be benefitted, with directions that clearly pointed to the immediate realisation of the testator's wishes. But in the progress of the law these restrictions have been gradually and insensibly removed. Now, as I think, it results from all the authorities that the expression "charitable purposes," in a bequest of residue, coupled with the appointment of persons who are to administer that bequest, suffices to exclude the next-of-kin, even where the will contains no evidence that the testator had ever applied his mind to the consideration of what was to be done with his estate, or that he had any other motive than that of disappointing the expectations of his next-of-kin. Of course I am very far from suggesting that such was the motive in the present case. I am stating what is possible in the existing state of the law. At the same time, I think we must recognise that this is a matter of opinion.. In the present state of the case law on the subject I think it must be left to the House of Lords in its judicial or legislative capacity to determine within what limits the right of charitable disposition is to be allowed.

On the second point I also agree with the Lord Ordinary and with your Lordship. The settlement under construction is a universal settlement, and I think, with the possible exception of bequests of specific articles, such a settlement is exclusive of the effect of all previous dispositions.

Therefore I agree that the reclaiming note should be refused.

LORD KINNEAR—I agree entirely with the opinion of the Lord Ordinary, and I also assent to the additional observations which have been made by your Lordship in the chair, with special reference to the points which have been argued to us, and I do not need to repeat them.

LORD PEARSON—I am of the same opinion.

The Court adhered.

Counsel for the Pursuers and Respondents (The Trustees under the Settlement of the deceased James Dick executed in 1902)—The Solicitor-General (Ure, K.C.)—Cullen, K.C.—Scott Brown. Agent—Henry Robertson, S.S.C.

Counsel for the Claimants and Reclaimers (The Next-of-kin)—Scott Dickson, K.C.—Hunter K.C.—Orr, K.C.—Duncan Millar—Munro — Mercer — T. Graham Robertson. Agents—Inglis, Orr, & Bruce, W.S.—W. Croft Gray, S.S.C.

Counsel for the Claimants and Reclaimers (The Trustees under the Settlements of 1891, 1899, and 1901 executed by the deceased James Dick)—Lees, K.C.—Ingram. Agent—Henry Robertson, S.S.C.

Friday, May 31.

SECOND DIVISION.

O'BRIEN *v.* ENRICO, ARBIB & COMPANY.

Reparation — Accident — Ship — Visitor to Member of Crew—Liability of Owners—Accident Due to Employee Acting beyond Scope of Employment.

A vessel about to depart on a voyage was lying in harbour moored to a quay. The wife of the mate, along with their child, went on board and spent an hour or two with her husband, her visit being entirely unconnected with any business or interest of the owners. The vessel was not provided with a gangway, and her husband brought her on board across a ladder upon which he had laid a plank. At the moment of her departure, her husband being engaged on ship's business, a rigger, an employee of the owners, improvised a gangway out of a plank which was being used to protect a skylight during coaling. The plank being rotten broke, and the mate's wife fell into the dock and was injured. She brought an action of damages against the owners of the vessel. The Court, after proof, *assoilzied* the defenders, *holding* that the pursuer was on board voluntarily and for her own purposes and in circumstances which imposed no duty upon the defenders in relation to her; and, further, that the rigger's act was one for which the defenders were not responsible, being an act of friendship outside the scope of his employment.

Ship — Factory — Gangways — Ladders — Wharfs—Factory and Workshop Act 1901 (1 *Edw. VII, c.* 22), *sec.* 79—*Regulations of October* 24, 1904, *by Secretary of State as to Gangways—Scope of Application—Visitor to Ship.*

Regulations by the Secretary of State dated October 24, 1904, and made under section 79 of the Factory and Workshop Act 1901, regarding gangways, &c., to be used when ships are lying at a wharf or quay, *held* to apply only in the case of persons employed in loading, unloading, or coaling ships, and not to affect the liability at common law of shipowners to third parties.

Section 4 of part 2 of the regulations of October 24, 1904, made by the Secretary of State regarding docks and quays in virtue of the powers conferred on him by the Factory and Workshop Act 1901, section 79, is as follows:—"If a ship is lying at a wharf or quay for the purpose of loading, or unloading, or coaling, there shall be means of access for the use of persons employed at such times as they have to pass from the ship to the shore, or from the shore to the ship, as follows:—(*a*) Where a gangway is reasonably practicable, a gangway not less than 22 inches wide, properly secured and fenced throughout on each side to a clear height of 2 feet

9 inches by means of upper and lower rails, taut ropes, or chains, or by other equally safe means. (*b*) In other cases a secure ladder of adequate length."

