JUNE 17, 1858.

The BARTONSHILL COAL COMPANY, *Appellants*, *v.* Mrs. CLARK or REID, *Respondent.*

The BARTONSHILL COAL COMPANY, *Appellants*, *v.* Mrs. STEWART or M'GUIRE and Others, *Respondents.*

Master and Servant—Reparation—Negligence of Fellow-servant—*An underground workman in a coal pit having been killed while being brought up the shaft of the pit in the cage, in consequence of the carelessness of the engine man at the pit head in working the steam apparatus for raising the cage:*

HELD (reversing judgment), *That the owner of the pit, in whose employment both men were, was not liable to the representatives of the deceased in reparation and* solatium *by way of damages for the fault of the engine man, on the ground that both men were engaged in the same common operation or employment in the business of the same master.*

A servant impliedly undertakes all the ordinary risks arising from the negligence of his fellow-servants, so far as regards the contract between him and his master: Per LORD CRANWORTH and LORD CHELMSFORD.

Appeal to House of Lords—Competency—Process—*Where the House of Lords found that an interlocutor in a jury case could not be competently appealed against, the subject matter involved in it was nevertheless rightly brought up for review by other interlocutors appealed from, against the competency of which there was no valid objection.*[1]

On 17th September 1853 two workmen or miners, William Reid and James M'Guire, were killed in being brought up the shaft, in the course of their duty, from the workings of the Bargeddie coal pit in Lanarkshire, of which the appellants were then the lessees. The cage in which they were coming up, and which is made to ascend the shaft by means of a steam engine, worked near the mouth of the pit, instead of having been allowed to stop at the platform, or proper part of the stage erected over the shaft, where the workmen get out after the ascent is terminated, had been improperly drawn up too high, and having gone over the pulleys at the top of the stage, the men were thrown to the ground from a height of 50 or 60 feet, and killed by the fall. James Shearer, a servant of the appellants, who was the workman at the time in charge of the engine, and of bringing up the cage, was afterwards (1st December 1853) tried at Glasgow Circuit Court for culpable homicide, and having pleaded guilty, he received sentence of imprisonment.

The widow of M'Guire and the widow and children of Reid respectively brought actions against the appellants to recover damages for the loss of life, on the ground that it was occasioned by the fault of Shearer, and that the appellants, as his masters, were liable for his acts.

The jury returned a verdict in *Reid's case* for the pursuer of £100; and the same in *M'Guire's case.*

At the trial the Lord President directed the jury, that if they were satisfied on the evidence that the injury was caused by culpable negligence and fault, on the part of Shearer, in the management of the machinery, the defenders were in law answerable. The defenders excepted to the direction, and asked a direction, which his Lordship refused, in the following terms:—"To direct the jury, in point of law, that if the jury are satisfied, on the evidence, that the defenders used due and reasonable diligence and care in the selection and appointment of Shearer as engine man, and that Shearer was fully qualified to perform the duties of engine man, and furnished with proper machinery, and all necessary means for the performance of these duties, then the defenders are not in law answerable for the personal fault or negligence of Shearer in the management of the machinery on the occasion mentioned."

A bill of exceptions having been refused by the Court, the defenders presented an appeal, maintaining that the judgment of the Court of Session ought to be reversed—"1. Because the direction to the jury that the appellants were answerable in law for the culpable negligence or fault of Shearer, was erroneous; and because the jury ought to have been directed that, if satisfied, on the evidence, that the appellants used due and reasonable diligence and care in the

[1] See previous reports 17 D. 1017: 27 Sc. Jur. 518. S. C. 3 Macq. Ap. 266, 300; 30 Sc. Jur. 597.

selection and appointment of Shearer as an engine man, and that he was fully qualified for the duties committed to him, and had been furnished with all requisite appliances and means for the performance of his duties, the appellants were not answerable for his personal fault or negligence in the management of the machinery on the occasion in question. 2. Because the pursuer had no case to go to the jury relevant to subject the appellants in damages, and, at any rate, no such case had been proved."

