

and Town Council of the burgh of Airdrie. An objection of a somewhat formidable character was taken to the title of these parties, upon which I do not desire to express any opinion, as that objection has been entirely obviated by the governing body becoming parties to the Case.

LORD DEAS and LORD MURE concurred.

LORD SHAND being one of the Commissioners delivered no opinion.

The Court pronounced the following interlocutor:—

“Find and declare that the scheme complained of is not, in respect of any of the objections maintained by the governing body, beyond the scope of, or disconform to the provisions of the Educational Endowments Act 1882, and is not contrary to law: Authorise the governing body to pay their own expenses and those of the Commissioners out of the funds of the Endowment.”

Counsel for First Parties—Pearson—Graham Murray. Agent—Alexander Wylie, W.S.

Counsel for Second Parties—J. P. B. Robertson—Gillespie. Agent—Donald Beith, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SHARP v. RETTIE.

Shipping Law—Ship—Claim for Wages by Engineer—Counter Claim of Damages—Neglect of Duty by Seaman—Merchant Shipping Act (17 and 18 Vict. c. 104), secs. 243, 244—Exclusion of Civil Remedy—Retention of Wages to meet Claim of Damage.

In an action for payment of wages at the instance of the engineer of a vessel against the owner, the defence was that the owner had a claim of damages for injuries caused by the misconduct and neglect of duty of the pursuer, which he was entitled to set off against the claim for wages. No entry of the misconduct complained of had been made in the ship's log at the time as provided for by sections 243 and 244 of the Merchant Shipping Act 1854. *Held* that the owner's claim of damages was not thereby barred, since these sections related only to summary criminal prosecutions, and did not supersede the civil remedy which the owner had at common law.

This was an action at the instance of John Sharp, an engineer residing in Leith, against Peter Rettie, master and owner or part-owner of the steamship “Escorial” of Glasgow, for the sum of £123, 0s. 5d. said to be due to him as wages.

The pursuer was engaged by the managing owners of the “Escorial” on 3d April 1883 to join the ship, then at Glasgow, as first engineer for a period not exceeding one year, for a voyage to Singapore and other ports in Chinese waters

and home to port of discharge in United Kingdom, at £16 per month of wages. By the articles of shipping he agreed to conduct himself in an orderly, faithful, and sober manner, and to be at all times diligent in his duty; “And it is hereby agreed that any embezzlement or wilful or negligent destruction of any part of the ship's cargo or stores shall be made good to the owners out of the wages of the person guilty of the same.”

The pursuer stated that he served on board the vessel under the agreement from 4th April until 8th December 1883, when the vessel arrived in Leith and his engagement terminated. He further stated that for the period he served on board the vessel there was due to him wages amounting to £130, 13s. 2d.; that he had received £7, 12s. 9d. to account at different dates, leaving a balance of £123, 0s. 5d., being the sum sued for.

The defence was that the pursuer had caused injury to the boilers, engines, and machinery of the vessel by his misconduct, and that there thus arose a claim of damages for a larger sum than that sued for, which the defender was entitled to set off against the pursuer's claim. In the statement of facts for the defender it was averred—“(Stat. 3) Before the said steamship left Glasgow her boilers were thoroughly scaled and cleaned, and her engine overhauled, and they and the whole machinery of said steamship were in a thorough state of repair when she left Glasgow.”

