Friday, December 1.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

GILLIES *v.* CAIRNS.

Reparation—Negligence—Master and Servant—Ship—Seaman Injured through Defective Ladder—Duty to Inspect—Custom of Trade—Fellow Servant.

A ship's steward having been injured through the giving way of one of the rungs of a ladder leading down into the lazarette of the ship, sued the shipowner, his employer, for damages. The evidence showed that while the ladder was originally sufficient, it was unsafe at the time of the accident. It was also proved that it was the custom in the trade in question to leave the repair of minor defects in the ways of a ship to the master and crew. There was no proof that it was usual to have an inspection of a lazarette ladder at the commencement of each voyage.

Held (1) that the lazarette ladder was one of the minor matters which were left to the care of the persons in charge of the ship by the proved custom of the trade, on which the Court, in such cases sitting as a jury, must go, and (2) that consequently no fault on the part of the shipowner was established, inasmuch as the defect in the lazarette ladder was either latent or, if apparent, had not been repaired owing to the negligence of a fellow servant.

This was an appeal from the Sheriff Court at Edinburgh in an action of damages for personal injury at the instance of Norman Gillies, shipsteward, 51 North Forth Street, Leith, against David Cairns, steamship owner, Leith.

The pursuer at the time of the accident was a ship steward on board the s.s. "Cavendish," in the employment of the defender, the owner of the ship. The vessel, which was bound for the Mediterranean with coal, left Leith on 8th July 1903 and arrived at Jarrow-on-Tyne on 14th July following. In the afternoon of that day the pursuer had occasion to go into the lazarette, where the stores were kept, and the access to which was by means of a ladder. While he was descending the ladder he fell, as he averred, owing to one of the rungs giving way, a distance of ten feet into the lazarette, and sustained a severe spinal injury. He averred—"(Cond. 4) The foresaid accident was due to the fault or negligence of the defender, or those for whom he is responsible. It was the duty of the defender to see that the ways and works in said ship were, prior to the commencement of each voyage, inspected and put in a safe condition for those requiring to use them. Prior to the commencement of the voyage condescended on, he failed in said duty as regards the ladder leading to the lazarette. The accident was caused by one of the rungs of the said ladder giving way owing to the defective condition of the ladder, and in particular of said rung and the fastenings thereof. Said rung was not securely attached to the uprights, the fastenings thereof being old and rusted. The ladder in question was old and shaky, not properly bolted together, and generally unfit for the purpose for which it was used. It had not been originally made for the lazarette, but was part of an old accommodation ladder which had been cut up. At the time of the accident two of the rungs on the ladder were awanting. They had been so from the commencement of the voyage. In respect of said ladder, the vessel was unseaworthy when the voyage commenced. The condition of the said ladder was known to the defender, or should have been so if he had discharged his said duty. He did not employ a ship's carpenter on said ship to attend to the ways and works."

The pursuer pleaded—"(1) The pursuer having sustained loss, injury, and damage through the fault of the defender, or those for whom he is responsible, is entitled to reparation as concluded for."

Proof was led. The result of the evidence appears from the notes of the Sheriff and Sheriff-Substitute (*infra*).

On 6th January 1905 the Sheriff-Substitute (HENDERSON) pronounced this interlocutor:—"Finds in fact (1) that on 14th July 1903 the pursuer, while in the performance of his duties as a steward on board the defender's steamer 'Cavendish,' fell from a ladder leading from the deck of said ship to its lazarette, owing to a rung of said ladder giving way under him, and sustained very severe injuries; (2) that the pursuer has failed to prove that the defender is responsible for the accident through which he was thus injured: Therefore assoilzies the defender from the conclusions of the petition; finds the defender entitled to expenses. . . ."

Note.—. . . "I assume that I am stating the law applicable to this case correctly when I lay down the following propositions—(1) That a shipowner is not bound to be an expert as regards the fittings, ways, and works of his vessel, and that, if he has put any ship of his under the management and control of a duly qualified and careful master, all of whose requirements he promptly conforms to and supplies, he no longer incurs liability should an accident occur notwithstanding his precautions; (2) that such a qualified and careful master is not bound personally to test all the fittings, ways, and works of his vessel, or to search for and bring to light latent defects in any of them, but that as regards such things, his duty is restricted to remedying all apparent defects, and also such minor deficiencies as he has not himself noticed, but which are reported to him by his officers or any of the crew under him or them. If this be the state of the law in such cases, it then becomes necessary to inquire where or how the defender here has offended against these conditions so as to make him liable for the injuries with which the pursuer met. The ladder in question had been in use for more than one voyage.