The respondents in *M'Guire's case* relied on the same reasons as in *Reid's case*, and, besides, maintained as a preliminary objection—(1) that as the first interlocutor appealed against (viz., by the Lord Ordinary on 31st January 1855) was interlocutory, an appeal against it was incompetent—48 Geo. III. c. 151, § 15; and (2) that the appeal against the interlocutor of the Court of 5th July 1855, disallowing the bill of exceptions; of 5th July 1855, applying the verdict; and of 19th July 1855, decerning for the taxed expenses, was incompetent, because it had not been presented within 14 days, as required by Statute 55 Geo. III. c. 42, § 7.—*Melrose* v. *Hastie*, 1 Macq. Ap. 698; *ante*, p. 315.

On the merits, the respondents, in their *printed case*, supported the judgment upon the following grounds:—"1. Because upon the facts, as found by the verdict, no other judgment could be pronounced by the Court. 2. Because at that stage of the cause, and in disposing of these pleas without evidence, the facts, as averred by the respondent, must be assumed as true; and these facts, so admitted, do not give room for the pleas maintained by the appellants. 3. Because, as the appellants were bound to put the deceased down and to take him up from the pit in safety, and as they thought proper to do this by means of a steam engine, which they entrusted to the management and superintendence of an engineer appointed by themselves for that purpose, they are liable for the consequences of any injury occasioned by the fault or neglect of the engineer in the management of that machinery, in raising the deceased from the pit. 4. Because, while there is no evidence that the appellants had exercised due care in the appointment of Shearer as engine man, or that Shearer was duly qualified to perform the duties of engine man, these circumstances, even if admitted, as well as the fact that he was furnished with proper machinery and all necessary means for the performance of these duties, are irrelevant to relieve the appellants from their liability for the injury occasioned to the deceased. 5. Because the exception does not properly raise the question of the master's liability to one servant for the fault or negligence of a fellow workman, and because, even if that question were raised by the exception, it does not apply to the proved circumstances of the case. 6. Because, even assuming that a party acting in the capacity of engineer, and the collier in the pit, were fellow servants, the law of Scotland holds the master liable for injuries occasioned by the negligence of his servant, although the party injured by that negligence is a fellow servant."

The case of *Reid* came on for discussion in the House of Lords in June 1856.

Solicitor-General (Bethell), *Anderson* Q.C., and *Craufurd*, for the appellants, argued as follows:—The law of master and servant, in England as well as Scotland, is founded on principles of common sense, as applicable to the mutual relations of the parties, and no statute qualifies the common law as regards the master's liability for the servant's negligence. There is, therefore, no reason to suppose the law of the one country to be different from that of the other, and it would be highly inexpedient that they should be so. In England it is now settled, that where two fellow servants are engaged in one common operation or work, and the one is injured by the negligent act of the other, in the course of such common work, the injured servant cannot hold the master liable in damages, unless he allege and prove some negligence in the master. That is an exception to the general rule, which makes a master liable to strangers injured by the servant's negligence. See a series of cases—*Priestly* v. *Fowler*, 3 M. & W. 1; *Hutchison* v. *York and Newcastle Railway Co.*, 5 Exch. 343; *Wigmore* v. *Jay*, *Ibid.* 354; *Wiggett* v. *Fox*, 11 Exch. 254; *Tarrant* v. *Webb*, 18 C.B. 799; *Stretton* v. *London and North Western Railway Co.*, at *Nisi Prius*, and in 16 C.B. 40; *Degg* v. *Midland Railway Co.*, 1 H. & N. 773; *Roberts* v. *Smith*, 2 H. & N. 213; *Seymour* v. *Maddox*, 16 Q.B. 326. Nearly all the English Judges have concurred in this doctrine; and so have the American Courts.—*Farwell* v. *Boston and Worcester Corporation*, 4 Metcalfe 49.

It is said the Scotch Courts go upon a contrary principle, holding the master liable to a servant injured by his fellow servant, as much as to a stranger; and this is said to be better sense. As far as the reason of the thing goes, however, the English rule was preferable. Where a master is held liable to a stranger for a negligent act of the servant, the law can only be defended on the theory, that the servant was the master's agent, and that the master was, in a certain sense, privy to the negligence. If the master had been acting instead of the servant, the stranger would be entitled to damages; and why should the public go without redress, because he puts some one to act in his place, and for his own convenience and benefit? The master has more control over his servant's acts than over an innocent stranger, and out of two innocent parties the master ought to suffer, for he reaps the benefit of the servant's work. But where one servant is injured by his fellow, in a work which they carry on together, these considerations are reversed. There is as much, if not more, privity between the two servants, than between either servant