“(Stat. 4) The said steamship arrived in Antwerp on 9th April last, where she loaded some cargo, and remained at that port for six days. Some slight repairs on the machinery of said steamship were done at that port on the pursuer's orders and under his supervision, and on the voyage from Antwerp to Marseilles she made a quick passage. (Stat. 5) The owners' instructions to the pursuer were that he was to make good use of his time during the voyage and at the various ports at which the said steamship was to call, to keep his engine, boiler, and machinery in a thorough state of repair, and for that purpose to see that the boilers were scaled and cleaned when necessary. (Stat. 6) At the ports of Marseilles, Manilla, Saigon, and Hong-Kong, on the outward voyage, the said steamship lay a considerable time taking in and discharging cargo, and at all of these ports the pursuer had ample opportunity of doing any repairs and cleaning that were necessary to the efficient upkeep of the boilers, engine, and machinery. (Stat. 7) At Hong-Kong, where the said steamship lay from 6th to 13th August, the pursuer was all the time drunk and quite incapable of properly attending to his work. He was on this occasion reprimanded by the defender. (Stat. 8) At all the ports mentioned in article 6, where the said steamship lay a considerable time, the pursuer instead of attending to his duty and getting the boilers cleaned and engine and machinery put in order for the run, wilfully neglected his duty, and failed to clean the boilers and overhaul the machinery so as to keep them in an efficient state of repair. (Stat. 9) On leaving Hong-Kong a pump-rod broke, and in consequence the steamer had to put back to Hong-Kong for repairs. If the pursuer had been attending to his duty this accident ought to have been foreseen and prevented. (Stat. 10) On the homeward run, and while the said steamship was at Singapore on 30th September and 1st October, the pursuer was ashore

and not attending to his duty. After the said steamship left Singapore the pursuer was drunk and unfit for duty for four days running, viz., on 2d, 3d, 4th, and 5th October. The defender on this occasion formally entered him in the log for drunkenness. (Stat. 12) On 9th November the said steamship arrived in Port Said, where the pursuer again went ashore and neglected his duty. The defender, at that port, seeing that the pursuer was neglecting his duty, went ashore for a boiler-maker to come on board and do some work to the boiler, which was reported to be nearly salted up. While ashore he found the pursuer in a public-house. Thereafter the pursuer came on board drunk, and continued so all next day. During the time the repairs were going on the pursuer was not in a fit state to take charge of the work. The work done was afterwards found not sufficient to put the boiler in a safe or satisfactory state to proceed to sea; and had the pursuer been sober and attending to his duty he ought to have known this, and remedied the state of affairs which his former drunkenness and carelessness had occasioned. (Stat. 14) The pursuer's course of misconduct and continued neglect of duty, as above libelled, was reported by the defender to the managing owners of said steamship, and so soon as might be after the steamer's arrival in Leith they had the engine, boilers, and machinery of said steamship opened up and examined. It was then found that these had been grossly neglected by pursuer, whose duty was to attend to them. In particular, the boiler tubes were filled up with salt, many of them solid, the combustion chamber tops so thickly coated with salt as to be dangerous, and the furnace crowns in same condition. The outside of the tubes was covered with salt of about a quarter of an inch thick, and in many places the salt was so thick as to form a solid mass between the tubes. The boiler fronts were burnt and bent, one pressure-gauge lost, another broken, pumps were without packing, and, in fact, everything under the pursuer's charge was in a disgraceful state of disrepair and dirt, all in consequence of pursuer's neglect of duty. By ordinary care on the pursuer's part, and the proper use of the appliances and means at his command, the said damage could easily have been avoided. (Stat. 15) In consequence of the pursuer's neglect of duty the boiler of said steamship has had to be almost retubed, the salt being so solid as to defy getting it off, though men were employed for ten days in endeavouring to get this done. A new boiler-gauge had to be bought and one repaired, and extensive repairs had to be done to the engines. The accounts for repair of the damage so caused by pursuer have not yet been obtained, but the cost exceeds the sum sued for. In addition to this cost the said steamship was detained for six days while undergoing said repairs. £25 per day is a reasonable allowance for said steamship, which for six days is £150. (Stat. 16) In consequence of pursuer's neglect of duty the said steamship lost considerable time on said voyage, in addition to the foresaid time lost while said repairs were being executed. The defender estimates that during the voyage the said steamship, through pursuer's carelessness, lost at least fifteen days, which at £25 per day is £375. (Stat. 17) In any case the pursuer cannot recover wages for the following days he was drunk and totally unfit

for duty, viz., six days at Hong-Kong, four days at sea, and two days at Port Said, in all twelve days, at £16 per month, is £6, 17s. 1d. The pursuer has, however, substantially and on the whole failed to perform his part of the contract of service, and is not entitled to recover any payment. He has caused loss, injury, and damage to the defender, as representing the owners, through his breach of contract and gross neglect of duty in manner above libelled, to an amount exceeding the sum now sued for."

