acting under the section that provides for the outfall and have to make the sewer on ground outside their own limits, they must have the authority of the Local Government Board, and when, as in this case, they are acting within their own limits, they must have as their authority the opinion of a surveyor, who must in his report state that the sewer which they think best is necessary.

The Sheriff here has taken the same view as I have taken, so that the question of the application of the finality clause of the Act does not arise, and it is unnecessary to say anything about it. I therefore concur with Lord M'Laren that the reclaiming note must be allowed, and the suspension be refused.

LORD KINNEAR concurred in the judgment proposed.

LORD PRESIDENT—I was so familiar with and so much engaged in the preparation of the Act at present under discussion that I confess I have considerable diffidence as to my power of putting a judicial interpretation upon it. I therefore content myself with saying that I agree with the judgment your Lordships propose. But I should like to reserve my opinion on that one matter, which I do not think is necessary for the disposal of this case, on which there has been a difference of judicial opinion between my two brethren on the bench who have given opinions.

I should like to add this also in regard to the drastic power conferred, and I do not hesitate to express an opinion upon it, because the section is not a new section; it will be found to be a repetition of a section in the old Act of 1867. It is, no doubt, very true that at first sight it looks against the practice of Parliament to give such a drastic right to local authorities, whether absolutely or with that modicum of control which Lord M'Laren thinks the clause possesses. In the one way or the other it is drastic to give this power of interfering with private rights without going through the ordinary proceedings for the compulsory acquisition of land. But I think if the subject comes to be examined, it is such a very exceptional case that there was good reason why Parliament should do it. We are dealing with sewers, and sewers of course do not mean house drains, but the general system by which the general drainage of a town or community is to be taken away, and, as Lord Adam has shewn, the power is in the section which begins by giving powers to go through streets. Now, it is scarcely conceivable that a local authority would ever wish to put a drain under a building instead of along a street, unless where it really could not be helped, because under a building is the most inconvenient place to put a sewer, there is such great difficulty in getting at it if anything goes wrong. So the use that would probably be made of this particular section, so far as going under people's houses, would be of a limited character; it would only be where you practically could not take the sewers along a street without in some place making a junction or cut between, one street and another. More than that, when it is done, from the very nature of a sewer which is put under ground, a man's property is not taken away altogether, though no doubt considerable injury and inconvenience is inflicted, for which, all the same, compensation is provided in the damages section.

I have thought it necessary to make these observations, for I have always been one of those who think that people's property should not be taken away by Act of Parliament without the very clearest indication that that is meant. But this power is not really so drastic an invasion of the rights of private parties as would at first sight appear.

The Court recalled the Lord Ordinary's interlocutor, refused the note of suspension and interdict, and decerned.

Counsel for the Complainers and Respondents—Crabb Watt, K.C.—W. T. Watson. Agent—Alex. Stewart, S.S.C.

Counsel for the Respondents and Reclaimers—Crole, K.C.—Pitman. Agents—Tait & Crichton, W.S.

Tuesday, November 21.

FIRST DIVISION.

[Lord Dundas, Ordinary.

TYRRELL *v.* PATON & HENDRY.

Reparation—Negligence—Master and Servant — Ship — Defective Hatchway — Injuries Sustained by Falling Down a Hatchway — Defect Existing Prior to Voyage and not Obviously Reparable by Crew—Relevancy.

In an action of damages for personal injuries brought by a ship's engineer against the owners of the ship, the pursuer made averments to the effect that his injuries had been caused through the hatches not being on, which state of matters was due to the defective condition of the beam on which they should have rested, and that this defect had, unknown to him, existed prior to that voyage, and for a considerable period, and was or ought to have been known to the defenders.

Held that the action was relevant, inasmuch as the defect (1) was alleged to have existed prior to the commencement of the voyage, and (2) was not one which it was self-evident the crew could have repaired.

Gordon v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23, *distinguished.*

This was an action at the instance of Samuel Tyrrell, engineer, 310 Baltic Street, Bridgeton, Glasgow, against Paton & Hendry, shipbrokers, 142 St Vincent Street, Glasgow, managers of the s.s. "Turtle," as representing her owners, in which he sued for the sum of £500 in name of damages for personal injury.