and the master; where those servants are engaged in a common operation, each servant is more under the control of the other. Moreover, if more than ordinary risk attend the common employment, each servant is better able to guard himself against the other's negligence than the master; and, moreover, each must have these contingencies in his contemplation when he enters into the service, and he contracts with a view to those risks. Accordingly, all that the master can reasonably be expected to do in the circumstances is to take care to employ competent and steady servants, and to see that any machinery used is sufficient and safe for ordinary purposes. Beyond that, the master ought not to be saddled with the consequences of a servant's occasional negligence. There is no sufficient authority for saying that the law of Scotland differs in these views from the law of England. There is no trace of the doctrine now set up, until the Lord Justice Clerk Hope's *dictum*, thrown out a few years ago, and latterly adopted by some of the other Judges; but it is unsupported either by reported cases or text writers, or by principle. In fact, the law of Scotland, if anything, leans the other way, and is more favourable to the master than the law of England is—*Linwood* v. *Hathorn*, 1 Sh. Ap. 20; 14th May 1817, F.C.; *Baird* v. *Hamilton*, 4 S. 790; Bankt. 1, 2, 30; *Sword* v. *Cameron*, 1 D. 493. The last case may be said to be the first one in which the present question was mooted; and it was then decided as of first impression. That case may be explained on the principle of the master's habitual negligence in his arrangements, and it was so put by some of the Judges. So of *Snedden* v. *Addie*, 11 D. 1159; *Paterson* v. *Monkland Railway Company*, 13 D. 1270. Until *Dixon* v. *Ranken*, 14 D. 420, there was no trace in the Scotch reports of the unsound doctrine, which the Lord Justice Clerk (Hope) first laid down. But even that case did not require such a doctrine for its decision, as it may well stand on the principle of the master's habitual negligence. According to the Justice Clerk, no negligence of the master required to be shewn. It was enough that the two servants had a common master. He, and the other Judges who agreed with him, misapprehended the law of England, for they assumed, according to it, that if the fellow servants were not employed in one common operation, the master would not be liable. But in England, if the two servants are not engaged in a common operation, the master is liable; as, for example, where the housemaid is run over by the coachman, or shot by the negligence of the gamekeeper. The next case is *Gray* v. *Brassey*, 15 D. 136; where the Lord President treated the question as new, and apparently he did not adopt the views of the Justice Clerk. In *O'Byrne* v. *Burn*, 16 D. 1025, however, and in the present case, the Judges seem at last to have fully adopted these erroneous views. The principle, therefore, had no proper foundation whatever in the law of Scotland, and it was obviously founded on mistake.

It was said that the notion, that there is some difference between the law of England and Scotland, was countenanced by *Paterson* v. *Wallace*, 1 Macq. Ap. 748; 26 Sc. Jur. 550; *ante*, p. 389; and *Bryden* v. *Stewart*, 2 Macq. 30; 27 Sc. Jur. 321; *ante*, p. 447; but that idea was a mistake, and arises from the erroneous rubric of Macqueen's report.

The Scotch doctrine ought therefore to be overruled, and the English doctrine adopted. Neither doctrine is binding on the House, for this is the first case before the House in which the point has been involved, and a general rule binding in both countries ought now to be settled.

The interlocutor disallowing the exceptions, ought not only to be reversed, but the interlocutor admitting the relevancy ought also to be so. No relevant case is stated. There is no allegation of personal negligence on the part of the master in the sixth article of the condescendence above referred to, and which is that mainly relied on. Nor is there any allegation that Shearer was an incompetent or unsteady workman, to the knowledge of the defenders. The two servants were obviously engaged in the same common operation, that of digging coal and bringing it to the surface; each workman being necessary to the other in attaining that common object. Therefore, admitting all that was proved at the trial, there is no case against the defenders. The action accordingly ought to be dismissed, and not merely a new trial granted; and the defenders ought to be assoilzied, there being no ground of action stated on the face of the record—see *Duncan* v. *Findlater*, M'L. & Rob. 911.