It has been I think proved that, so far from being of flimsy or unsatisfactory construction, it was, if anything, too heavy and big for the purpose to which it had been turned after it ceased to be an accommodation ladder. Originally, undoubtedly, it was a well made and perfectly safe ladder. . . .

"After careful consideration of the evidence as to the state of this ladder when the voyage on which the pursuer was injured commenced, I have come to the conclusion that there was nothing in its external appearance or condition to put any persons, who were either inspecting the ship for faults or making use of the ladder in the ordinary way, on their guard as to its being in the slightest degree in a dangerous state.

"The defender's evidence as to his instructions to the master (Lister) as to keeping everything in good order is fully corroborated by the master. There is also the further fact that the vessel had been gone over before the pursuer's accident by foremen for the ship repairers at Jarrow for all possible defects, and this ladder was not reported against.

"On the whole, I have come to the conclusion that the step that gave way with the pursuer must have been damaged the evening before by the crew when lowering provisions and cases into the lazarette. This supposition on my part is however quite unnecessary for the decision of the case, as my true ground of judgment is that the pursuer has failed to prove that his accident happened through any cause for which the defender can be held responsible."

On appeal the Sheriff (MACONOCHIE), by interlocutor of 16th February 1905, adhered.

Note.—"In order that the pursuer should be successful in this action, it is necessary, in my opinion, that he should prove that the ladder was in a defective condition at the commencement of the voyage; that the defender did not fulfil the duty laid upon him of having the fittings of the vessel properly inspected before she sailed, and that the breaking of a step of the ladder, which caused the accident, arose from a cause which a careful inspection would have revealed—*Rothwell* v. *Hutchison*, January 21, 1886, 13 R. 463, 23 S.L.R. 307; *Gordon* v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23. After very careful consideration of the evidence, I have come to the conclusion that the pursuer has failed to discharge the onus of proof which is upon him.

"The evidence as to the state of the ladder when the ship left Leith is not at all satisfactory, but I cannot hold that it is proved that it was then in a dangerous condition. . . .

"Assuming, however, that the ladder was not in a safe state when the vessel left Leith, the question is, did the owner discharge the duty on him of having a proper inspection made before that time. Now it seems to me that in law it cannot be said that, assuming that the ladder was dangerous, that amounted to unseaworthiness in the sense of sec. 458 of the Merchant Shipping Act 1894, nor can it, I think, be said that at common law, inasmuch as the owner did not personally inspect this ladder, he did not discharge the onus upon him. In matters of this kind the owner may be quite incapable of making a proper inspection and of detecting a fault. In my opinion he discharges the onus on him if he directs a competent person to make the inspection for him and furnishes him with the means of making good imperfections—*Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568; *Mackenzie* v. *Treganna S.S. Co.*, November 30, 1893, 31 S.L.R. 141; *Hedley* v. *Pinkney & Sons S.S. Co.*, [1894] A.C. 222. Here I think it is proved that he did appoint the master to inspect, and that the master, who is the person usually charged with the inspection of such minor matters did inspect. But further, even if the master overlooked a fault which he ought to have discovered, I am of opinion that the owner is not liable in damages on the ground that the master was a fellow workman of the pursuer's (see *Wilson's*, *Mackenzie's*, and *Hedley's* cases, *sup. cit.*).

"Lastly, even on the assumption that the ladder was defective, and that no thorough inspection was made, was the fault so patent that a properly executed inspection would have revealed it? This question is a difficult one, but on a consideration of the evidence, and looking to the facts as to the long use of the ladder without accident, and without complaint of its state being made to the officers, I have come to be of opinion that it must be answered in the negative. . . .

"I may add that I attach no importance to the inspection and repairs which the defender says were made at Jarrow just before the accident occurred. No person who was employed in making those repairs was called as a witness, and there is no evidence to show that the ladder in question was then even inspected. On these grounds I hold that the pursuer has failed to discharge the onus of proof which is upon him, and that being so, it is not necessary for me to form any opinion as to how the accident occurred."