The pursuer pleaded—" (4) The alleged charges against the pursuer not having been entered in the official log-book, and the other procedure required by statute not having been followed, evidence of the defender's averments ought not to be received. (5) In any view, no deductions from the pursuer's wages ought to be made, except those included in the account of wages delivered to the pursuer by the defender."

The defender pleaded—" (1) The pursuer not having performed his part of the contract of service, he is not entitled to recover the sum now sued for. (2) The pursuer having caused loss, injury, and damage to the defender, as representing the owners, through his breach of contract and neglect of duty, to an amount exceeding the sum now sued for, the defender is entitled to absolver."

The sections of the Merchant Shipping Act 1854 bearing on the case are quoted in the opinion of the Lord Ordinary *infra*.

It is also provided by section 241 of the Merchant Shipping Act 1854, that "If the Board of Trade or any local marine board has reason to believe that any master or mate is, from incompetency or misconduct, unfit to discharge his duties, the Board of Trade may either institute an investigation or may direct the local marine board . . . to institute the same."

Section 11 of the Merchant Shipping Amendment Act 1862 (25 and 26 Vict. cap. 63) provides—"The power by the 241st section of the principal Act given to the Board of Trade, or to any local marine board, of instituting investigations into the conduct of any master or mate whom it has reason to believe to be from incompetency or misconduct unfit to discharge his duties, shall extend to any certificated engineer whom the Board of Trade or any local marine board has reason to believe to be from incompetency or misconduct unfit to discharge the duties, in the same manner as if in the said section the words 'certificated engineer' had been inserted after 'master' wherever 'master' occurs in such section."

The Lord Ordinary (FRASER) on 21st February 1884 allowed to the defender a proof of the 14th and 15th statement of facts for him, and to the pursuer a conjunct probation.

"*Opinion.*—The action is for wages at the instance of the engineer of a steamship against the master—for himself and as representing the owners—to which the defence is, that no wages are due, in respect of drunkenness and neglect of duty on the part of the pursuer, in consequence of which it is said that he has caused injury and damage to the defender to an amount exceeding that now sued for. Various acts of drunkenness are condoned upon by the defender; as is also neglect of duty in not keeping his engine boilers in good condition, as he was bound to do.

"The pursuer maintains that these averments as

to misconduct on his part cannot be remitted to probation, because no entry of them was made in the log-book as required by statute; and this raises a somewhat important question on the Merchant Shipping Act 1854, sec. 243. That section has nine subdivisions enumerating various offences of seamen, and states the punishment attachable thereto. The only one of these which seems to be applicable to the circumstances of the present case, as alleged, is the 5th subdivision, in the following terms:—'For continued wilful disobedience to lawful commands, or continued wilful neglect of duty, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour, and also, at the discretion of the Court, to forfeit for every twenty-four hours' continuance of such disobedience or neglect either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute.' Under this section the charges against the pursuer might be brought, for they are charges of wilful neglect of duty. Now, the next section (244) states what the master is to do when such an offence is committed. He is directed to make an entry of it in the official log-book, and this entry is to be signed by him and one of the crew. The offender is to be furnished with a copy of this entry and may reply to it; and then it is enacted—'In any subsequent legal proceeding the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the Court hearing the case may at its discretion refuse to receive evidence of the offence.' This entry in the log-book is still further enforced by the 284th section (subdivision 1), which enacts,—'If in any case an official log-book is not kept in the manner hereby required, or if any entry hereby directed to be made in any such log-book is not made at the time and in the manner hereby directed, the master shall for each such offence incur the specific penalty herein mentioned in respect thereof, or, where there is no such specific penalty, a penalty not exceeding £5.' In order to see whether the entry of such offences as are charged against the pursuer ought to have been made, it is clear, on reading the 244th section and the 282d section together, that they should. The former section expressly requires the captain to enter offences such as wilful neglect of duty. The 282d section summarises the matters that are to be put in the log-book. It commences with these words:—'Every master of a ship for which an official log-book is hereby required, shall make, or cause to be made therein, entries of the following matters (that is to say):— . . . (2) Every offence committed by any member of his crew for which it is intended to prosecute, or to enforce a forfeiture, or to exact a fine, together with such statement concerning the reading over such entry and concerning the reply (if any) made to the charge, as hereinbefore required.'

