up or not. I am therefore of opinion, and on the grounds stated by the Lord Ordinary in his note, that the interlocutor ought to be affirmed.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

Counsel for the Pursuer—Asher, Q.C.—Low—Dundas. Agent—Robert Strathern, W.S.

Counsel for the Defender — Graham Murray—Boyd. Agent — William Boyd, W.S.

Saturday, October 25.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

RAMAGE & FERGUSON *v.* FORSYTH.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42)—*Precautions for Safety of the Servant — Specific Statement of Duty Neglected.*

A workman engaged on board a vessel was injured by falling into a man-hole in the engine-room as he stepped over some pipes which lay on the deck between him and the man-hole, and prevented his seeing it. In an action of damages he admitted that he knew man-holes existed on board the vessel, and that they were necessary for the use of the workmen, but averred that he did not know of the existence of the man-hole in question, that the light in the engine-room being dim the place of the accident was therefore imperfectly lighted, and that the man-hole had been covered so as to be invisible upon the two previous occasions on which he had been there; it was further averred that it was the duty of the employers, or their foreman, in order to prevent accidents to the workmen, to have had the man-hole "covered or protected."

The Court *dismissed* the action as irrelevant, holding that the pursuer's averments showed that he had failed to take proper precautions for his safety, and also that he had not shown how in the circumstances the man-hole could have been protected.

The pursuer was an engineer in the employment of Messrs Ramage & Ferguson, shipbuilders and engineers, Leith, and upon 19th May 1890, when he was injured by falling through a man-hole in the engine-room as after mentioned, he was engaged in fixing on the mountings of the boilers of the steamship "Talune," which the defenders had recently launched. The "Talune" is a "tank-bottomed" ship. Inside the tanks, of which the bottom is in such vessels formed, there is a large number of pipes, bolts and nuts for fastening down the engines, and other fittings, and it is necessary that the workmen engaged upon the engines should have freedom of access to these tanks. Access is customarily provided by means of man-holes, and it is necessary that these should be kept open while the work is proceeding. The pursuer was aware that such man-holes were necessary and existed, but averred that he was "unaware of the existence of the man-hole in question," and that previous to the accident he "had been only twice in the engine-room, and upon these occasions the said man-hole was hidden by timber or other material having been thrown over it, as he did not notice it."

Prior to 19th May 1890 the pursuer's way to his work was by means of the forward hatch, but upon that day the forward hatch was blocked up, and he had to proceed to his work by means of the after hatch, and through the engine-room in which the man-hole in question was. The averment relating to the accident was—"At the time above-mentioned"—viz., 10 o'clock a.m.—"there were some lead pipes on the one side of the said man-hole, but it was otherwise quite unprotected, and on making his way to the boilers on the morning in question the pursuer on stepping across the foresaid lead pipes went into the man-hole, and fell violently upon the other side of it, breaking three of the ribs of his left side, and otherwise sustaining serious bruises and injuries." The averments of fault are contained in the following passages—"It was the duty of the defenders, or of their foreman the said James Aitken, to cover or protect the said man-hole in order to prevent accidents to their workmen, but although they had received repeated warnings of the danger by other workmen stepping into the said hole previous to the pursuer's accident, they failed to cover or protect the said man-hole, although this might have been done without in the least hindering the work and at insignificant expense. In so failing the defenders or their said foreman were guilty of gross carelessness and neglect, and it is averred that this was the cause of the accident to the pursuer. At the time of the said accident the light in the engine-room was dim, and there was no lamp burning to show the pursuer the open man-hole. The defenders in failing to have the said engine-room properly lighted were in fault, and their failure in this respect contributed to the pursuer's accident."

The Sheriff-Substitute (RUTHERFURD) allowed parties a proof of their averments by interlocutor of 11th July 1890, and the case came up on appeal by the defenders.

Argued for the appellants—There was no relevant averment on record of a duty neglected by the appellants. The man-holes were necessary, and necessarily left open. To cover or protect them was impossible consistently with despatch in completing the ship, and in any case no way was suggested by which the protection of them could be accomplished. The case as disclosed on record was one of carelessness on the part of the pursuer, who had not fulfilled his first duty to look where he was going. The averments were weaker than

in *Moore* v. *Ross*, 17 R. 796, and 27 S.L.R. 626, and there the Court held the accident to be due at most to misadventure.