The pursuer appealed, and argued—The defender had failed to provide proper materials and was therefore liable—*M'Killop* v. *North British Railway Co.*, May 29, 1896, 23 R. 768, 33 S.L.R. 586. The same obligation lay on the owners of vessels in regard to providing safe materials as on other employers. There was a duty to inspect here—*Webb* v. *Rennie*, [1865] 4 F. & F. 608. The dangerous condition of the ladder may not have been apparent to a casual observer, but it could have been discovered by a careful inspection. The defender was in fault in not having done so—*Macdonald* v. *Wyllie & Son*, December 22, 1898, 1 F. 339, 36 S.L.R. 262. The rule that a servant continuing to work in the face of a known danger was not entitled to recover did not apply to a seaman on board ship—*Rothwell* v. *Hutchison*, January 21, 1886, 13 R. 463, 23 S.L.R. 307, nor where there was negligence on the employer's part—*Smith* v. *Baker & Sons*, [1891] A.C. 325, at

p. 362. The case of *Mackenzie* v. *Treganna S.S. Co., Ltd.*, November 30, 1893, 31 S.L.R. 141, cited by the Sheriff, was distinguishable, for the equipment of the vessel here was defective. There was no ship's carpenter on board, and that made it all the more necessary to have a careful inspection before the vessel sailed—*Murphy* v. *Phillips*, 1876, 35 L.T. N.S. 477. The vessel was unseaworthy in the sense of sec. 458 of the Merchant Shipping Act 1894.

Argued for respondent—The liability of an employer for supervening defects was different from that for original defects—*Macdonald* v. *Wyllie & Son* (*cit. supra*). The ladder was part of the gear of the ship, and was quite sufficient at the commencement of the voyage, and that was sufficient—*Gordon* v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23. The defender was not liable for latent defects, nor for defects caused by rough usage during the voyage in question. It was for the master and crew to look after the ways of the ship. The master had in fact inspected the ways of the ship and satisfied himself that they were sufficient. If there was any negligence it was that of a fellow servant, for which the defender was not liable—*Wilson* v. *Merry* v. *Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568. The vessel was perfectly seaworthy—*Hedley* v. *Pinkney & Sons' Steamship Company*, [1894] A.C. 222. The custom of trade must be read into contracts of employment, and the custom here was to leave the repair of minor defects to the crew. The repair of this ladder was in the same category as the splicing of a rope and properly left to the master and crew—*Gordon* v. *Pyper* (*cit. supra*).

LORD PRESIDENT—This is an action of damages by a ship's steward for injuries which occurred to him owing to a step giving way in a ladder which led down to what is called the lazarette.

The learned Sheriffs have assoilzied the defender because in their view the case turned on the well-known doctrine laid down in *Wilson* v. *Merry & Cuninghame*. The case here has been argued on different grounds, and I think it is necessary to say to what I think the facts come. I have no doubt that the ladder, of which a step gave way, was on the occasion of the accident in what may be called a somewhat rickety condition. The original steps of the ladder as it existed at first were substantial, the steps being made of teak, being secured in a groove, and kept in position with screw nails. It seems that these original steps had been in several instances recently replaced, and that the replacing work had been done in a somewhat makeshift manner. At the same time I do not think the pursuer has been able to show—and the onus of course is on him—that this ladder when originally put up was insufficient, so far as safety was concerned, for the purpose for which it was put up. It may not have been a convenient ladder for it had been originally used as an accommodation ladder, but I think in its construction it has been proved to have been amply strong for its purpose. I do not need to say more than this, that I do not think the pursuer has proved that the ladder as originally built was unfit for the purpose for which it was put there. At the same time I think he has proved that at the time of the accident the ladder was in an unsafe condition.

The question then comes, in that state of the facts, to be—what is the law applicable to the matter? There are a great many cases, and I do not propose to go through them, but I think it is very well settled that an employer's duty consists in the furnishing, first of all, of proper apparatus. That does not mean that he warrants it or guarantees it, but it does mean that he must provide proper apparatus, and that he cannot delegate that duty to anyone else. But for the reasons I have already stated I do not think that in this case the employer has been shown to have failed in that initial duty. But no doubt his duty does not end there. He has also a duty to see that the apparatus, proper at first, does not fall into an improper condition. The law is nowhere better put than in the case of *Webb* v. *Rennie*, 4 Foster & Finlayson, p. 608, where the late Chief-Justice Cockburn, after speaking of the duty on the employer to provide a proper apparatus, goes on (p. 612)—"And although in general the employer was not liable unless he knew of the danger"—that is to say, where the apparatus had got into an improper condition—"yet it was his business to know if, by reasonable care and precaution, he could ascertain whether the apparatus or machinery were in a fit state or not." Now, the case in question there, for purposes of analogy, is very like the case here. It was an accident that was brought about by the fall of a telegraph pole which had become rotten by standing in the ground for a considerable time. Nothing was said against the telegraph pole when it was originally put up—there was no averment that it was not a good enough pole—but it had been allowed to go wrong, and had become a bad pole. I think that is exactly the same as the ladder here.

