rates is simply in security of that repayment.

LORD M'LAREN—The royal burgh of Renfrew is a municipal corporation, constituted, I suppose, by royal charter, as its name implies. I take it to be quite settled in the law of Scotland that every municipal corporation by going through proper forms may come under personal obligations to creditors, and that it is not necessary that the creditor should prove value as a condition of enforcing that obligation.

Now, when the Legislature authorised muncipal corporations not only to pledge the harbour rates, but also to use obligatory language binding the burgh in express terms for payment of the debt, I can give no other construction to such authority but that it meant the obligation to receive all the effect which an obligation by corporations should have according to the law of Scotland. Such an obligation would certainly not render the corporators liable to personal diligence, but it would be the foundation of diligence against the estate of the corporation, and it is in order that it may receive such effect, I presume, that this charge has been given. I agree with the Lord Ordinary that no grounds have been shown for suspending the charge, and I agree that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR—I am of the same opinion. I think if the Act of Parliament had done nothing more than would appear from the rubric to section 18, and authorised the Town Council to borrow money on the security of the rates, that there might have been a great deal to be said for the argument that that did not imply any authority to charge a loan upon any other fund except the rates, but, on the contrary, withheld by implication any such authority, and that therefore if the obligation upon any other fund were imposed in execution of the power given by the Act, it must be supported by some prior and wider powers, and not by the powers given by the Act itself. But then when one passes from the rubric to read the statute itself, one finds, in the first place, there is a general power given to the burgh to borrow, and then in the 19th section the burgh is not only authorised but required to grant a bond for the sums so borrowed in a certain form, and when you come to the form and find that the obligation which they are required by the statute to give is an obligation not merely affecting the rates, but affecting the burgh itself, then it appears to me that the question is at an end. I agree with your Lordship that the Magistrates being required by Act of Parliament to bind the burgh, that obligation must receive all the effect which any other obligation duly undertaken on behalf of the burgh will receive according to the law of Scotland.

It is said that its effect must be limited because the word "burgh" as used in this Act of Parliament means merely the corporation *qua* harbour trustees, and therefore the obligation imposed upon the burgh by the Act is an obligation not upon the common good or upon the magistrates in their general capacity, but upon the harbour trustees. But, in the first place, we

are not construing an Act of Parliament; we are construing a bond which the Act of Parliament required to be executed; and in the second place, the words are not to apply to harbour trustees in the bond and to the burgh in the Act. They are to receive their ordinary signification.

I only add that the respondent's application depends for its efficacy entirely on the Act of Parliament of 1853. I think it is most probable that apart from that Act it might have been supported by Sir William Rae's Act, but I think it is satisfactory to find that the Act of 1853 is perfectly sufficient to support the application.

The Court adhered.

Counsel for the Complainers and Reclaimers — Vary Campbell — Greenlees. Agents—Kirk Mackie & Elliot, S.S.C.

Counsel for the Respondent—H. Johnston—G. W. Burnet. Agents—Carmichael & Miller, W.S.

Friday, June 3.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

MILNE *v.* TOWNSEND.

Reparation—Latent Defect in Machine—Duty of Inspector — Onus — Res ipsa loquitur.

In an action of damages where an accident had occurred through the lower strap of a crane snapping owing to a latent defect, it was proved that two years before, the upper strap had snapped from a similar defect; that the defender, the owner of the crane, had not then discarded the lower strap, but had sent the crane to be overhauled by a competent engineer, who had examined and retained the lower strap; that since then the defender's foreman had continued to inspect the crane in the ordinary way, and that sufficient time had not elapsed to necessitate such special inspection as could alone have revealed the defect.

Held that no fault had been established against the defender, who fell to be assoilzied.

Observations upon the *onus* of proof in cases of latent defect, and upon the application of the maxim *res ipsa loquitur* to such cases.

Alexander Milne, carter, 10 Carmelite Street, Aberdeen, brought an action of damages for £500 in the Sheriff Court at Aberdeen against W. C. Townsend, granite and marble merchant, 38 Portland Street, Aberdeen, for the loss of his son, who had been mortally injured on 21st April 1891 by the fall of a crane while in the defender's premises, and had died the following day.

He averred—"The cause of the accident was the snapping or giving way of an iron bar which fastened one of the crane stays to the ground, and the defect could have easily been discovered upon a fit and careful examination of the crane by the defender, and it was the duty of the defender to examine this iron bar so minutely as to enable him to see a crack which was there, and so to prevent the mischief. . . . *Separatim* — If it was not the duty of the defender in ordinary circumstances, it became his duty so to minutely examine the said iron bar after he knew the crane was defective. It broke down on four occasions, and two men were injured by it. When repairing the defects on these occasions it was the duty of the defender to have had the crane made complete in every way, and to have seen that it was put in a fit condition to work, as such a state of things called for the exercise of greater vigilance than ordinary on the part of the defender."

The defender pleaded—"(1) The accident having occurred through a latent defect in the machinery belonging to the defender, the defender is not liable in any reparation to the pursuer."

A proof was allowed, from which it appeared that the defender's crane was erected in 1887; that the sole plate upon which the uprights stood gave way, that the crane did not come down, and that the defect was rectified; that in June 1889 the top strap gave way, and that the crane came down and injured one of the workmen, and that immediately thereafter the defender instructed Mr Sangster, from whom the crane had been got, to put the crane into thorough working order. Shortly before the accident in question, the jib-rope gave way, and the jib came down, but that was not due to any deficiency in the crane. The accident in question was caused by the lower iron strap breaking.

Mr Sangster deponed—"I went over the crane in June 1889, and examined the strap. I examined the lower strap as well as all the other parts of the crane. I satisfied myself at that time that there was no defect in the lower strap. The same lower strap was used in the reconstruction of the crane. I was quite satisfied with the lower strap. . . . I have examined the strap since the breakage. There was a defect in the left hand side of the strap at the lowest hole prior to the accident, but the lower surface adhered after the upper part was fractured. . . . From an examination of the fracture I could not say that it was discoverable. Wood covered the upper surface of the strap, and part of the bolt covered the lower surface of the strap, and I don't think that the crack could be seen by examination. There was no other way to discover a defect of this sort except by heating. I don't think scraping would have made the crack visible, unless there had been some weight upon the crane so as to open the crack. After what I had done to the crane in 1889, I don't think an employer would be looking for a crack in April 1891. We often find in a bar of even the best iron that part of it is fibrous and part crystalline. You can only discover that in breaking it cold. I see that the