Mrs Catherine Darroch or O'Brien brought, in the Sheriff Court at Glasgow an action of damages for personal injury against Enrico, Arbib & Company, owners of the s.s. "Cousins Arbib." The Sheriff-Substitute having allowed a proof before answer, the pursuer appealed to the Court of Session for trial by jury.

Upon the case coming before the Second Division the defenders maintained that the pursuer's averments were irrelevant, and moved the Court to dismiss the action.

The Court allowed a proof, which was taken before Lord Kyllachy.

The *facts* are stated in the rubric, and in the opinions of their Lordships *infra*.

The following authorities were referred to in the course of the debates upon relevancy and upon the proof:—*Nicolson* v. *Macandrew & Company*, July 7, 1888, 15 R. 854, 25 S.L.R. 607; *Campbell* v. *A. & D. Morrison*, December 10, 1891, 19 R. 282, 19 S.L.R. 251; *Indermaur* v. *Dames*, L.R., 1 C.P. 274, 2 C.P. 311; *Smith* v. *London and St Katherine Dock Company*, L.R., 3 C.P. 326; *Brady* v. *Parker*, June 7, 1887, 14 R. 783, 24 S.L.R. 561; *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; *Gordon* v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23; *Messer* v. *Cranston & Company*, October 15, 1897, 25 R. 7, 35 S.L.R. 42; *Lunnie* v. *Glasgow and South-Western Railway Company*, February 10, 1906, 8 F. 549, 43 S.L.R. 372; *Kelly* v. *State Line Company*, June 5, 1890, 27 S.L.R. 707; *Tolhauser and Another* v. *Davies*, 1888, 57 L.J. (Q.B.) 392; *Thatcher* v. *Great Western Railway Company*, 1893, 10 T.L.R. 13; *Watkins* v. *Great Western Railway Company*, 46 L.J., C.P. 817; *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

LORD JUSTICE-CLERK—The facts proved in this case are clear and simple. The pursuer, who is the wife of the mate of a steam vessel belonging to the defenders, and which was just about to start on a voyage, came to the vessel with linen which she had been dressing for her husband. But as her husband was about to go on a voyage, she desired to see him before leaving, and to spend a little time with him, along with their child, which she had brought with her. Accordingly, she spent an hour or two in her husband's cabin. She and her husband left the cabin with a view to her going on shore. On their way to the side of the vessel the mate stopped to speak to the pilot, and the pursuer having gone forward, a rigger put a plank across to the quay, and was assisting her to cross by it, when it broke and they fell into the water, and she suffered the injuries of which she complains. The plank was rotten, and this was the cause of its giving way. It was a plank which had not been provided to be used for a gangway, but was being used at the time as a fender to prevent pieces of coal which might fall in the work of coaling the vessel from breaking the glass of the deck skylights.

These being the facts, the question is whether there is any case against the defenders as having a duty towards the pursuer, as being on board in circumstances making them responsible to give safe conduct.

Now the circumstances do not, in my opinion, disclose two important facts which are necessary to the pursuer's case. The pursuer has not made out that it was necessary for her to go on board at all. Bringing her husband's clean clothes was quite a legitimate proceeding; but they might have been delivered by hailing the deck hand on duty and handing them to him. I cannot hold that she had any right to go on board, or any invitation to do so. This is on the assumption that she did go on board with the clothes. But in point of fact her husband got men from the vessel to go on shore and carry the clothes to his cabin. The pursuer had brought them in a cab. There was a box and a bag, and she could not have carried them on board.

Therefore the object she had in going on board was, not to bring the clothes to her husband, but to visit him as her husband, for her and his pleasure. The visit lasted for some hours, and had no connection with business or duty of any kind. She was in no different position than if she had gone to a house where her husband was staying temporarily in order that they might enjoy one another's society. The defenders, therefore, had no duty towards the pursuer. She was not there on their invitation, any more than a visitor to a servant is invited into the servant's master's house by the master. In such a case the master would have no duty to take care of the safety of the servant's friend. That, as it appears to me, is the import of the decisions, which are numerous.

