Counsel for the Pursuers and Respondents—Comrie Thomson—Sym. Agents—Auld & Macdonald, W.S.

Counsel for the Defender and Appellant — Asher — Maclennan. Agent — Andrew Newlands, S.S.C.

Friday, December 11.

SECOND DIVISION.

[Lord Low, Ordinary.

CAMPBELL *v.* A. & D. MORRISON.

Reparation—Master and Servant—Insufficient Precaution for Safety of Workman—Defective Gangway—Relevancy.

K. & Co., the contractors for a steamship, sub-contracted for the hull with S. & Co., who employed A. & D. M. to dry-dock the vessel. A. & D. M. fitted up for S. & Co.'s use a gangway, from which a workman of K. & Co. fell, and was injured. He sued A. & D. M. for damages, alleging that the gangway was defective and dangerous, but he did not allege that it was other or less sufficient than the defenders had contracted to supply, or that they were bound to maintain the gangway.

The Court *dismissed* the action as irrelevant, holding that the obligation of the defenders was to satisfy S. & Co., that the fair inference from the pursuer's averments was that they had done so, and that they were under no obligation to the pursuer.

Reparation—Master and Servant—Damages—Joint Contributor—Discharge of Liability—Personal Bar.

K. & Co., contractors, sub-contracted with S. & Co., who again employed A. & D. M. The latter fitted up for S. & Co.'s use a gangway, from which a workman of K. & Co. fell and was injured. An action for damages at his instance against these three firms having been dismissed for want of jurisdiction, the pursuer took a sum of money from S. & Co., which his agent acknowledged "as in full of expenses incurred by my client and myself, as his agent, in connection with his alleged claim for damages, and in consideration of the said payment the said S. & Co., but they only, are discharged of all said alleged claims." In consideration of a sum paid by K. & Co. the pursuer discharged them "of and from all claims of reparation and for payment of legal and other expenses now or hereafter competent to me" in respect of the accident, and bound himself to relieve K. & Co. "from all claims of relief competent to any other person liable in reparation for said accident.

Held, by the Lord Ordinary (Low), that these sums had not been received as compensation for the alleged injuries, and that the pursuer was not thereby barred from suing A. & D. M. for damages therefor.

George Campbell, Greenock, with consent and concurrence of his father as his curator and administrator-in-law, sued A. & D. Morrison, joiners and builders there, for £500 as damages for personal injury sustained by the pursuer.

The pursuer was an apprentice engineer in the employment of Messrs Kincaid & Company, Limited, engineers, Greenock, who were contractors for the s.s. "Alexandria," although they themselves only supplied her engines and machinery. Messrs Seath & Company, shipbuilders, were sub-contractors for the hull, and they employed the defenders to dry-dock the vessel. The defenders in the course of their employment had fitted up a gangway from the dock side to the ship's side. On 12th September 1890, when the pursuer was crossing this gangway on his way to his work, one of the planks of which it was composed turned over and he fell into the dock, and was injured.

The pursuer averred—"In order that the work might be done by the pursuer and other workmen engaged at the vessel, she had to be docked, and the operations in connection with the docking of said vessel were undertaken and performed by the defenders, and a gangway, from the side of the dock to the ship for the use of all the workmen engaged thereon, was supplied and laid down by them, which it was their duty to do. The said gangway was the only means of access to the vessel. It was part of the duty of the defenders when docking the vessel to provide a gangway for the use of the pursuer and anyone requiring to go on board the vessel, but the gangway which they provided was dangerous and defective."

The defenders averred, amendment having been allowed—"(Ans. 8) Explained further that on 8th January 1891 the pursuer discharged Messrs Seath & Company, the builders of the s.s. "Alexandria," against whom he had made a claim in respect of such injuries, of all claim for damages in consequence of the injuries alleged to have been sustained by him at Garvel Park Dock, Greenock, on 12th September preceding, and that his own employers, Messrs Kincaid & Company being insured with the Employers Insurance Company of Great Britain, Limited, the pursuer recovered from said insurance company prior to this action being raised, in respect of the accident which is the ground of action, and of Messrs Kincaid & Company's liability therefor, the sum of £40 or thereby in name of damages."

The defenders pleaded—"(1) The statements of the pursuer are not relevant and sufficient to sustain the conclusions of the summons. (9) In any view, the pursuer having elected to accept a sum in name of damages from the insurance company, with whom Messrs Kincaid & Company, his own employers, were insured, on their behalf and in respect of their liability for the accident, which is the ground of the present action, is barred from now recovering against the defenders."

