Counsel for Defenders—Millar, Q.C., and Mackintosh. Agents—Philip, Laing & Monro, W.S.

Saturday, January 18.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

LEDDY *v.* GIBSON & CO.

Reparation—Injury to Person—Fellow-Servant.

In an action of damages brought by a seaman against the ship-owners, on the ground of his having been injured through the fault of the captain of the ship—*Held* (1) That the ship-owners were not responsible; (2) That the captain of a ship is a "fellow-servant" of his crew in questions with the owners.

The pursuer in this action, Terence Leddy, was on 16th March 1871 in the employment of Messrs George Gibson & Co., shipowners, Leith, as a seaman on board their steamer "Osborne," and raised the present action for the purpose of recovering damages from them, on the ground that he was injured in his person through the fault of the captain or master of the "Osborne," for whom the defenders, as owners thereof, were responsible.

The pursuer avers that, in the course of the return voyage from Rotterdam to Leith, the "Osborne" required, as usual, to be turned from the river Maas into the canal running to Helvoetsluys, and that Mr James Johnston, the captain of the Osborne, directed a rope, called a *spring-rope*, which was not fit for the intended purpose, to be used in checking or turning the steamer into the canal, and that he ordered the pursuer and other seamen to pay out or ease off, at the timberheads, near the bow, the rope, one end of which was fastened on shore. Also that this spring-rope was of insufficient length—that the pursuer was obliged, and was ordered, on account of its shortness, to let it go, while there was a heavy strain upon it—and that in consequence the end of the rope struck the pursuer before he could get clear of it, and broke one of his legs, and severely hurt the foot of the other. It is further set forth that the pursuer was thus injured by the gross fault and negligence of Captain Johnstone (who was in command of the vessel, in virtue of the powers conferred upon him by the defenders) in not using, or ordering to be used, a fit, sufficient, or suitable rope for the purpose, or, at all events, in not stopping the steam-boat from proceeding before the rope was nearly all paid out, which it was the duty of Captain Johnstone to do.

The pursuer pleaded—That having been injured in his person by and through the fault of Captain Johnstone, for whom the defenders are responsible, as above mentioned, he was entitled to decree for reparation and damages.

The defenders pleaded—That the statements of the pursuer were irrelevant, and insufficient in law to warrant the conclusions of the summons, and his injuries having been occasioned by his own fault, or at all events he having contributed to the accident by his want of care and inattention to the warning given to him; or otherwise, the said injuries having been occasioned by the fault of the pursuer's fellow-servants, the defenders were not liable in any damages on this account, and ought to be assoilzied.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 1st November* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, sustains the second plea in law for the defenders; dismisses the summons, and decerns; finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax and to report."

In the Note appended to this interlocutor, the Lord Ordinary, after narrating the circumstances of the case, continues—"The Lord Ordinary is of opinion that the pursuer has not set forth in his summons a good or sufficient cause of action. The pursuer does not aver that the Captain of the steamer did not possess the statutory certificate of competency, or that he was not fit and competent for the duties of his office. There is no allegation that the defenders had failed to furnish the steamer with ropes of sufficient length, and fit for the purposes of checking or turning the steamer into the canal. On the contrary, it is averred in the summons that the mode of turning the steamer into the canal was by means of a *check-rope*, and that there were on board the vessel two check-ropes used for this purpose to suit the state of the tide; and the pursuer's complaint is, that these ropes were not used, but that the captain ordered a rope 'called a *spring-rope*, which was not of sufficient length, or fit or intended for the purpose,' to be used. The sole ground of action, therefore, is the fault of the captain of the steamer in using this insufficient spring-rope, and in not using one of the two check-ropes on board the vessel, or some other rope fit and sufficient for the purpose.