It may be said, even assuming what I have said, that it will not apply. Where a person is by permission in premises, there may be liability if some part of the premises, or appliances in the premises, be in a state which constitutes a danger in use, if an invitation to any person permitted to be on the premises to use it can be inferred. However far that doctrine may have been carried, I am unable to see that it has any application here. It cannot be said that the defenders in having this plank on board intended it to be used, or gave any invitation to anyone to use it, as a gangway. It was quite suitable for the purpose for which it was being used. The mistake made was in using it for a purpose for which it had not been intended. I think it may safely be assumed that if the pursuer's husband had not stayed behind to speak to the pilot he would not have allowed the plank to be used as it was. The placing of the plank by the riggers was a volunteered act of courtesy on their part, and not part of their duty. They had no duty, as serving the owners, to the pursuer at all. If a servant makes a mistake by which a visitor is injured, it is well settled that the owner of the premises is not liable for the servant's act. Such actings are not within the scope of the servant's em-

ployment, and the master does not take any such risk. Whatever liability might have been maintained against a master if servants in using proper appliances use them in a dangerous way, this is not a case of that kind at all. Here I think the riggers went outside the scope of their employment in doing, not an act of duty, but a friendly act, for which the defenders are not responsible. What they did was not done "in the course of the service and for the master's benefit" (*Barwick* v. *English Joint-Stock Bank*).

I do not think it necessary to notice the contention of the pursuer that under certain public regulations those in charge of the vessel should provide a proper gangway between it and the shore. In my opinion these regulations do not apply in the circumstances of the case.

I am therefore in favour of a decree of absolvitor.

LORD STORMONTH DARLING—I have given anxious consideration to this cause, and I own I was at one time disposed to think that the shipowners had incurred liability to pay damages to the pursuer, chiefly owing to their failure to comply with the regulations made by the Secretary of State under the Factory and Workshop Act 1901, which regulations have statutory force. By Part II of these regulations it was provided that if a ship is lying at a wharf or quay for the purpose of loading or unloading or coaling, there shall be means of access for the use of persons at such times as they have to pass from the ship to the shore or from the shore to the ship (*a*) by a gangway wherever reasonably practicable; and (*b*) in other cases by a secure ladder of adequate length, meaning, as I understand the regulation, a ladder to be used as a ladder. I further thought, and still think on the evidence, that in fact there was no such gangway on board, and that the very desire of the master and carpenter to make out, contrary to all the other evidence, that there was such a gangway (though nobody else saw it), showed that it was "reasonably practicable" to have one.

But having read the opinion of my brother Lord Low I have come to be satisfied that this regulation was intended solely for the use of persons employed in the processes of loading or unloading and coaling, and that it cannot affect the liability of the shipowners towards persons not so employed, though otherwise in the position, as this lady was, of being lawfully there. I therefore concur with Lord Low on this point, and indeed in the whole case.

LORD LOW—I am of opinion that the defenders are not liable in damages to the pursuer in respect of the accident which occurred when she was leaving their ship.

The pursuer was lawfully on board the ship, but in my judgment she was there merely by permission and not by invitation. I do not think that she came on board ship upon any business in which the defenders had an interest. It is averred upon record that the pursuer required to go on board with her husband's clothes. If that had been established the pursuer might have been regarded as having been on board by invitation, and on business upon which the defenders were, although remotely, interested, in which case the latter would have been bound to use reasonable care for her safety. In the first place, however, although the pursuer did bring her husband's clothes to the ship's side she did not require to go on board in order to deliver them; and indeed it is plain from the evidence that she did not, in fact, herself take them on board, or see that they were brought on board.

In the next place, her main object in going to the ship was to see as much as possible of her husband before he sailed. She accordingly took their child with her and remained on board for several hours and until shortly before the ship left the harbour. The pursuer therefore was on board ship simply in the capacity of a visitor to one of the defenders' servants, and I do not think that it makes any difference that she was the wife of that servant, and that he was an officer. A mere visitor to any member of the crew would, in my opinion, have been in the same position as the pursuer in a question with the defenders.

In such circumstances I think that the authorities show that there was no duty on the defenders to see that the condition of the ship did not subject the pursuer to danger. I may refer to *Smith* v. *London and St Katherine Dock Company*, L.R., 3 C.P. 326; *Indermaur* v. *Dames*, L.R., 1 C.P. 274, 2 C.P. 311; *Heaven* v. *Pender*, L.R. 11 Q.B.D. 503 (the opinion of Cotton, L.J., and Bowen, L.J.); and *Devlin* v. *Jeffrey's Trustees*, 5 F. 130, (especially Lord Kinnear's opinion).

It was, however, argued that, even assuming that the pursuer was merely a volunteer or licencee, the defenders are liable because their servants used as a gangway, when the pursuer was leaving the ship, a plank which was decayed and dangerous.

Now, the owner of premises may be liable to a mere licencee if the latter is injured by something which is in itself dangerous being used or left upon the premises in such a way as to be dangerous, or even if there be upon the premises a hidden danger or trap, at all events if the circumstances imply an invitation to use the trap.