"Now, the defender is not prosecuting for any offence, nor exacting a fine, and he is not *in terminis* exacting a forfeiture. But he is in reality enforcing such forfeiture, seeing that he pleads, in answer to the pursuer's claim for wages, compensation in consequence of the injury and damage which the pursuer's neglect of duty caused to him. This was a case, therefore, that ought to have been entered in the log-book. But the only one

of the offences of the pursuer so entered is his drunkenness on the 2d, 3d, 4th, and 5th October 1883.

"The defender insists upon setting off his claim for damages against the claim for wages, founding on the common law, while, on the other hand, the pursuer contends that the common law in this matter is superseded, and that he can only be made liable under the 243d section (subdivision 5) to imprisonment (which is not sought against him), and to (at the discretion of the Court) a forfeiture of six days' pay for every twenty-four hours' neglect of duty. Mr Justice Shee, in the 11th edition of Abbott on Shipping (p. 153), expresses an opinion contrary to this in the following terms:—'The breach of these duties and of this engagement consists in desertion, quarrelsomeness, turbulence, mutiny, disobedience, neglect of duty, drunkenness—offences which, according to the frequency of their occurrence, the length of their continuance, and their circumstances in each particular case, besides the penalties and forfeitures enacted by the statutes, may at common law justify the personal restraint and correction of the mariner, or subject him to dismissal and forfeiture of wages. It may happen that the regulations prescribed by the statutes to protect the mariner against an undue infliction of forfeitures, such as an entry in the log-book of the circumstances attending the alleged offence, have not been complied with by the master; and in such a case, although the statutory forfeiture may not be incurred, yet proof of the mariner's misconduct, to the satisfaction of the Court of Admiralty, may furnish a defence to an action brought by him for his wages against the master or owners.' This opinion has been repeated in the 12th edition edited by Mr Prentice, Q.C., published in 1881 (p. 131). But these opinions have not been sustained by a judgment of the Queen's Bench Division in England. It was determined in the case of *The Great Northern Steamship Fishing Co. v. Edgell* (6th June 1883, 11 Q. B. D. 225) that the Merchant Shipping Act 1854 (17 and 18 Vict. cap. 105), sec. 243—which enables a seaman who neglects without reasonable cause to join his ship, to be punished, upon proceedings before a Court of summary jurisdiction, with imprisonment and forfeiture of part of his wages,—by implication takes away any other remedy against the seaman for breach of contract, and the shipowner cannot, where the amount which he claims does not exceed £10, take proceedings for the recovery of damages.

"It is therefore maintained that no proof should be allowed of any offences not entered in the log-book, and the pursuer is willing to allow a deduction for the four days' neglect of duty that were entered in that book. If the construction of the statute by the Queen's Bench be right, then the question would come to be, whether the Court, exercising the discretion given to it by the 244th section, should receive evidence of the offences which are not entered in the log-book? No explanation is given on the record, or was given to the Lord Ordinary, why the other acts of drunkenness that are set forth were not entered in the log-book. It was not said (except in regard to one matter) that they had not come to the knowledge of the defender. On the contrary, it is said that they were made matter of remonstrance, and on one occasion, on 9th November,

the defender had to send ashore, when the vessel was at Port Said, for a boilermaker to perform the pursuer's duties.