"The pursuer at the time was not a stranger, but the servant of the defenders. So also was the captain. The captain and the pursuer were, the Lord Ordinary considers, fellow-servants engaged in one common employment, namely, the navigation of the vessel. No doubt they had each different duties to perform, and the pursuer was under the command of the captain. But, as observed by Lord Cranworth in the case of *Wilson* v. *Merry and Cunningham*, 'Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation, and their captain, whose directions the labourers are bound to follow, are all fellow-labourers under a common master, as has been more than once decided in England, and on this subject there is no difference between the laws of England and Scotland.' The pursuer and the captain being fellow-servants, the defenders, as their masters, are not responsible for an injury sustained by the pursuer through the fault of the captain, because the pursuer, when he entered the defenders' service, must be held to have done so in the knowledge that he was exposed to the risk of injury through any fault on the part of the captain while acting as the defenders' servant, and on the footing that as between himself and his masters he would run that risk. Such a fault as the pursuer complains of is just one of the ordinary risks of a seaman's service, for which the masters, the owners of the vessel, are not, the Lord Ordinary thinks, liable in reparation. The pursuer may sue the captain for the consequences of his fault, but he has no ground of action against the defenders, whom he does not allege to have committed any wrong.—*Wilson* v. *Merry & Cunning-*

ham, 29th May 1868, Law Reports, Scotch Appeals, I. 326; *Bartonshill Coal Company* v. *Reid*, 17th June 1858, 3 Macq. 266; *Hutchison* v. *The York, Newcastle, and Berwick Railway Company*, 22d May 1850, 19 Law Journal, Exc. 296; *Searle* v. *Lindsay*, 22d Nov. 1861, 31 L. J. Com. Pleas, 106.

"The Lord Ordinary is of opinion that the pursuer's first plea is obviated by the Board of Trade not having instituted an enquiry respecting the pursuer's injury, and by the Board having stated, in answer to the letter of the pursuer's agent, written since the defences were lodged, that the Board does not intend to institute any such enquiry under part IX. of the Merchant Shipping Act 1854."

The pursuer having reclaimed, at advising:—

Lord Cowan—This is an interesting case, and in some respects different from the previous cases involving questions of liability for injury sustained by servants in the course of their employment.

With reference to the case of *Gregory*, I concur with the opinions of the Court as expressed at that time, and also in the grounds on which those opinions were based. I don't think we can go into nice distinctions drawn by the Lord Advocate as to the grounds of judgment in that case. I think we must regard the judgment as founded broadly on the principle of "collaborateur." As to the relation of the captain of a ship to his employers, the shipowners, on the one hand, and the crew of his vessel on the other, I think there can be no doubt that the captain and crew are all acting in a common employment under the same master. Are they or are they not "collaborateurs?" I think they are, and that such a case as the present is a particularly striking illustration of the principle, and the grounds of the Lord Ordinary's judgment amply sufficient for the decision of this case.

Lord Benholme—I have no doubt at all that the defence ought not to be rested on the anomalous position of the captain of a ship—he having supreme authority on board his ship. My only doubt is with respect to the English doctrine of "collaborateur." Is that to be held as similar and co-extensive with all servants, officers, agents, &c. of all kinds employed under the same contract? Or is it not rather to be confined to those servants on the same, or very nearly on the same, footing of equality? My doubt is derived from some observations by English Judges, seeming to point to a distinction between a sub-foreman and an upper foreman, for example, holding the former to be a collaborateur, but at the same time reserving their opinion as to whether the latter stands in that relation or not. No doubt the captain of a vessel is in a very superior position of authority; however, while not willing to hold the distinction to which I have referred to have been over-ruled, I am not prepared to give effect to that distinction in the present case.

Lord Neaves—There can be no doubt that the most general, as well as the most equitable, rule is—"*culpa tenet suos auctores*," and that means, not only that whoever commits a fault is responsible for it, but also that no one else is responsible. But to this rule there are several exceptions, and one of these exceptions is expressed with us by the maxim "*qui facit per alium facit per se*," and in England, "*respondeat superior*." To this less comprehensive rule there are also sub-exceptions, viz., (1) If the party who employs another, employs, not one of his own servants, but an independent tradesman, who undertakes to transact that class of work, then the employer is not responsible for injury arising under the management of the tradesman. My own coachman drives over a child, I am responsible for the injuries caused by the accident, but if, instead of my own coachman, I employ a post chaise, and the driver of it drives over the child, I am not responsible.