The plank was certainly not a dangerous thing in itself. It was quite fit for the purpose for which it had been brought from the hold, namely, to protect a skylight when coal was being shipped, and it was dangerous only when used for an improper purpose and one for which it was never intended. The case would have been the same if a sound plank had been used which was not strong enough to support the weight of the pursuer and of the rigger who was helping her.

In regard to the theory of invitation and trap, it may very well be that the plank, when used as a gangway, was of the nature of a trap, because I assume that to outward appearance it was sound; and admittedly

the pursuer was invited to use it by one of the defenders' servants. But these facts are not in themselves sufficient to render the defenders liable. If this had been a regular gangway which the pursuer had used, but which had become so decayed that it broke under her, the case would have been very different, because the very appearance of the thing would have been an invitation to use it, and a representation that it might be safely used, and it would have been part of the equipment of the ship for which the defenders were responsible. But I fail to see any sound principle upon which the defenders can be held liable, merely because when a visitor was leaving the ship one of the ship's hands took it upon him to use a plank which was neither intended nor suited for such a purpose, as a means of communication with the quay.

It is not unimportant to remember what the actual circumstances were. The pursuer's husband intended to take her on shore, as he had brought her on board, by means of a ladder and plank, but when she was ready to leave the ship he was engaged on ship's business, and two riggers put out the plank, and one of them was leading the pursuer across it when it broke. The riggers were merely doing an act of civility to a visitor who was leaving the ship, and I do not think that the defenders are responsible for the result. It is settled that the master of a house is not liable for injuries received by a visitor through the fault or carelessness of one of his servants. That is one of the risks of the place which the visitor takes, and the fact that the visit is paid to a ship and not to a house can make no difference.

Further, I do not think that the riggers can be said to have been acting within the scope of, or in the course of, their duty. Assuming that, so far as the defenders' responsibility for their acts is concerned, the riggers were in the same position as members of the crew, it was no part of their duty to select the means by which strangers who were leaving the ship should reach the quay. If there had been a gangway which the riggers put out, and if the accident had happened because it was not placed securely, it could not have been contended that they were not acting within the scope of their duty. But they took upon themselves to select and use as a means of access to the quay a plank which was not supplied or intended for that purpose, and which, even if sound, would not have been suitable for that purpose, seeing that it was to be used by a lady. Although the riggers only intended to do what was civil and courteous, I think that they went outside of, and beyond the scope of, their duty. Willis, J., in delivering the judgment of a very strong Court in *Barwick* v. *English Joint-Stock Bank* (L.R., 2 Ex. 259), stated the law thus—"The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Again, in *Storey* v. *Ashton* (L.R., 4 Q.B. 476), it was laid down that the question in such cases is—"Whether the servant was doing that which the master employed him to do." I do not think that these statements of the principle to be applied have ever been questioned, although difficulty has been frequently found in applying them to the facts of a particular case. In the present case it seems to me to be impossible to say that the riggers were doing what the defenders employed them to do, or that they were in any reasonable sense acting for the defenders' benefit.

The pursuer further founded upon certain regulations in regard to gangways to be used when ships are lying at a wharf or quay. I think that it is sufficient to say that these regulations apply only in the case of persons employed in the loading, unloading, or coaling of a ship, and do not, in my judgment, affect the liability at common law of a shipowner to third parties.

I am therefore of opinion that the defenders should be assoilzied.

LORD ARDWALL—I have found this to be a case of some difficulty. The pursuer obtained access to the vessel "Cousins Arbib" on the day in question by means of a ladder laid horizontally from the quay to the ship's bridge deck and a plank laid upon the ladder, and with the assistance of her husband, who was the first officer on board the said ship. Unfortunately when she came to leave the ship her husband was detained for a few minutes speaking to the pilot. While he was so engaged, a person in the employment of James Gray, a foreman rigger, and who was at the time working on the ship, instead of getting a ladder took a plank which was lying near and laid it down between the bridge deck and the shore, and was in the act of giving the pursuer his hand to steady her when the plank broke and both of them were precipitated into the water. The proximate causes of the accident accordingly were, first, the unsafe condition of the plank, and second, the use of that plank without any other support to form a means of egress to the pursuer from the ship.