"The Lord Ordinary adopts the construction put upon the statute by the Queen's Bench Division, and in the exercise of his discretion he refuses to accept evidence of any of the pursuer's offences except those set forth in the defender's 14th and 15th statement of facts. The neglect of duty therein pointed at could not have been discovered by the master of the vessel, and were not in point of fact discovered, until she had arrived at Leith and had her boilers and other machinery overhauled. It could not therefore be expected that this neglect of duty could be entered in the log, and evidence of it has now been allowed. If proved, a question of difficulty may arise as to the amount of forfeiture of wages which may be imposed; but that is a question that need not at present be solved."

The defender reclaimed, and argued—He should be allowed a general proof of all his averments, for statements 14 and 15 could not be proved without the others. Sections 243 and 244 of the Merchant Shipping Act were to be read together, and therefore it was only in the case of a prosecution for an offence under section 243 that an entry required to be made in terms of section 244. The term "subsequent legal proceedings" referred only to prosecutions under section 243. But the defender was not prosecuting under section 243, and therefore no entries were necessary. He was making a claim of damages which he had at common law, and which the statute had not taken away—*Fraser on Master and Servant*, 475; *The Duchess of Kent*, 1 Rob. Adm. Rep. 283; *Abbott's Law of Merchant Ships and Seamen*, 11th ed. p. 153, 12th ed. p. 131. In any event, the defender was entitled to ask the Court, in the exercise of its discretion, to allow a forfeiture without any entry in the log-book—*M'Lachlan on Merchant Shipping*, 247. The decision in the case of the *Great Northern Steamship Fishing Co.* was not in point, because that was a case of an ordinary deck hand; this was the case of a certificated engineer, who by section 11 of the Merchant Shipping Act Amendment Act 1862 (25 and 26 Vict. c. 63) was placed in the same position as the master with regard to investigations as to misconduct under section 241 of the Act of 1854. The pursuer had already been tried by the Board of Trade under section 241, and his certificate had been suspended for six months. The decision in the English case was not sound, because common law rights could not be discharged except by express enactment—*Wolverhampton New Waterworks Co. v. Hawkesford*, 28 L.J., C.P. 242. *Addison on Torts* (5th ed.), 65; *Chapman v. Pickersgill* 2 Wilson, C.P. 145; *M'Avoy, &c. v. Young's Paraffin Co. (Limited)*, November 5, 1881, 9 R. 100; *Morrison v. Baird & Co.*, December 2, 1882, 10 R. 271.

The pursuer replied—Section 243, sub-section 5, took away the common law remedy which previously existed—*Great Northern Steamship Fishing Co. v. Edgehill*, 11 Q.B.D. 225. An engineer was within the definition of seamen contained in section 2 of the Act of 1854. The provisions of that Act were intended to protect seamen. The remedy given by the statute could only be enforced by complying with the provisions of sec-

tion 244 in regard to entries in the log-book. The criminal remedy came in place of the civil remedy—*Fortune v. Frost*, 3 B. and P. 302; *Christie v. Thompson*, June 12, 1858, 20 D. 1114. The defence was barred under section 171, because after the vessel arrived in port an account was delivered to the pursuer with a deduction of four days' wages only.

At advising—

LORD PRESIDENT—The pursuer here states in the 2d article of his condensation that "on or about the 3d day of April 1883 the pursuer entered into an agreement with the owners of the said ship "Escorial," whereby it was agreed that the pursuer should join the said ship, then lying at Glasgow, in the capacity of first engineer, for a period not exceeding one year, being for a voyage to Singapore and other ports in Chinese waters, and home to a final port of discharge in the United Kingdom, and should receive therefor wages at the rate of £16 per month." And then he states that he signed articles to this effect. He sailed with the vessel accordingly as first engineer, and when the voyage had been performed as specified, the amount of the wages remaining due to him was £123, 0s. 5d.