Upon 4th June 1891 the Lord Ordinary (Low) pronounced this interlocutor:—"Supersedes the adjustment of issues *in hoc statu*, and before answer in regard to the ninth plea-in-law for the defenders, allows to them a proof of the averments which were added to the answer to the eighth article of the condescendence, and to the pursuers a conjunct probation, &c.

"*Note.*—The defenders now aver that the pursuer has accepted, in name of damages for the injuries which form the ground of the present action, a sum of £40 from his own employers, and that he is thereby barred from claiming damages from the defenders It is a settled rule that where an injury is sustained through the fault of two or more persons, and the party injured recovers damages from any one of them, the obligation is extinguished as to the rest, because, as Mr Erskine puts it (iii. 1, 15), 'An obligation founded solely upon damage cannot possibly continue after the damage ceaseth to exist.' In the circumstances disclosed in the present case it might be a matter of some difficulty to say who is the party truly responsible to the pursuer, and it was stated by his counsel that he had already raised an action (which was thrown out) in the Sheriff Court against Kincaid & Company and Seath & Company. Now, if it turns out to be the case that the pursuer has transacted with one of the parties against whom he has made a claim, and has accepted a sum as reparation for the injuries which he received, then, in my opinion, his claim for damages will be exhausted, and the present action will fall to be dismissed. I therefore think that the proper course is to allow a proof of the defenders' averments to which I have referred."

Upon 11th September 1891 his Lordship issued this interlocutor:—"Having considered the cause, Finds that the pursuer has not accepted any sum in name of damages, or as reparation for the injuries libelled: Therefore repels the ninth plea-in-law for the defenders: Appoints the cause to be enrolled for further procedure, and reserves all questions of expenses: Further, grants leave to reclaim.

"*Opinion.*—The averment upon which I have allowed a proof is to the effect that the pursuer accepted, in respect of the injuries sustained by him, from an insurance company with whom his own employers, Messrs Kincaid & Company were insured, 'the sum of £40 or thereby in name of damages.' It appeared to me that if the pursuer had actually accepted a sum in satisfaction of his claim, and as reparation for the injuries which he had received, he could not be allowed to proceed with the present action. The facts brought out in evidence are as follow—The pursuer brought an action in the Sheriff Court in Greenock against his own employers Messrs Kincaid & Company, the builders of the ship, Messrs Seath & Company, and the present defenders, who had contracted with Messrs Seath & Company for docking the ship. The action was thrown out on a plea of no jurisdiction. The pursuer's agent, Mr M'Dowall, then appears to have determined to bring an action in the Court of Session against the present defenders alone, as being the parties against whom the pursuer was most likely to establish his claim. Mr M'Dowall, however, was unwilling absolutely to give up the claim which he had made against Seath & Company and Kincaid & Company without receiving some consideration for doing so, and it appears to have occurred to him that he might at all events obtain from these two firms a sum which would put him in funds to carry on the Court of Session action. He accordingly went to the agents of Seath & Company, and obtained from them a sum of £12, for which he granted a receipt, in which he acknowledges receipt of the money 'as in full of expenses incurred by my client and myself, as his agent, in connection with his alleged claim for damages.' . . . 'And in consideration of the said payment, the said T. R. Seath & Company, but they only, are discharged of all said alleged claims.' Mr M'Dowall then went to Mr Oattes, the agent of the Employers Insurance Company of Great Britain, with whom Messrs Kincaid & Company were insured, and who had defended the action in the Sheriff Court in Kincaid & Company's name. Mr M'Dowall told Mr Oattes that he was raising an action in the Court of Session against the present defenders, and was considering whether or not Kincaid & Company should also be called, and he intimated that if the insurance company would make a payment to the pursuer, which would help with the expenses of the Court of Session action, the pursuer would give up his claim against Kincaid & Company. Mr Oattes agreed to the proposal, and ultimately the amount to be paid by the insurance company was fixed at £17, 10s. A discharge was prepared by Mr Oattes, and was ultimately signed by the pursuer and his father. The latter, however, only signed the discharge on being assured by Mr M'Dowall that it would not prejudice the pursuer's right to sue the present action. The discharge is No. 29 of process, and by it the pursuer, with consent of his father, and in consideration of £17, 10s. paid to him by Kincaid & Company, discharges that company 'of and from all claims of reparation, and for payment of legal and other expenses now or hereafter competent to me,' in respect of injuries occasioned by the accident. The pursuer and his father also bind and oblige themselves to free and relieve Kincaid & Company 'from all claims of relief competent to any other person liable in reparation for said accident.' It is clear that the money paid by Seath & Company and by the insurance company was neither paid nor received as compensation to the pursuer for the injuries which he had received. The money was paid by the companies for the purpose of getting rid of a claim which, however ill founded, might have resulted in expensive litigation with a man of no means, and was accepted by the pursuer as the consideration in respect of which he agreed not to press a claim for reparation against