The pursuer made the following averments—"(Cond. 2) On or about Tuesday, 16th February 1904 the pursuer was engaged by the defenders at Glasgow as engineer on the 'Turtle.' The boat left for Warrenpoint in Ireland with a cargo of coal, and having discharged her cargo there she left for Maryport on or about Thursday night, 18th September. (Cond. 3) On Friday morning, 19th February 1904, about 4 a.m., the pursuer was requested by the mate, who was at the wheel, to go forward and call a sailor to relieve him from his duty. The pursuer went forward as desired, and in the course of doing so he fell into the hold of the vessel through the middle hatches, which were uncovered. . . . Explained and averred that it was very dark at the time of the accident to the pursuer. (Cond. 4) The mouth of the hold or hatchway is about 30 feet long by 12 feet broad or thereby, and in it there are two iron thwartship beams and three fore and aft beams, and the hatches were placed on the top of the latter. At the time of the accident the aft hatches were on, but not the middle hatches. The reason why the hatches were off was that, as the pursuer has since learned, the forward thwartship beam was bent and twisted, with the result that the centre fore and aft beam, which is interposed between the two thwartship beams, was too short and would not catch in the socket in the forward thwartship beam. In these circumstances the middle hatches could not be put on, but the pursuer was unaware of this at the time. . . . It is admitted that the hatches were laid on the top of the coal cargo during the voyage from Glasgow to Warrenpoint, being supported by the coal. . . . (Cond. 6) For the pursuer's injuries the defenders are responsible. It was their duty to see that the boat and its equipment were in a proper, safe, and seaworthy condition. In particular, it was their duty to see that the hatches, and the thwartship and fore and aft beams on which they rested, were in good and sufficient order. This the defenders culpably failed to do. The thwartship beam was, as already stated, bent, twisted, and defective, and the centre fore and aft beam was too short. This state of matters rendered it impossible to put the centre hatches on, with the result that a trap existed on the boat, which particularly during the night formed a danger to which the defenders' employees were exposed. It was the duty of the defenders to have repaired the beams referred to, or in any event to have warned their employees of the danger which this defective condition created. This the defenders culpably omitted to do. They knew, or should have known, the defective state of their boat, as the pursuer has ascertained and avers that it had been in the same condition for a considerable time previously, and that an accident of a similar nature had in consequence thereof occurred on a previous voyage. The pursuer's injuries were a natural and probable result of the defenders' negligence. After the pursuer was injured the thwartship beams and the fore and aft beams were altered. One thwartship beam and two fore and aft beams in good condition were used, instead of the two thwartship and three fore and aft beams in use previously. These formed a good and sufficient support for the hatches."

In answer the defenders averred that the accident happened through the pursuer's own fault; that appliances were on board for covering the hatches; that they had been used on the voyage from Glasgow to Warrenpoint referred to in Cond. 2, and that if they were not on the hold at the time of the accident it was owing to the fault of the master or of the fellow-servants of the pursuer.

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant."

On 25th February 1905 the Lord Ordinary (DUNDAS) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion—"The pursuer states that on 16th February 1904 he was engaged by the defenders as an engineer on board the cargo-boat 'Turtle,' of which the defenders, who are shipbrokers, are admittedly managers and represent the owners. About four a.m. on 19th February, the pursuer, being as he avers requested by the mate, who was at the wheel, to go forward and call a sailor to relieve him from his duty, went forward as desired, and in the course of doing so fell into the hold of the vessel through the middle hatches, which were uncovered, and sustained injuries in respect of which he now sues for £500 of damages. The pursuer explains, and there seems to be no doubt, that the reason these hatches were off was that the forward thwartship beam was bent and twisted, which rendered it impossible to utilise the system of beams upon which the hatches ought to rest. This defect in the beam had, the pursuer says, existed 'for a considerable time previously,' and had caused an accident on a previous voyage. The nature of the 'fault' with which the pursuer charges the defenders is set out in article 6 of the condescendence. He says it was their duty to see that the boat and its equipment were in a proper, safe, and seaworthy condition, and in particular to see that the hatches and the beams on which they rested were in good and sufficient order. He alleges that the defenders culpably failed in this duty, the said thwartship beam being bent, twisted, and defective, and that the impossibility of putting the centre hatches on resulted in the existence of a 'trap,' particularly at night. It is averred that the defenders' duty was to have repaired the beam or to have 'warned their employees of the danger,' and that they 'knew or should have known the defective state of their boat.'

