assoilzied the defender. I am of opinion that the Sheriff is right, and for the reasons which he has stated, to which I have very little to add.

The condition of the agreement or contract under which the defender became cautioner was, that the debtor was to remain vested with his whole estate with a liability to pay the instalments under the composition arrangement as they became due. That bargain was one which the debtor and his creditors were not entitled to depart from if the cautioner was to remain liable. But in four months after making that bargain the creditors and the debtor entered into a new contract, whereby the debtor was at once divested of his whole estate, and such a bargain did, or reasonably might deprive the cautioner of a right of relief against the debtor's estate which he was entitled to rely upon having when he granted his cautionary obligation. The appellant argued that the taking of the trust-deed did the cautioner no prejudice, which he would not have suffered if the creditor, instead of taking a trust-deed, had applied for sequestration of the debtor's estate after his failure to pay the first instalment; and that taking out sequestration would not have liberated the cautioner. The cases of *Freeland* and *Muir* were cited in support of this argument. The law laid down in these cases was not questioned, but I think these cases do not aid the pursuers' contention.

In the cases cited, the rule laid down was that creditors who do diligence for recovery of a first instalment under a composition arrangement do not thereby liberate the cautioner for a second or third instalment. Sequestration is just a kind of diligence, and may be resorted to by a creditor like diligence of any other kind. It would be out of the question to say that creditors to whom a first instalment is due are not to be allowed to use the means which the law provides for recovery of what is due to them except on condition of giving up a cautionary obligation for something which is not yet due. Creditors may undoubtedly resort to such means without any such consequence following. But if creditors, instead of using such means, enter into a new bargain with the debtor for obtaining, not money payment of the instalment due, but payment of their whole debt, so far as the debtor's whole estate when realised will yield payment, then they cannot hold a cautioner like the defender liable on his limited cautionary obligation—an obligation granted on a condition which left the debtor vested in his whole estate. In short, the creditors by voluntary arrangement with their debtor, having without the cautioner's consent essentially altered the conditions under which the cautioner alone consented to be bound, cannot enforce that cautioner's obligation. I think the case of *Scott*, referred to by the Sheriff, is quite in point, and am of opinion that this appeal should be dismissed.

LORD RUTHERFURD CLARK was absent at the hearing of the cause.

The Court pronounced this interlocutor:—

"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-Substitute of the county of Aberdeen dated 3rd April 1893: Find in law in terms of the findings in law in the interlocutor of the Sheriff of the county of Aberdeen dated 23rd May 1893: Dismiss the appeal, and of new assoilzie the defender from the conclusions of the summons, and decern," &c.

Counsel for Appellants—M'Kechnie—W. Campbell. Agents — Duncan Smith & M'Laren, S.S.C.

Counsel for Respondent—Salvesen—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Thursday, November 30.

SECOND DIVISION.

MACKENZIE *v.* THE STEAMSHIP "TREGENNA" COMPANY, LIMITED.

Reparation — Personal Injury — Seaman Injured by Defective Ladder — Fellow Workman.

A seaman on board a vessel was injured by a fall from a wooden ladder which broke under him while he was climbing from the hold to the deck. The defect in the ladder might have been observed by inspection, and the captain was in fault for failing to have it repaired. The owners supplied the captain with all that he desired for the use of the vessel. There were two fixed iron ladders from the hold to the deck.

In an action by the seaman against the owners of the vessel, *held* that the defenders were not liable for the accident, which had occurred by the fault of the captain.

William Mackenzie, seaman, sued The Steamship "Tregenna" Company, Limited, Leith, for £250 sterling as damages for personal injury sustained by him on board the "Tregenna."

The pursuer averred that he had been engaged by Captain Smith, master of the "Tregenna." He signed articles, and joined the vessel upon 12th November. He was sent down to work in the main-hold along with the second mate, the boatswain, and two other seamen. "A wooden ladder was at the time in position between the deck and the hold, and was being used for going down and coming up by the crew, and by carpenters working in the hold. The pursuer and the other persons above named descended by the said ladder. At the dinner hour his party stopped work and proceeded to go on deck. The pursuer was ascending by the said ladder, and had nearly reached the hatch-combings, and was about to place his hands on the combings, when one side of the ladder suddenly broke, and he was precipitated to the bottom of the hold, a

distance of about 20 feet. He thereby sustained a fracture of the left leg and other serious injuries. . . . The said ladder was broken or fractured, and not safe for use at the time when the accident occurred, and this was known or ought to have been known to the defenders, or the persons entrusted by them with the charge of the ship, who yet negligently failed to repair the defect, or to warn their employees of its dangerous condition. The said ladder was in constant use by the crew and others employed on board with the knowledge and permission of the defenders, and they or their servants allowed the pursuer to go down and come up by it on the date of the accident, and have thereby rendered themselves responsible for the injuries he sustained."