The defence to the action is not a challenge of the amount said to be due, if the pursuer is entitled to recover at all, but is upon the ground, that the defender has committed a breach of contract, and therefore is not entitled to sue upon the contract; further, that by the breach of contract serious loss and injury has been caused to the defender's property, whereby a claim of damages has arisen which he is entitled to set off against the pursuer's claim under the contract. That this would be competent in the ordinary case is not disputed. It is always competent when one party sues the other upon a contract entered into between them, for the latter to say "You broke the contract, and instead of my being in debt to you, you are in debt to me." Though this form of defence amounts in substance to an action of damages, yet it is an action of damages for real injury, by which I mean injury done by the pursuer to the property of the defender, and this is made very clear on the face of the record and statement of facts for the defender. That statement is to the effect that when the vessel sailed from Glasgow the engine and boilers had been repaired and were in good order and well fitted for the work they had to perform, if only they were well kept, but that when the vessel returned to Glasgow after her voyage, the engine and the boilers were in a total state of disrepair and disorder, and that very serious injury had been caused by the neglect of duty, drunkenness, and other misconduct of the pursuer.

That in the ordinary case is of course a relevant defence, but the reply made by the pursuer is that it is not competent to set off such a claim against the amount of the wages due to him, because the provisions of the Merchant Shipping Act 1854 have not been complied with, and he refers to section 243, and also to section 244. The part of section 243 to which special reference was made as being applicable here provides for the case of continued wilful disobedience or continued wilful neglect of duty; and what the pursuer says is, that if this occurs and is not entered in the log-book by the

master, and read over to the seaman, and a copy of the entry furnished to him, and his reply, if any, entered also, all in terms of section 244, then in any subsequent legal proceeding the ship's owner or master are not entitled to found upon the facts which the master has neglected to enter. If that were the effect of the two sections taken together, it rather appears that it would be sufficient to bar this defence, because the cause of the real injury to the defender is just the continued neglect of duty specified in section 243. But I think that the argument of the pursuer is founded upon a misreading of what is provided in section 243. Section 243 deals with summary criminal prosecutions, and with nothing else. The title of the section, which in the statute may be taken as part of the Act, is "offences of seamen and apprentices and their punishments." The text of the section begins, "Whenever any seaman who has been lawfully engaged, or any apprentice to the sea-service, commits any of the following offences, he shall be liable to be punished summarily as follows;" and then everything which follows in the sub-sections has special reference to offences and punishments. When we come to the 5th section, which is the one in question, it provides—"For continued wilful disobedience to lawful commands, or continued wilful neglect of duty, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour, and also, at the discretion of the Court, to forfeit for every twenty-four hours' continuance of such disobedience or neglect either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute." Therefore section 243 enacts nothing but what punishments may be inflicted in form of fines, penalties, or forfeitures, which are all as much punishments as imprisonment. It is of very little consequence what becomes of the fine—whether it goes to the Queen, or to the party injured, or to the common informer, or half to the common informer and half to the Queen. That does not affect the character of the fine, penalty, or forfeiture, which must always be of the nature of a punishment. Now, it is in reference to the summary criminal prosecutions under section 244 that entries in the log-book are required, and I cannot imagine a more clear connection between two sections than there is between section 243 and section 244. The one follows directly after the other, and provides that "in any subsequent legal proceeding the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the Court hearing the case may at its discretion refuse to receive evidence of the offence." That plainly shows that the subsequent legal procedure is the procedure in regard to summary criminal prosecutions.