(2) Another exception is illustrated by those cases beginning the use of the term "collaborateur"—a term referring to the relative position of servants where several are employed in the same matter. As to these circumstances the law is fixed.

There can be no doubt that the captain of a vessel, though occupying a position of great authority, must nevertheless himself act under the orders of the ship-owners, and I know no authority for holding that he is to be regarded as a depute master, and not a fellow servant. I am of opinion that the well ascertained principle of collaborateur has been as rightly applied in the interlocutor of the Lord Ordinary as in any case.

Lord Justice-Clerk—I am of opinion that the interlocutor of the Lord Ordinary is well founded, on the grounds which he has fully explained. The injuries of which the pursuer complains are said to have been inflicted by the neglect of the master of a vessel of which the pursuer was one of the crew, in the course of a voyage. As far as the defenders, who are the owners of the vessel, are concerned, the master and the crew were their servants, engaged under a common employer, in the execution of a common employment, and, on the principle established in the case of the *Bartonshill Coal Company*, the defenders could not be liable for injuries received by one of their servants by the negligence of another in the execution of the contract of employment, if they had exercised reasonable care in their selection of the servant who was guilty of the neglect which caused the injury.

It has been maintained that the master of a seagoing vessel holds an independent position, and that on a voyage he has the absolute control of the ship, so much so that even the owners, had they been on board, could not have interfered with his orders. This is true, and arises from the incidents and exigencies of navigation. But there can be no doubt that if third parties, or strangers, are injured in person or property by the fault of the master or captain, the owners are responsible, because he is the servant of the owners, and the rule of law "*qui facit per alium facit per se*" would regulate the liability of the owners. In the present case the owners are not liable, because both captain and crew were fellow servants under a contract of employment with a common employer.

I took occasion in the recent case of *Gregory* v. *Hill* to explain the principle on which the *Bartonshill Company* was decided, and which we must now hold to be the law applicable to such cases, and I refer to my observations there on the English decisions. The exception to the general rule, *respondeat superior*,—expressed among us in our law by the *brocard* of the civil law, *Qui facit per alium facit per se*,—has been rested in England entirely on an obligation implied in the contract of service, under which the servant is presumed to undertake all the ordinary risks of the service, arising from the fault of those employed along with him, and to be recompensed for this risk by the remuneration which he re-

ceives. I do not say that the case of *Priestly*, which was the first of the series, necessarily proceeded on so artificial a rule, but it is now clearly established, and, as far as I can judge, universally acknowledged and enforced in the courts in England.

It is true that in the case of *Merry & Cunningham*, which was a clear and simple illustration of this rule, Lord Cairns and Lord Colonsay expressed the opinion, and doubtless quite accurately, that the rule itself was only one illustration of the maxim "*culpa tenet suos auctores*," and indicated that this maxim might perhaps in some supposed cases have a wider application. But hitherto no such limitation of the employer's liability has ever received effect, and I have great doubts if it admits of application without much clearer definition. If indeed the liability of the employer were in all cases to be limited by the rule *culpa tenet suos auctores* to an obligation to use reasonable care in selecting his servants, whether those who suffered by the negligence of those employed were fellow servants or strangers, such a rule would be simple. But it is needless to say that such is not, and never has been, the law. In the case of *Gregory* v. *Hill*, on a review of all the authorities, we refused to liberate the contractor for the mason work, in the building of a house, for the neglect of his servant, by which the servant of a contractor for the joiner work of the same house was injured. The most recent decision on the subject in the English Courts, of which I am aware, is the case of *Murray*, Law Reports, C. Pleas, vol. 6, p. 24. In that case a stevedore had been employed by the owners of a ship to land a cargo at Liverpool. In the process of landing one of his men injured one of the crew, who brought his action against the owners. It was found that the man who caused the injury was the servant of the stevedore, and not of the owners. Justice Willes, in giving his opinion, says "The rule, out of which this case forms an exception, that a servant or workman has no remedy against his employer for an injury sustained in his employ through the negligence of a fellow workman or servant, is subordinate to another rule, and does not come into operation until a preliminary condition is fulfilled; it must be shown that if the injury had been done to a stranger he would have had a remedy against the person who employed the wrong-doer." The plaintiff was held to have no such remedy in that case, because the stevedore was an independent contractor, over whose servants the owner had no control.