Lord Advocate (Moncreiff), and *Serjeant Byles*, for the respondent.—This is no doubt a perplexing question, and the law, as declared in Scotland, is at variance with the law as acted on in the Courts in England; but the Scotch doctrine is more just. There seems no sound reason for drawing a distinction between the liability of the master for injuries to a servant caused by a fellow servant, and his liability for injuries to a stranger caused by a servant. There seems to be no exception to the general principle in the law of most European countries —3 Pothier 81 (octo. ed.); Oblig. §§ 2 and 3, No. 121. The doctrine adopted in England seems to be peculiar, and countenances subtleties which the Scotch law wisely repudiates. The Scotch authorities seem never to have contemplated that any exception to the general liability of the master existed when a fellow servant caused the injury—Bell's Prin. § 2031; and the absence of any decisions of the Court arises from the understanding that the law admits of no doubt. At all events, the Scotch law is much older than the English law on this subject, and is more liberal in protecting servants, as witness the law of *solatium* and seduction as applicable to servants; and hence it is not to be wondered at, that it is more liberal in protecting one servant against

another. The cases of *Paterson* v. *Wallace*, 1 Macq. Ap. 748; *ante*, p. 389; and *Bryden* v. *Stewart*, 2 Macq. Ap. 30; *ante*, p. 447, countenance the notion that the Scotch law differs from the English law on that subject. The American decision is no authority, being a mere reflection of the English cases. The English cases are, no doubt, developments of the primary case of *Priestly* v. *Fowler*, where Lord Abinger went a great length, and indulged in illustrations which are unsound, even in England, at the present day. It appears that if negligence on the part of the servant concur with negligence on the part of the master, the latter is not liable; but there was no negligence on the part of the deceased here. It is said, however, that where two servants are engaged in one common operation or work, the master is not liable for injury caused by the negligence of one to the other. This is not clearly laid down in the English cases, and there is no definite line drawn by which a common work is defined. Take the case of a steam ship; one servant is a stoker, another is a mere seaman—if the stoker is injured by the seaman, is the master not liable? And yet they cannot be said to be engaged in a common work, for they are in distinct departments.

[LORD CRANWORTH.—Suppose there are 100 men in the ship, and the steersman is accidentally drunk, and runs the ship on a rock whereby all the crew are drowned, is the master liable in 99 separate actions to the representatives of these men?]

These illustrations are, no doubt, perplexing. But take the case of a master who employs men at a distance from their dwellings, and he conveys them by a private railway to and from their work; if the engineman cause an injury, will the master not be liable to these men? If he charged the men at a certain rate for conveying them, he would clearly be liable; how, then, can it make any difference that he conveys them gratuitously? That is like the present case. It cannot be said that the engineman and the miner were here engaged in a common work; they were in distinct and separate departments. They were as much removed from each other as the housemaid and the gamekeeper. The master by the agency of Shearer contracted like any other carrier to convey the miners up and down the shaft. The master was, in fact, employed by the miners to carry them safely. He has therefore broken his contract in not bringing up Reid safely. The decision of the Court below was therefore right, and ought to be affirmed.

Sir R. Bethell replied.—It is obvious from the opinions of the Judges in the Court below, that they considered the present a point of novelty, and they reasoned from general principles, just as the English Judges have done in recent cases. There can, therefore, be no difficulty in settling this point finally in the law of both countries by the present decision. The respondents seem to assume that a master warrants the integrity and safety of every machine or apparatus the servant has to deal with, but that notion was effectually contradicted by the case of *Couch* v. *Steele*, 3 E. & B. 402, which discredited certain dicta of two Judges in *Gibson* v. *Small*, 4 H. L. C. 370, *et seq.*

LORD CHANCELLOR CRANWORTH.—My Lords, this is a case of extreme importance and some nicety, and before I submit any motion to your Lordships, I should wish to have further time to consider the question.