With regard to the first, I think it was thoughtless on the part of the defenders to have on board the ship a plank in such a rotten state as that which gave way under the weight of a woman and a man over a stretch of such a short distance as four or five feet, and I thought at the discussion that there was a good deal to be said for the view that where there is a plank of that kind on board a ship where it may be readily used for the purpose of being laid between the ship and the quay for the passage of visitors or otherwise, it was the defenders' duty to have a sound plank; but, on the other hand, there is no evidence as to the history of this plank or how it came to be on board, or even what was the cause of its breaking, the plank itself having been lost by falling into the water at the time of the accident. But there is no evidence to

show that the plank was not perfectly sound when supplied by the defenders to the ship, or to show that the defenders failed to put at the disposal of the officers or others in charge of the ship plenty of planks and other materials to supply the place of those that had suffered from long usage, so that for all that appears in the case it may well have been that the plank was good when originally supplied, and that the defenders throughout had put it in the power of the captain and others in charge of the ship to replace worn-out planks with new ones whenever that was necessary. But further, there is no evidence to show that this plank was intended for any other purpose than merely as a fence or fender to be hung along the port-holes and sides of the ship to prevent injury to the glass through coal falling on it in the course of loading. Indeed, as the pursuer's husband explains, that was the purpose for which that and other similar planks were got out of the vessel's hold. Now, it is impossible to say that the defenders were legally in fault in having old planks for such a purpose, provided they did not put them to other purposes for which they were not fit.

This brings me to the second point, as to whether the defenders are responsible for the rigger who was using the plank for the purpose of assisting the pursuer out of the ship. Now undoubtedly at the time he did so Linton was on board the ship as a rigger, and in the employment of the defenders as such for the purpose of doing a rigger's work. He was therefore their servant to that effect, but otherwise he was not in their employment but in the employment of Gray. Now, what he did in the way of putting the plank down for the pursuer to walk across was not, in my opinion, any part of his duty as a rigger in the defenders' service. He was voluntarily, and as an act of kindness, assisting the first officer's wife to leave the ship, but it was no part of his duty to determine what means should be used for that purpose; and if he had not so hastily put out this plank, which had been brought on deck for a totally different purpose, the pursuer's husband would have made the same arrangement for his wife leaving the ship as he had for her entering it, by placing the ladder between the bridge deck and the shore, and placing a plank on the top of it, which would have kept her perfectly safe. I accordingly am unable to hold that the defenders were liable for supplying the said plank as a means of egress from the ship. The fact that it was so supplied was, in my opinion, due to the unauthorised and mistaken, though well-meant, action on the part of Linton, for which, for the reasons I have above indicated, I do not think the defenders can be held legally responsible.

I have examined the cases which were quoted at the discussion as more or less resembling the present, and in particular the cases of *Heaven* v. *Pender*, 11 Q.B.D. 503; *Indermaur* v. *Dames*, L.R., 2 C.P. 311; *Smith* v. *The London and St Katherine Dock Company*, L.R., 3 C.P. 326; *Miller* v. *Hancock*, [1893] 2 Q.B. 177; and *Brady* v. *Parker*, 14 R. 783. In all these cases it was held that liability attached to the defenders in respect of a duty towards the pursuers or plaintiffs which they had failed to perform, such duty arising from invitations, express or implied, to enter on certain premises or use certain works or ways. In my opinion the pursuer has failed to show that there was in the present case any duty upon the defenders to furnish means of access and egress to and from their ship for visitors to members of the crew, especially considering that the ship had finished loading her cargo and was ready to sail. It may be true that the pursuer was legitimately on board the ship; but, on the other hand, I am of opinion that it must be held that she was there as what has been called in England a mere "licensee," that is, voluntarily and for her own purposes, and having no business there in which the defenders were interested, or which imposed any duty upon them in relation to her. If this be so, it would appear that there are no grounds for fastening legal liability for the accident on the defenders, or for holding that the rigger, in going forward and placing an unsafe plank for the pursuer to walk upon, was engaged in the performance of an act within the scope of his employment by the defenders. It would rather seem that when the pursuer went on board in the way and at the time she did, she took all the risks of the situation, and had just to obtain by herself, or by the aid of her husband, under whose guardianship she was when she entered the ship, such means of egress as he or she herself deemed safe. Unfortunately, her husband having left her for a minute or two, to her own guidance, she accepted the proferred services of a rigger to assist her on shore, and these, however well meant, led to the accident for which she now claims damages from the defenders. For the reasons I have stated I do not think the defenders are liable in such damages.

The Court assoilzied the defenders.

Counsel for the Pursuer—G. Watt, K.C.—Munro. Agent—D. Maclean, Solicitor.

Counsel for the Defenders—Scott Dickson, K.C.—Spens. Agents—J. & J. Ross, W.S.