Argued for the respondent—The man-hole was left unprotected in a place where the workman had lawfully occasion to be. The appellants were not entitled to lay a trap for their workmen, and this was a place with which the workman was unfamiliar. Indeed the case was stronger, as the pursuer had been there before, and the man-hole had been concealed from him by timber or other material, so that he was led to believe there was no danger. The fault was greater, as the trap was laid in a place which was dimly lighted.

At advising—

LORD PRESIDENT—This case arises from an accident which occurred to the pursuer while he was engaged as a workman in the defenders' service in completing the construction of a vessel they had built. There is no doubt that when a vessel is in the course of construction the workmen engaged incur many risks of accident incidental to their employment, and in the present case one special source of danger was the existence of a number of man-holes which were left open for the convenience and necessity of the workmen in finishing the ship. The pursuer was employed in fixing on the mountings of the boilers, and the way in which he had reached his work up to 19th May, when the accident occurred, was by going down the fore hatch, but upon that day the fore hatch was closed, and he had consequently to make use of the after hatch. The averment is, that at the time of the accident—viz., 10 o'clock a.m.—"there were some lead pipes on the one side of the said man-hole, but it was otherwise quite unprotected, and on making his way to the boilers on the morning in question the pursuer on stepping across the foresaid lead pipes went into the man-hole, and fell violently upon the other side of it, breaking three of the ribs of his left side, and otherwise sustaining serious bruises and injuries." Now, from the statement that the man-hole was unprotected, I do not understand that it should have been fenced, for that would be inconsistent with the purpose of it as a convenience to the workmen, and therefore the only material averment is that the lead pipes in question were between the pursuer and the man-hole, concealing the man-hole from him, and that in stepping over them on the way to his work he fell into the man-hole. Now, his own statement merely comes to this, that he did not look where he was going. It seems to have been a very careless proceeding upon his part, and if the light in the engine-room was dim at the time, as he says, that is a very great aggravation of his carelessness. He owed it to himself in threading his way to his work, through a vessel in which he knew there were open man-holes, to do so with very great care indeed, more especially if he had to pass through a part of the vessel that was dimly lighted, and this duty to himself he did not fulfil. The only other allegation of fault is contained in condescendence 5, in these words—"It was the duty of the defenders, or of their foreman the said James Aitken, to cover or protect the said man-hole in order to prevent accidents to their workmen, but although they had received repeated warnings of the danger by other workmen stepping into the said hole previous to the pursuer's accident, they failed to cover or protect the said man-hole, although this might have been done without in the least hindering the work and at insignificant expense." But it is to be observed that the pursuer does not explain what he means by protecting the man-hole. These man-holes are left open that they may be constantly used by the workmen, and to make a relevant averment of a duty upon the defenders' part, and failure in that duty, it is incumbent upon the pursuer to demonstrate how the protection of the man-hole should be accomplished. I do not think any failure in duty is averred, and therefore I am for dismissing the case.

LORD ADAM—The case is shortly this—The pursuer was an engineer in the employment of the defenders. For some weeks before the accident he was constantly about the vessel, and on 19th May he was injured when on his way to his work by falling into a man-hole. Now, it appears to me that a workman engaged upon a vessel in course of construction is bound to use care in going about, and this pursuer was aware there were a good many man-holes about the deck of this vessel, although it is averred he was unaware of the existence of the man-hole in question. He was bound accordingly to look after himself, and if the light was dim there was a more pressing duty upon him to take care; but he took no care at all, and fell into the man-hole. It is averred that the man-holes should have been protected, but that appears to be out of the question as inconsistent with the purpose for which they were there, and it is not said how they could be protected consistently with the proper progress of the work. I entirely agree with your Lordship.

LORD M'LAREN concurred.

The case was dismissed as irrelevant.

Counsel for the Pursuer—A. J. Young—A. S. D. Thomson, Agents—Hutton & Jack Solicitors.

Counsel for the Defenders — Salvesen Agents—Macpherson & Mackay, W.S.