Messrs Seath & Company and Kincaid & Company. I think that it is impossible to hold that such a transaction precludes the pursuer making a claim for reparation against anyone. He has not received any sum in name of damages or as reparation for his injuries, and if the defenders are truly responsible for these injuries, I see no ground for holding that the pursuer is barred from suing them. The transactions with Seath & Company and Kincaid & Company cannot, I think, prejudice the defenders. Such transactions cannot make the defenders liable unless they would have been liable in any case, and a transaction to which they were not parties cannot prejudice any right of relief which they may have against Kincaid & Company or Seath & Company. I must therefore hold that the defenders have failed to establish the averments remitted to probation."

The defenders reclaimed, and argued—The action was irrelevant. The pursuer was in the employment of Messrs Kincaid & Company; he must look to them for reparation if he had any claim at all. The defenders had no contract with them, and he could only sue under contract. Seath & Company had employed the defenders to dock the ship; after that it became the duty of Kincaid & Company to look after the safety of the workmen. Assuming, however, that the responsibility of making the gangway at first was upon the defenders, Seath & Company had accepted it as sufficient, and that excluded the pursuer from insisting in this action—*M'Gill* v. *Bowman & Company*, December 9, 1890, 18 R. 207; *Ovington and Others* v. *M'Vicar*, May 12, 1864, 2 Macph. 1067. *Discharge*—It appeared that the pursuer had already accepted sums of money from different persons as damages for the injury he sustained in this accident; he could not therefore sue the defenders. The summons in the Sheriff Court referred to in the proof was against all three parties, conjunctly and severally, so that one could have been found liable to pay the whole damage—*Brinsmead* v. *Harrison*, June 19, 1872, L.R. 7 C.P. 547.

The respondent argued—*On Relevancy*—Neither Kincaid & Company nor Seath & Company had constructed the gangway; the defenders were therefore liable for its defective condition. *On Discharge*—The pursuer was not barred. Kincaid & Company and Seath & Company to be rid of a doubtful claim made terms with the pursuer, and paid certain small sums on condition that he would not put them to the expense of a litigation, but that was not a discharge of the pursuer's claim against the person who was principally in fault. It was merely partial payment and not complete satisfaction in the meaning of the passage from Erskine—*Western Bank* v. *Bairds*, March 20, 1862, 24 D. 859.

At advising—

Lord Young—The pursuer is an apprentice engineer, and upon 12th September 1890 he was in the employment of Messrs Kincaid & Company, engineers, Greenock. At that time his employers were under a contract to put engines into a ship called the "Alexandria," lying in the Garvel Graving Dock at Greenock. He says that upon that day the gangway leading from the dock to the ship's side, and which was composed of a few planks, gave way under him, and he sustained the injuries mentioned upon the record.

At first in respect of this accident he brought an action in the Sheriff Court at Greenock against his own employers Kincaid & Company, and also against Seath & Company, shipbuilders, by whom the ship had been built, and who were putting the finishing touches to her, and also against the present defenders, who are ship-carpenters, and whose sole connection with the ship was that they were under a contract with Seath & Company to dock the vessel and to build a gangway from the dock to the ship's side. In that action objection was taken to the Sheriff's jurisdiction, which objection it is not necessary to consider, and the Sheriff in the view that he had no jurisdiction dismissed the action.

It is also stated that the pursuer through his agent effected a settlement with two of the parties to that action, viz., Kincaid & Company and Seath & Company, getting a sum of money from each and granting each a discharge. The discharge to Seath & Company merely bears that it is a receipt for expenses and we do not need to consider it. The receipt to Kincaid & Company bears to be granted in full satisfaction of any claim for reparation in respect of the injuries occasioned by the accident, and was a complete discharge. Then he brought an action in this Court against the present defenders Morrison & Company, who had supplied the gangway which he says was defective.

There are two defences stated. One of these, which the Lord Ordinary has repelled, is, that the pursuer is barred from suing this action because he had taken sums of money from Kincaid & Company and from Seath & Company in reparation of his injuries, and granted them discharges. The other, which the Lord Ordinary has not considered, is, that this case is irrelevant. I propose to consider almost exclusively the second of these defences. It appears to me to be a good defence, and I think we can dispose of it on considerations simpler and more clear than those which are involved in the other defence.