The defenders averred—"And it is further explained that the accident was due to the reckless and careless conduct of the pursuer, who attempted to reach the deck by the said wooden ladder, which he had no right to do, instead of ascending as the other seamen had done by either of the fixed iron hold ladders (of which there are two) provided for the purpose, as is well-known to the pursuer."

The following issue was adjusted for the trial of the cause:—"Whether on or about 12th November 1892, at or near the Albert Dock, Leith, the pursuer, while in the employment of the defenders, and working on board their steamship "Tregenna," was injured in his person, through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The trial was heard at the Summer Sittings before the Lord Justice-Clerk and a jury. The jury found for the pursuer, and assessed the damages at £100.

The evidence showed that this ladder had been placed by some workmen, who were engaged in repairing a leakage in the deck, but the other men who were working in the hold were entitled to use it. The ladder belonged to the ship, but was not part of the regular equipment of the ship. There were two iron ladders fixed to the side of the vessel leading to the hold. No complaint had been made to the captain, but he deponed that the crack might have been seen on a close inspection, and that he would have rectified it if he had known it was cracked, and that he was supplied with everything necessary for the proper equipment of the ship.

The defenders obtained a rule on the pursuer to show cause why a new trial should not be granted.

The pursuer argued—There should not be a new trial. The defence on record was that the pursuer had no right to go upon this ladder, but that had been disproved at the trial, and now a new defence was to be set up. This case was different from *Leddy* v. *Gibson & Company*, June 18, 1873, 11 Macph. 304. In this case the ship was in a home port, and not at sea, under the charge of a ship's husband, and not of a captain. The argument that the law did not favourably regard seamen had been displaced by the passing of the Merchant Shipping Act 1876 (39 and 40 Vict. cap. 80). It had been held, however, in an Irish case later than *Leddy's*, that the captain was a deputy master, and liable for improper equipment—*Ramsay* v. *Quinn*, June 29, 1874, Irish Rep. 8 C.L. 322. It was the duty of the ship's husband to see that the vessel was properly supplied with all that was necessary for carrying on the work of the vessel, and if he did not do so, the owners were liable—*Steele & Company* v. *Dixon and Others*, July 8, 1876, 3 R. 1003.

The defender argued—The pursuer was not entitled to recover damages, because either the crack in the ladder was patent or it was a latent defect. If it was patent, then the pursuer could see it as well as anyone else, and ought not to have used the ladder; if it was latent, then no one was to blame. Assuming, however, that the defect ought to have been discovered, the owners were not liable, because they had put sufficient equipment on board, and it was the duty of those on board to see that the equipment was kept efficient. If it was the duty of the captain to do this, then the captain, according to the case of *Leddy*, *supra*, was a fellow-workman, and the pursuer could not recover from the owners. The principle had been settled in the case of *Gordon* v. *Pyper*, December 1, 1893, 29 S.L.R. 178. The case of *Ramsay* was considered in an English case—*Hedley* v. *Pinkney & Sons' Steamship Company*, November 17, 1891, L.R., Q.B.D. 258—and the principle there laid down repudiated.

At advising—

LORD JUSTICE-CLERK—In this case there are two points to be noticed—one is whether the ladder which caused the accident was so plainly defective that the defect must have been seen by anyone who made a proper inspection of it. That question, I think, is one on the evidence for the jury, and if the result had depended upon their view of the question, I would be against interfering with their decision.

It is another question whether if the defect in the ladder had been observed, and the fault lay in not having it repaired, that fault being the fault of one of the seamen or officers on board the ship—even it may be of the highest officer, viz., the captain—the pursuer can make the owners of the vessel liable in damages? On the evidence it is plain that the owners supplied the vessel with all the appliances usual and sufficient for such a vessel, and no doubt if the captain found that he had not sufficient ladders for carrying on the work of the ship, he could have supplied more on his own authority. It is proved, indeed, that the work could have been carried on without the use of this ladder at all, because there was another ladder on board of greater length that would have answered the purpose. Therefore undoubtedly this ladder was not used because the defenders had failed to provide any other ladder suitable for the work. Now, if this ladder had a serious crack in it which the captain knew of, and he allowed the

ladder to be used notwithstanding, he committed a fault, but the question is, whether the owners are liable for his fault?