With reference to the law of England, I think it has been as completely settled as it can be settled, without having been carried to a Court of Error, that in respect of injuries occasioned to one of several workmen engaged in a common work, (and I know of no distinction, whether the work be dangerous or not dangerous,) the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed. I take that to be clearly settled as being the law of England. When I say it is settled, I mean only as far as it can be settled without having been brought by writ of error to any superior Court. The principle of the law of England I take to have been enunciated in the case of *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company*, and to have gone upon this principle. So far as persons external to the master and his servants are concerned, the master is to be considered as responsible for every one of those servants, and the person who receives an injury is not bound to inquire whether that injury has resulted from one sort of miscarriage or another—the master is the person to whom, on general principles, he is entitled to look; so far as he is concerned, he is external to the whole, and the whole is considered as one body united in the master; but the case is different in a question arising entirely within the circle embracing master and servants. The law of England considers that there is not the same reason, indeed that there are reasons operating in a contrary direction there; for every person knows exactly who does occasion the injury, and he undertakes the service knowing that he is liable to injury as well from accidents that cannot be guarded against as from neglect or mismanagement on the part of those who are engaged with him in the common service. The Court of Exchequer, which is the Court in which those cases have chiefly arisen, after considering the question a good deal, came to the conclusion, that the principle which makes the master liable to complaints made *ab extra*, does not make him liable to complaints arising *intra* the whole body of himself and his workmen. Now, my Lords, I take that to be established, unless upon further consideration in this House, the House should come to the opinion, that that has been wrongly laid down. I take that to be clearly established as being the law of England; it was so laid down in many cases in the Court of Exchequer. It

appears, but I was not aware of it before, that Lord Campbell acted upon that principle in a case tried before him at Nisi Prius; it has also been several times canvassed in the Court of Exchequer; and I learn from the authority quoted, that the Court of Massachusetts has adopted the same view of the case, as being founded upon correct principle.

That being so, what is to be done in Scotland? because your Lordships here are to consider yourselves as a Scotch tribunal deciding not what ought to be, but what is, the law of Scotland now upon this question. Where it is shewn, that a difference exists between the two laws, unquestionably your Lordships must adhere to that which is established as the law of Scotland; but neither in Scotland nor in England are the decisions upon this subject grounded, nor do they profess to be grounded, upon any matter *juris positivi;* it is merely, that in one country, as well as in the other, looking to the general considerations arising from the relation of master and servants, *inter se*, and the relation external to their own body, the application of the principles arising from these considerations, tracing our way as well as we can between conflicting analogies, is that which must lead us to a sound decision. The principle I have already pointed out as arrived at in the Courts of England, so far as it can be said to have been arrived at without being brought before a Court of Error, is against the liability of the master.

It is said, that the case is different in Scotland; and three or four authorities of recent years, beginning, I think, in 1852, and carried on through 1853, 1854, and 1855, have been relied on as establishing a different conclusion. The Solicitor-General disputes that conclusion, and says that they do not lead, or, at all events, do not necessarily lead to the conclusion, that there has ever been, in those two cases, a decision intended to be at variance with the English cases. That is disputed by the Lord Advocate. It will be my duty to look through those cases very attentively, and to see how far they are in conflict with the English law; and if they are in conflict with the English law, then will arise the necessity for deciding, whether they have so established the law of Scotland, from the mode in which the Scotch Judges have reasoned by analogy, different from that which has been the conclusion of the English Judges, as to make it your Lordships' duty, as the ultimate Court of Appeal, to hold that the law is different in the two countries; or, at all events, that the law is different in Scotland from that which has been assumed to be the law in England, because, unquestionably, to a certain extent, the law has been considered as not absolutely binding upon your Lordships, either in one country or the other. It will be my duty to look into this matter with the best attention that I can. I can only say, that I should very much regret if I am not able to advise your Lordships, either that the law of England is, I will not say, not to be altered, but can be laid down in conformity with what your Lordships are bound to say is the law of Scotland; or that your Lordships should say, that the law of Scotland has been in those cases misunderstood; or that these cases do not lead to the conclusion to which the Lord Advocate supposes them to lead.

This is a case which, though not involving a large amount, involves questions of very considerable interest and importance; and, therefore, I must ask your Lordships a little further time to consider it.

Cur. adv. vult.

(Before the *case of Reid* was set down for judgment, the *case of M'Guire* was argued by counsel in June 1858. And LORD CRANWORTH at the date last mentioned had ceased to be Lord Chancellor, having been succeeded by LORD CHELMSFORD.)

Case of M'Guire.