Therefore it comes to this—Did the employer know, or ought he to have known, that this ladder was in a bad condition. Did he know himself? Of course there is no question that he did not. Now, when it comes to a question of whether he ought to have known, there comes in a question that affects a good deal his duty in respect of such matters. In this class of cases it seems to me that your Lordships, who are, I think, sitting as a jury, must not go on what your own views would be, but must go according to the proved custom of the trade or business that you are concerned with. It was said by a learned Judge in one of the cases—I think an American one—that it would never do for juries to sit down and settle under what conditions and regulations trades are to be conducted, and that, although they must be the judge in every case of whether reasonable precautions have been taken, they must determine that not of their own consciousness of what they think right or wrong, but according

to what are proved to be the ordinary conditions in the trade. Now, applying that rule here, I do not think there has been any proof amounting to this, that an inspection of a lazarette ladder was a thing which in ordinary circumstances would take place at the commencement of each voyage. In other words, I think it was necessary that these minor matters should be left to the person in charge of the ship, generally the master, and that consequently when the ladder came, by some reason or other, to be worn out—it may have been by things being bumped on it or some other reason—this was just one of those things which the master, or the man delegated by the master, ought to have discovered. It might have been put right by any temporary precaution. The putting of the steps safe is an operation anybody with tools and a screw could have done at once. They may not have made, as one of the witnesses put it, a tradesmanlike job of it, but safety might have been secured.

I accordingly come to the conclusion that the pursuer here is really in a dilemma. Either the fault was latent altogether, in which case nobody was to blame, or it was just one of those things rightly left by the employer to some other person, and, if this was negligence, it was negligence of fellow servants, in respect of whose negligence the pursuer cannot recover, not, as Lord Cairns pointed out, owing to any technical rule, but simply because pursuer has failed to show that the employer has been guilty of any negligence towards him. Upon these grounds I am of opinion that the result the Sheriff has come to is right, and that the appeal should be dismissed.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—I agree with your Lordship and have nothing to add.

LORD KINNEAR was not present at the hearing.

The Court pronounced this interlocutor—

"Find in terms of the findings in fact and in law in the interlocutors of the Sheriff-Substitute and of the Sheriff, dated 6th January 1904 and 16th February 1905 respectively: Refuse the appeal, affirm the said interlocutors, of new assoilzie the defender from the conclusions of the petition, and decern: Find the defender entitled to the expenses of the appeal, and remit," &c.

Counsel for Pursuer and Reclaimer—M'Lennan, K.C.—J. W. Forbes. Agent—J. Ferguson Reekie, Solicitor.

Counsel for Defender and Respondent—Younger, K.C.—Jameson. Agents—Boyd, Jameson & Young, W.S.

Thursday, December 7.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

CAMPBELL *v.* COCHRANE.

Reparation—Slander—Judicial Slander—Privilege—Communication to Pursuer's Agent by Defender—Malice—Relevancy.

An employer, replying to a claim on the ground of wrongous dismissal, made by a dismissed servant through an agent, wrote, *inter alia*—" . . . I may inform you that the reason of" the servant's "dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house." And later in another letter—"I do not anticipate any difficulty in proving that" the servant "did dishonestly take my butter." *Held* (recalling the judgment of Lord Ardwall) (1) that the communications were of the nature of pleadings and entitled to the highest privilege; (2) that facts and circumstances from which to infer malice were not relevantly averred; and consequently (3) that no issue could be allowed.

Opinion (*per* Lord M'Laren) that the facts and circumstances necessary for an inference of malice in the case must have been antecedent to and independent of the dismissal.

On 11th August 1905 John Campbell, Welton Farm, Blairgowrie, brought an action against Major Archibald Hamilton Cochrane of Dalnabreck, Ballintuim, Blairgowrie, to recover £500 as damages for slander contained in two letters written by the defender to the pursuer's agents. Campbell had been engaged by Major Cochrane's gamekeeper (Ross) to manage a small farm for his master. In the course of his work he considered he was interfered with by Ross and saw his master with regard to the matter, and shortly afterwards, at a second interview, he was dismissed on a month's notice. Having taken legal proceedings for wrongous dismissal he was successful in his action, and it was in the negotiations prior to that action that the letters complained of were written.

The pursuer averred—"With that object"—[*i.e.*, to get his relations with Ross put on a proper footing]—"the pursuer called upon the defender on the evening of Monday, 31st August 1903, and desired that a meeting be arranged by the defender at which Ross should be present, as he deemed it unfair to make any statement about Ross until he should be present to hear and answer same. The defender took offence at the attitude of the pursuer in insisting that Ross be present at the interview, and, becoming angry, replied that if Ross was interfering with his work, it was no business of the pursuer's whatever, and that he would not tolerate complaints from servants, and he could not have anyone about his place that would