In the Irish decision quoted to us by Mr M'Kechnie it was held that in such a case the owners would be liable, but in the English case in which that decision is considered, such a reading of the law of master and servant is altogether rejected, and in this Court there is no doubt that under the decision quoted by the defenders a captain is held to be a fellow-servant of the seamen under him; therefore the owners would not be liable for an accident caused by the captain's fault.

The case of *Gordon* v. *Pyper*, I think, is quite decisive of this question. In that case a traveller-rope had been supplied to a trawler. It was in good condition when supplied, but during its service it had got frayed and weakened, and was unfit to bear a strain put upon it, so that it broke and injured a seaman. It was the duty of the captain to see that the rope was kept in proper condition, and the owners were held by a unanimous judgment of this Court not to be liable. I think the rope and the ladder are in the same category, and therefore I think the rule must be made absolute for a new trial.

LORD YOUNG—I am of the same opinion. It is not alleged that the appointment of the ship was defective. There were two iron ladders fixed to the side, and leading down into the hold, and these were sufficient for the purposes of the ship, but there was some special work going on, and this wooden ladder was placed where it was for the use of the workmen, but it is plain from the proof that the sailors used this wooden ladder as well as the iron ladders. This ladder was not part of the ordinary appointment of the ship—it lay on board, and was carried about from place to place, but it was not part of the appointment, and that is why I said the pursuer did not complain of defective appointment.

It is plain that the ladder was in a defective condition, because it broke down, but whether the defect was patent or not is a matter of controversy.

Suppose that the defect was patent, who was to blame for allowing the ladder to remain on board in such a condition that when it was used it broke down? As a matter of common sense I should think it was the duty of some one of the crew to see that the ladder was kept in proper repair, and not of the owners of the vessel. Whose duty among the crew, then, was it to see that this was done? That raises the question, if an accident occurs to one of the crew from the fault of another of the crew, who is responsible? That, again, raises the general question, what is the law of contract applicable to the circumstances? Does a sailor, when he ships on board a vessel, take upon himself the risks of accident occurring through the fault of one of the crew who was his fellow-servant, or does he not? It must be by implication of course, because there is nothing of that kind stated in the contract of service.

I have no hesitation in saying that according to our law any sailor engaging to go on board a vessel takes upon himself the risk of error or fault upon the part of any other member of the crew, and I think it is according to the decisions that he takes upon himself the risk of any error or fault upon the part of his captain. The captain and crew are really the contracting parties. It is usually the case, and it was the case here, that the master of the ship engages his own crew. The crew select what captain they will serve under, and the captain engages what crew will suit him, and therefore it is the strongest case possible for implication in the contract that a sailor engaging under any captain takes the risk of any danger which may arise from the error or neglect of that captain. Therefore if there is any fault from the error or neglect of the captain the owners are not liable, because under the common law the captain is a fellow-servant of the seaman.

The same reasoning would apply if the defect was latent—*prima facie* in that case there would be no fault—but if there was fault, then the fault would be that of one of the crew and a fellow-servant.

I think that the evidence has not proved any wrongdoing on the part of the owners of the vessel.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court set aside the verdict and granted a new trial.

Counsel for Pursuer— M'Kechnie—Mackintosh. Agents—Snody & Asher, S.S.C.

Counsel for Defenders — Jameson — W. J. Mackenzie. Agents — Mill, Bonar, & Hunter, W.S.

Thursday, November 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

TALISKER DISTILLERY *v.* HAMLYN & COMPANY.

Contract — Conflict of Laws — Clause of Reference—Arbiters Unnamed—Lex loci solutionis.

A contract executed in London between Scottish distillers and English merchants for the sale of grains to be made and delivered in Scotland contained a clause providing that should any dispute arise out of the contract, it was to be settled by arbitration by members of the London Corn Exchange or their umpire in the usual way.

Held (*aff.* Lord Kyllachy—Lord President *abs.*, and Lord Kinnear *diss.*) that action on the contract was not excluded by this clause of reference to arbiters unnamed, the contract being a single