"In my opinion these averments fall distinctly short of relevancy. It seems strange that a seaman who had been on board the vessel for several days, during which the said hatch lay uncovered, should not have been able to avoid any chance of danger there might be in the existence of such a patent condition of affairs. But apart from

that, I hold the pursuer's averments to be irrelevant upon the authority of *Gordon* v. *Pyper*, 20 R. (H.L.) 23, which is not, in my judgment, distinguishable in any material particular from the present. There a seaman on board a trawler alleged that while helping to raise the trawl he was injured in consequence of the breaking of a rope or ropes, which was due to defective splicing. The action was dismissed by the Court as irrelevant, and the House of Lords affirmed. There was nothing in the pursuer's statement to show that the splicing was defective at the time when the vessel was equipped. In the present case no such suggestion is made in regard to the bent beam, and the fact that the twist is said to have been in existence before this particular voyage began seems to me to make no difference. I refer to the opinion of the Lord Chancellor (Herschell) in *Gordon's* case and also to the additional observation of Lord Watson, that 'even if that allegation had been made' (viz, that the splicing was originally defective) 'I should not have been prepared to hold that a mere defect in the splicing of the tackle, which is obvious, constitutes any default of duty on the part of the shipowner if he provides the master and crew with proper material for correcting the defect in the course of the voyage.' In the present case the pursuer makes no suggestion, and it would seem difficult to make such, that the master and crew had not on board the means either of straightening the obvious twist in this beam, or of protecting the edge of the hold if their combing was not of a sufficient nature to secure those on board from danger. It seems to me that the pursuer has not set forth any relevant case against the brokers as representing the owners, and I shall therefore sustain the defenders' first plea and dismiss the action with expenses."

The pursuer reclaimed.

Argued for the reclaimer—The pursuer's averments were clearly relevant. He averred a defect in the permanent condition of the ship—a defect existing during the previous voyage. It was also averred that the defenders were aware of its existence. It was clearly a case for inquiry. The judgment of the Lord Ordinary proceeded on two grounds—(1) that the defect was patent to the pursuer, and was an obvious defect. The Lord Ordinary was in error in so thinking, for the defect could not be discovered till the accident happened. The statement of the pursuer was that the accident happened at 4 a.m. on a very dark morning in February, so that the danger was not, on the pursuer's statement, a patent one. Moreover, whether a danger was patent or not was a subject for inquiry. (2) The Lord Ordinary was in error in thinking that this case was governed by that of *Gordon* v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23. That case was clearly distinguishable. The defect which caused the accident there was obvious, and it had emerged during the voyage. Here the ship was alleged to have been defective before the voyage in question began, for the hatches could not be put on owing to the state of the forward thwartship beam. That was a defect for which the owners were liable, and was not the fault of a fellow-servant.

Argued for respondents—The duty of the respondents was to supply a seaworthy ship. That had been done. The defects alleged were such as the crew could and ought to have remedied. The owners were not responsible for such defects—*Steel & Craig* v. *State Line Steamship Company*, July 20, 1877, 4 R. (H.L.) 103, 14 S.L.R. 734; *Hedley* v. *Pinkney & Sons' Steamship Company*, [1894] A.C. 222. If there were fault here it was fault on the part of a fellow-servant, for which the owners were not responsible—*Hedley* v. *Pinkney*, *cit. sup.*

LORD PRESIDENT—This is an action at the instance of a seaman, who was an engineer on board the "Turtle," of which the defenders represent the owners, and it is an action of damages for injuries which the pursuer alleges he sustained through falling down the mouth of the middle hatchway.

The Lord Ordinary has dismissed the action as irrelevant, and he has done so on the authority of the case of *Gordon* v. *Pyper*, 20 R. (H.L.) 23, which was decided in the Second Division and affirmed on appeal in the House of Lords. That was an action of damages at the instance of a seaman against the owners of a steam trawler, in which the pursuer averred that he had received injuries owing to the defective splicing of two ropes.

The Lord Ordinary holds that the present case is governed by that decision. I cannot help thinking that the Lord Ordinary has been misled by an expression which the Lord Chancellor uses in his judgment in that case. What the Lord Ordinary says is this—"The action"—*Gordon* v. *Pyper*—"was dismissed by the Court as irrelevant, and the House of Lords affirmed. There was nothing in the pursuer's statement to show that the splicing was defective at the time when the vessel was equipped. In the present case no such suggestion is made in regard to the bent beam, and the fact that the twist is said to have been in existence before the particular voyage began seems to me to make no difference."

That, I think, shows that the Lord Ordinary has read "equipped" as meaning the equipment of the vessel when she first put out from dock, and not as meaning equipped when the particular voyage began.