It is plain from what I have said that the foundation of the action is the alleged imperfection in the gangway which the defenders had put up, and the first question for us to consider is, under what contract or how otherwise did the defenders put it up? It is explained in the record that "the operations in connection with the docking of said vessel were undertaken and performed by the defenders, and a gangway from the side of the dock to the ship for the use of all the workmen engaged thereon was supplied and laid down by them, which it was their duty to do." The contract therefore was between Seath & Company and Morrison & Company, and

under that contract the defenders placed the gangway between the dock and the ship. This is contract relation, and no other, and the defenders had no concern with the ship except what that contract gave them. The contract was made between the defenders and Seath & Company, and the pursuer explains that Seath & Company have no connection with his employers. Now, how should there be a ground of action to the pursuer against Morrison & Company because they had imperfectly executed their contract with Seath & Company?

Delict is out of the question. There were cases of delict and *quasi*-delict mentioned in the argument to which it was sought to assimilate this case, such as the act of anyone placing an obstruction upon the streets of a town or upon the public highway. These are delicts because the safety of the public is concerned, and anyone placing such an obstruction might cause danger to the public. A contractor to supply a gangway from the dock to the ship's side is not in that position at all. He supplies what he has contracted to supply, and he is accountable to the party with whom he contracted for his performance of the contract. It is precisely the same case as if anyone had contracted to supply the rigging or woodwork of the hull. If an accident occurred at sea through the breaking of the rigging, there would not be an action *ex delicto* against the contractor who had supplied it. In the course of the argument I referred to a class of cases at one time common when travelling was carried on by means of stage-coaches before the time of railways. It was never held that the passenger or servant of the company who suffered from the breakdown of the coach, could have an action against the coach-builder for supplying bad material. He must go against those with whom he had made his contract, leaving them their right of relief against any person responsible to them. The case was mentioned—it may have actually happened—of a person having bought a defective gun, which goes off accidentally and injures a companion of the person who bought it. The injured person has no claim for compensation against the gunmaker for supplying a defective article. In the same way I cannot hold that the statement that the defenders, under a contract between them and Seath & Company, supplied a defective gangway, is a sufficient ground of action for the pursuer. That is enough for the decision of the case. We do not know what the terms of the contract between the defenders and Seath & Company were, and according to the view I have expressed the pursuer is not a party who has a right to inquire into its terms.

I may just glance at the other part of the case as to what would be the effect of the settlement which the pursuer came to with Kincaid & Company, and the discharge in full he gave them of their claims. It may be that the pursuer had a good ground of action for the injuries which he suffered, but it could only be on the ground that his employers had a duty to see that a good gangway was supplied for his use. If he had a good action against them he has accepted a payment of money and given them a discharge. The tendency of the view I hold is, that if the defenders were under an obligation to supply a good gangway, and guarantee its safety to others, then the contracting party, the defenders, might be liable to the pursuers' employers either directly or through Seath & Company.

But, as I have said, I think this action should be dismissed on the ground that it is irrelevant, so it is useless to consider this question. I only wish to guard myself against being supposed either to approve or disapprove of the views on which the Lord Ordinary has proceeded, and irrespective of them I am of opinion that on the statements in his own condescendence the pursuer has no good ground of action, and that Morrison & Company, who only contracted with Seath & Company, have no concern with the pursuer.

Lord Rutherfurd Clark—It is stated in the pursuer's record that the contract of the defenders had been completed before the accident for which damages are claimed took place. I therefore concur.

Lord Trayner—If it were necessary to decide the question which has been disposed of by the Lord Ordinary in the interlocutor reclaimed against, I should be inclined, as at present advised, to agree with the view which the Lord Ordinary has taken. But it is not necessary to decide that question, because I think the pursuer's case fails on relevancy. The gangway in question—the alleged insufficiency of which is said to have been the cause of the injuries sustained by the pursuer—was fitted up and supplied by the defenders under a contract between them and Seath & Company, the builders of the vessel. It is not said that the gangway was in any respect other or less sufficient than the defenders had contracted to supply. On the contrary, the fair inference from the pursuer's averments is, that the gangway as supplied was taken off the hands of the defenders by Seath & Company, and it must be taken that in doing so they were satisfied that the gangway was conform to contract. In these circumstances I fail to see how a claim can arise at the pursuer's instance against the defenders such as he here seeks to establish. The defenders were under no obligation to the pursuer; there was no relation between them which could give rise to an obligation. The defenders having fulfilled their contract as regards the gangway to the satisfaction of their co-contractor their obligation and duty concerning the gangway was at an end, for the pursuer does not aver that the defenders were bound to maintain the gangway during the time it was being used. I could have understood a claim at the pursuer's instance against his employers for having failed in their duty to provide or see provided a safe access to the work which the pursuer was employed to perform. But I

cannot see how any such duty could be said to lie on the defenders.