It has been contended, however, that these enactments provide a remedy to the shipowner which cuts off by implication any common law right he may have to recover damages. I am quite unable to agree with that argument. I think it involves the most unreasonable construction of a statute ever heard of. The result would be very unreasonable if the Legislature intended it, for the destruction of property might amount to hundreds or thousands of pounds, and yet the shipowners would have to be satisfied with a forfeiture of wages as a consequence of acts of

continued disobedience or neglect of duty which must be entered in the log-book, though the cumulative effect of these acts might be to destroy the engines or the ship.

As a general rule, when a new remedy is introduced the common law remedy is not cut off except by express words or by very clear implication. I can conceive no case more clear than the present for holding that the common law remedy is not cut off. The remedy, so far from being substitutional, is not even parallel, for section 243 does not deal with civil actions or remedies, but with criminal prosecutions, and I certainly never heard of a summary criminal prosecution coming in place of an action of damages. It is after the criminal charge has been disposed of that a claim of damages arises as a necessary or a natural consequence, whereas it is contended here that this summary criminal remedy, whether adopted or not, is sufficient to prevent any claim being made for damages, or at least that the shipowner cannot claim more than the wages forfeited in the prosecution, and that he cannot even claim that without recording the various acts of misconduct in the log-book.

It certainly makes one hesitate a little to find that apparently in a case decided by the Queen's Bench Division an opposite conclusion was reached. The facts are not well given in the report, and have to be gathered from the leading judgment, and I am not quite sure that I understand what the facts were. I can only say, after reading the judgment, that if it is applicable to a case like the present I am totally unable to come to the same conclusion.

The defender is therefore put to prove his averments of misconduct and damage, and I do not see how the proof can be limited. These are averments of damage consequent on the misconduct of the pursuer, and yet the Lord Ordinary has practically prevented the defender from proving the pursuer's misconduct, for how he could bring home the general charge without going into particular acts I do not see. I am therefore for allowing the defender a proof of his averments.

LORD MURE—I am of opinion that sections 243 and 244 relate to summary criminal procedure only in regard to the various offences specified in the former of those sections, involving punishment by way of fine, penalty, forfeiture, and imprisonment. They deal exclusively with criminal offences, and I cannot think that these sections were intended to exclude an action of damages at common law for injury done to the boilers and engines which are the property of the defender through the continued negligence of the pursuer. I myself have great doubts whether, since the passing of the Merchant Shipping Amendment Act 1862, which places the engineer in the same position as the master and mate in regard to inquiries under section 11 of that Act by the Board of Trade, the first engineer comes under sections 243 and 244 of the principal Act at all.

LORD SHAND—The question here arises on the defence of the shipowner in an action against him for payment of wages, but it might equally well have arisen in the form of an action of damages at the instance of the shipowner, involving

a claim which amounts, as in this case, to a sum of between £500 or £600. It is a claim of damages in respect of real injury done to the boilers and engines belonging to the defender through the negligence of the pursuer.

From the defender's statement of facts it appears that the pursuer's misconduct and continued neglect of duty was such that the engine and boilers were in a disgraceful state of disrepair and dirt; that the boiler-tubes were so thickly coated with salt as to be dangerous; and that all the machinery under the pursuer's charge had been so neglected that the property of the defender had been very seriously injured indeed.

The Lord Ordinary has refused to allow the case to go to proof except upon statements 14 and 15 for the defender, so that he has practically rejected the shipowner's claim, for I fail to see how he is to prove that the pursuer was guilty of the misconduct averred in those statements unless he is allowed to go into the various acts specified in the other statements. In taking this course the Lord Ordinary has followed the English case of *The Great Northern Steamship Company v. Edgehill*, which was decided in the Queen's Bench Division, and to which your Lordship has referred.