In the report of *Gordon* v *Pyper*, during the argument, the Lord Chancellor makes this observation—"There is no statement that the rope was in this condition when the vessel started on the venture." That shows in what sense the Lord Chancellor uses the word "equipped" in the judgment. Lord Watson says—"I concur. There is no allegation in this record that at the time when this vessel sailed the tackle was defective so far as regarded this splicing."

When you consider that the point you have referred to in the passages I have quoted is the starting of the venture or the sailing of the ship, it is clear that there is in the present case a clear averment that matters were wrong when the vessel started on the voyage, and that consequently *Gordon* v. *Pyper* does not warrant this action being dismissed as irrelevant.

There remains the second point, however, as to which the Lord Ordinary says that he agrees with the dictum of Lord Watson in *Gordon's* case, that "even if that allegation had been made"—viz., that the splicing was originally defective—"I should not have been prepared to hold that a mere defect in the splicing of the tackle, which is obvious, constitutes any default of duty on the part of the shipowner if he provides the master and crew with proper materials for correcting the defect in the course of the voyage."

I have no doubt that all that is perfectly sound, but it must be taken *secundum subjectam materiam*, which is the splicing of a rope. That is a thing within the ordinary education of every seaman, and a defect in a rope is not a structural defect which the crew could not be expected to put right for themselves. Here the pursuer says that he fell down the hold, not because there were no hatches, but because the hatches were off, and the reason which he alleges for that is this, that "the forward thwartship beam was bent and twisted, with the result that the centre fore-and-aft beam, which is interposed between the two thwartship beams, was too short and would not catch in the socket in the forward thwartship beam."

I am not giving any opinion whether these defects could be put right by the crew. All I do say is that it is not a defect which, like the splicing of a rope, is self-evident — to be capable of immediate removal. Therefore I think that this is not a matter which can be disposed of on relevancy. It may well be that the case may afterwards be found to fall within Lord Watson's dictum, but that will depend on the facts. Where the matter is not, as the pursuers stated, self-evident as capable of cure by the crew, it is not, I think, necessary as matter of pleading that he should aver that it was not so capable.

I think, therefore, that the interlocutor of the Lord Ordinary should be recalled, but of course all such questions as contributory negligence must remain open, for I cannot help thinking that there are many actions where pursuers come into court hoping that juries will find in their favour and disregard the rule of law—a perfectly sound rule of law—that a man must take the risks of the employment in which he is engaged.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship. If it turns out that there was a ship's carpenter on board who was competent to mend this hatch, and that there was material on board for mending it, the defenders would not be liable.

I say so not on any specialities applicable to ships but on general grounds, for if an employer provides competent material and proper use is not made of it by his servants, that is a fault on the servants' part for which the employer would not be liable.

I agree in thinking that this is a case for inquiry, and that proof should be allowed.

LORD KINNEAR—I am satisfied that the facts here must be ascertained in the ordinary way before the question of responsibility can be decided.

The Court recalled the Lord Ordinary's interlocutor and ordered issues.

Counsel for the Pursuer and Reclaimer—Watt, K.C.—Munro. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—Ure, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, November 21.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

CONVERY *v.* LANARKSHIRE TRAMWAYS COMPANY.

Foreign—Reparation—Conflict of Laws—International Private Law — Lex loci delicti commissi—Action in Scotland by Domiciled Irishman for Solatium.

A domiciled Irishman living in Ireland raised an action in a Sheriff Court in Scotland against a tramway company operating there, to recover damages, by way of solatium, for the death of his son, who had been killed, he averred, by their negligence. The law of Ireland recognising no claim for solatium, the defenders pleaded, *inter alia*—(1) The action is irrelevant; (2) no title to sue.

Held that the pursuer's remedy was regulated by the *lex loci delicti commissi* irrespective of his domicile, and an allowance of issues *granted.*

Kendrick v. *Burnett*, November 17, 1897, 25 R. 82, 35 S.L.R. 62, *explained and distinguished.*

Expenses—Appeal for Jury Trial—Summar Roll Discussion—Preliminary Pleas—Allowance of Expenses in Interlocutor Deciding Preliminary Pleas.

In an action of damages for solatium in which the pursuer had appealed for jury trial, the defenders pleaded, *inter alia*, no relevant case and no title to sue. After a discussion in the Summar Roll, the Court, in the interlocutor repelling the preliminary pleas, *allowed* the pursuer the expenses of the discussion.

On 28th March 1905 James Convery, Maghara, County Londonderry, Ireland, raised an action in the Sheriff Court of Lanarkshire at Hamilton against the Lanarkshire