This is not in my view a claim arising out of a wrong done to the pursuer for which all concerned in the wrongdoing would be liable. The defenders committed no delict or *quasi*-delict. The most that is alleged against them is a breach of contract. For that, if true, they must answer to the person with whom the proper contract was made, but to no other. What the pursuer may have reason to complain of is, that Seath & Company having accepted from the defenders an insufficient gangway the pursuer's employers were negligent in failing to see that the gangway was made sufficient before permitting or inviting their servants to use it. But this just comes to a claim against the pursuer's employers for failure to perform a duty incumbent on them, not a claim as for a wrong done to the pursuer by the defenders.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the action as irrelevant.

Counsel for the Reclaimers—H. Johnston — Ure. Agents — Smith & Mason, S.S.C.

Counsel for the Respondents—Strachan—Watt. Agents — Clark & Macdonald, S.S.C.

Friday, December 11.

SECOND DIVISION.

[Sheriff of Ross, &c.

ROSS *v.* POWRIE AND PITCAITHLEY.

Property—River, Tidal and Navigable—Obstruction in alveo—Salmon-Fishings—Interdict.

A tidal and navigable river ran in a curve from north to east. The main run of the water was towards the right bank, which practically held in the water, while certain low flats and channels were left along the left bank at ebb tide. The chief pressure of the water was upon the right bank, at the lowest part of the curve, and at this point the water had a tendency to flow in small streams across the base of a peninsula which formed part of the right bank of the river, and along the face of which there was a valuable salmon shot. The tenants of the salmon-fishings on the left bank erected opposite this point an embankment of piles, boards, and shingle, for the purposes of their fishing, and the proprietor of the fishings on the right bank sought to interdict it as *in alveo*, or at anyrate as injuring or threatening injury to his property.

It was proved that the erection interfered with the flow of the water, which naturally ran, not eastwards past the face, but northwards over the site of the erection; that it was constructed partly on one of the said flats and partly in the *alveus* of the stream covered at low water at summer flow, and that at least the substantial part thereof was erected in the *alveus;* that it had the effect of forming at that place a bank of sand and gravel; and that the additional pressure of the water caused by it had materially increased the volume of the streams which ran across the base of the peninsula on the opposite bank, which, if further developed, would transform the peninsula into an island, and thus injure the fishings along the right bank of the river formed by this peninsula.

Held that the embankment was illegal, because (1) it was *in alveo,* (2) even if not altogether *in alveo,* it was *unum quid,* and (3) even although it was not *in alveo,* but on the foreshore, it affected the ordinary flow of the water to the prejudice of the complainer.

This was an action in the Sheriff Court of Ross and Cromarty, by which Sir Charles Ross of Balnagown, with the consent of the tacksman of the salmon-fishings in the Kyle of Sutherland at Bonar, craved interdict against Powrie and Pitcaithley, salmon fishers, Perth, tenants of salmon-fishings on the opposite side of the river belonging to George Auldjo Jamieson, C.A., Edinburgh, trustee on the sequestrated estate of Evan Charles Sutherland of Skibo. The petition prayed that the respondents should be interdicted from (1) encroaching upon the *alveus* of the Kyle of Sutherland by driving stakes into the *alveus,* and erecting an embankment of shingle along the line of these stakes in the *alveus* at a place *ex adverso* of the complainer's lands, which had the result of elevating the *alveus,* and obstructing, narrowing, or deviating the stream of the Kyle at that part; (2) from using that embankment for fishing purposes in the Kyle, and to have the *alveus* restored to its former condition.

The Kyle of Sutherland is a tidal and navigable river, and divides the lands of Balnagown and Skibo, which lie respectively on its right and left banks. In this part of its course it runs in a bend from north to east. The main run of the current is towards the right bank, which practically presents a continuous and definite line of resistance except at one point as aftermentioned. On the left bank the water is shallower, and at low tide various shoals and mud-flats, intersected by channels, are exposed, particularly opposite the southmost or lowest part of the said bend or curve. From this point the right bank stretches to the sea in a long and narrow peninsula, and ends in the "Scaup Point," which affords a valuable salmon shot. At the lowest part of the said curve the pressure of the water is greatest, and the water has a tendency to make its way in small streams over the base of the peninsula. It was exactly opposite this point that the