I agree with both your Lordships that this is not a case to which the provisions of the Merchant Shipping Act of 1854 with regard to entries in the log-book have any application. I think that section 244 must be taken along with section 243. By section 243 are introduced various fines and forfeitures which are just punishments, and it is to these alone that the provisions in section 244 with regard to entries in the log-book apply. That is to say, if the shipowner, or other party entitled to prosecute, means to make neglect of duty on the part of a seaman the subject of a complaint, so that it may be punished as a criminal offence or misdemeanour, then a note of the misconduct must be entered in the log-book. But has that any application to a case of this kind? The claim of the shipowner here is clearly for what is of the nature of a civil debt, and I am therefore of opinion that these provisions have no application to a case such as the present. It is a general principle that where by statute an additional or cumulative remedy is given in the shape of penalty or punishment it cannot be assumed that the civil or previously existing remedy is intended to be abrogated without, as your Lordship has said, express words or the clearest implication. It has not been suggested that there is anything of the kind in the statute here, and the only difficulty, in my mind, arises from the English decision, and the respect which I have for the Judges who pronounced that decision. I observe, however, that Mr Justice Field, at the close of his opinion, which was concurred in by Mr Justice Denman and Mr Justice Hawkins, says—"We think therefore, although not without some hesitation, that the Magistrates have rightly dismissed the summons, and that the appeal must follow the same fate." As to the principle upon which the decision rests it rather appears that the Judges there took the same view of the general rule of law as that stated by your Lordship, for it is said that the additional remedy is not to be regarded as superseding the remedy already in existence, unless it is provided by the statute in express words or

by necessary implication. I notice that in one passage Mr Justice Field says—"But the duty under consideration in this case is an ordinary obligation to perform an ordinary contract of service, to the breach of which has been annexed the general remedy by action in favour of the employer ever since the contract of service itself. In order, therefore, to be able to hold that the employer is deprived of that remedy, the mere annexation of a new specific remedy would not by itself be sufficient; it must also appear from the statute to have been the intention of the Legislature that the general remedy should not co-exist, otherwise the new remedy will be merely cumulative, and in aid of the general one—*The Mayor of Lichfield v. Simpson*, 11 Q.B. 731. It is not, however, necessary that this intention should appear in express terms; it may be implied, and will and ought to be so if the future application of the general remedy is inconsistent with the new legislation. In such a case the exclusion will take place just as effectually as if the statute had expressly declared it." Then, in what follows, Mr Justice Field goes on to show that the general remedy is inconsistent with the new legislation. With that view I am unable to concur. I do not think that the general remedy is inconsistent with the new legislation. In the first place, as your Lordship has stated, the remedies are not parallel—the one is a criminal prosecution for a misdemeanour, the other a civil action of damages. In the second place, as was remarked at the bar, the two remedies are not commensurate, for in the case of a forfeiture of wages the amount forfeited might be very small, while the claim for damages might be very large. And yet it is maintained that the owner by this provision for the forfeiture of wages has lost his right to claim a very large sum, which may amount to hundreds or thousands of pounds. I think that would require very clear words, which I do not find here. Seeing, however, that the statute does authorise a forfeiture, if it should appear that the shipowner has got so much under a forfeiture which he has already enforced, I cannot suppose that he would be entitled a second time to claim the same forfeiture—the forfeiture must be once for all.

On the whole, I am of opinion that these provisions of the Merchant Shipping Act relate to misdemeanours only, and that it is in regard to these only that entries are required to be made in the log-book of charges of misconduct. I therefore think that we should allow the defender a proof of his averments.

LORD DEAS was absent.

The Court recalled the interlocutor of the Lord Ordinary, allowed to the defender a proof of his statement of facts, and to the pursuer a conjunct probation, and found the defender entitled to expenses since the date of the Lord Ordinary's interlocutor.

Counsel for Pursuer (Respondent)—Thorburn Agent—Andrew Wallace, Solicitor.

Counsel for Defender (Reclaimer)—R. V. Campbell—Ure. Agents—Campbell & Smith, S.S.C.