It was suggested that the captain of a vessel on a voyage was to be held to be a "deputy master" in the sense in which that term has been used in some English cases. If, however, I rightly understand the phrase, it denotes one who is appointed to do that which, from the nature of the contract, the employer would himself have done. This is not the position of the captain of a sea-going vessel. In so far as he is anything but a servant, he is rather in the position of an independent contractor. But, as regards a question like this, I cannot look on him in any other light than as a servant, along with the rest of the crew, of the owners of the vessel, although he has control and power of superintendence over his fellow servants.

Counsel for the Pursuer—Scott and Rhind.

Counsel for the Defender—Lord Advocate and Trayner.

Saturday, January 18.

SECOND DIVISION.

[Lord Gifford, Ordinary.

IRVINE *v.* ROBERTSON.

Interdict—Sea-shore.

Where a piece of ground had been reclaimed from the sea and used for drawing boats upon, and also as a public access to the sea-shore, *held* that proprietors of ground in the immediate vicinity of the sea-shore, who had assisted and paid for reclaiming the ground, and had used it as an access to and from the sea, had a sufficient title to maintain the existing state of possession, which had endured for forty years and upwards.

The Lord Ordinary's Interlocutor and Note fully explain this case:—

"*Edinburgh, 2d July* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process—Sustains the reasons of suspension: Suspends, prohibits, interdicts, and discharges in terms of the note of suspension and interdict: Declares the interdict granted perpetual, and decerns: Further, decerns and ordains the respondent instantly to remove the paling recently erected by him on the piece of ground within the burgh of Lerwick, shown in green upon the sketch or plan produced with the note of suspension and interdict, and any other impediments or erections recently placed by him thereupon, and to restore the said ground to the condition in which it was prior to the erection of the said paling; and continues the cause in regard to the remaining conclusion of the note of suspension and interdict, and also as regards the question of expenses.

"*Note.*—The Lord Ordinary regrets that the parties' advisers in Lerwick have thought it necessary to lead proof at such great and unnecessary length as they have done, more especially as a great part of the proof relates to matters which can have no bearing upon the decision of the question at issue.

"After repeated consideration, the Lord Ordinary is of opinion that the following facts have been established by the proof:—

"The area or piece of ground, extending to 1409 square feet, which has been taken possession of and enclosed with a paling by the respondent, with the view of building upon it, was at one time part of the sea-shore of Lerwick, situated opposite the properties of the complainers and respondent. Within the last 40 years it has been gradually reclaimed from the sea, in consequence of the deposit of rubbish upon it from time to time by the inhabitants of Lerwick. As it was reclaimed it was used and possessed by the inhabitants of Lerwick for the purpose of drawing boats upon it, and also as a public access or thoroughfare to the sea-shore, and after it was constructed to the Victoria Pier, which is the public pier of Lerwick. The market cross was in course of time erected, and markets were held upon it. In 1866 an open drain ran through it to the sea, past the market cross, and it became, from the deposit of town-refuse and otherwise, a nuisance to the neighbouring proprietors and their tenants. In consequence of this, a committee of the Parochial Board, as the Local Authority, was appointed, which during that year called a meeting of the neighbouring proprietors, whose