Sir R. Bethell Q.C., and *Anderson* Q.C., (with them *Craufurd,*) for the appellants.—(As to the general point arising on the bill of exceptions and the plea of relevancy, the argument was the same on both sides as in the *case of Reid*, and the two arguments have been consolidated in the preceding report.) The respondents object to the competency of this appeal. But it is clearly competent as regards the two final interlocutors applying the verdict, and that is daily practice—*Campbell* v. *Campbell*, M'L. & Rob. 387. Moreover, when a final interlocutor is appealed, that enables all the preceding interlocutors to be brought up—48 Geo. III. c. 151, § 15; *Kerr* v. *Keith*, 1 Bell's Ap. 386. It may be said that the interlocutor disallowing the exceptions cannot be appealed, because the petition was not presented within fourteen days, as decided by *Melrose* v. *Hastie*, 1 Macq. Ap. 698; 26 Sc. Jur. 317; *ante*, p. 315; but this case differs from *Melrose* v. *Hastie*, because here there is a plea to the relevancy which shews error on the record, quite independent of the facts found by the verdict. It is said, that that interlocutor repelling the plea of relevancy is not appealable, because it was not reviewed by the Inner House; but the reason why it was not so reviewed was in consequence of the consent of parties, and the objection does not lie in the mouth of the respondents. The respondents agreed, that this case should abide the result of *Reid's case*, and that must mean the final result, as settled by the House in the previous appeal. What we seek now by this appeal is to have judgment *non obstante*

veredicto. We say the verdict has decided an immaterial issue, and we have enough left on the record to entitle us to judgment. The sixth article of the condescendence did not allege, that Shearer was an incompetent or habitually drunken servant, nor that the defenders knew of his being drunk on the day in question. Therefore, admitting that Shearer's negligence caused the injury, there must be judgment in our favour because of the want of such allegations. We are entitled to be assoilzied, for anything that appears on this record.

Lord Advocate (Inglis), and *Mair*, for the respondents.—By 55 Geo. III. c. 42, § 7, the verdict is final and conclusive, unless an appeal is presented in fourteen days after the exceptions are disposed of; *Melrose* v. *Hastie.* Therefore the interlocutor disallowing the exceptions cannot be appealed against, because the statutory limitation of time has been exceeded. Nor can the first interlocutor, viz., that of the Lord Ordinary, be appealed against, because it was never reviewed by the Inner House; 48 Geo. III. c. 151, § 15. The two final interlocutors do nothing more than follow out those two previous interlocutors. They flow logically from those; and, therefore, if the party wanted to appeal with effect, he could only have appealed against the interlocutor disallowing the exceptions, which he has not done.

[LORD CRANWORTH.—But the verdict depends on the evidence; and suppose the evidence shews, that there was no case to justify the interlocutor applying the verdict, are we precluded from going into the matter on this final interlocutor, which you must admit is, in form at least, appealable?]

Here the verdict is not before the House, nor the evidence; and therefore you cannot look at the bill of exceptions at all, for the statute says the verdict shall be final and conclusive, unless there is an appeal in fourteen days from the interlocutor disposing of the exceptions.

[LORD CRANWORTH.—Under the Jury Acts the verdict is not final and conclusive to all intents and purposes, but merely conclusive as to the facts found by it. Suppose those facts are immaterial?]

Then it must be open for the House to hear over again all the questions of law involved at every stage, which seems to be contrary to the whole spirit and provisions of these statutes.

(*Anderson*, in reply was not heard, in consequence of the judgment in *Reid's case* being given at this stage; and immediately afterwards judgment was given in the *case of M'Guire, per* LORD CHANCELLOR CHELMSFORD, as below.)

Reid's case.

LORD CRANWORTH.—My Lords, in this case which was heard now, I regret to say, exactly two years ago, I formed a strong opinion at the hearing of the case; but at the close of the argument, I intimated that I would not finally dispose of it till I had had an opportunity of looking more accurately, and with more attention, into the Scotch cases, than I had been able to do during the progress of the argument. I was unable to dispose of the case that session, as the parliament came to an end early, viz., in July; but in the recess I attentively considered the matter, and, inasmuch as it was one of general application, I committed to paper the view which I had formed of the case, and I was prepared to have delivered it to the House at the commencement of the following Session of 1857; but it was then intimated to me, that it would be well to delay, as there was another case raising the same question, viz., the case at the instance of the representatives of Mrs. M'Guire. I accordingly thought it expedient to postpone judgment in the *case of Reid* till the other had been heard. The proposition I made was, that I would not deliver my views to your Lordships, in the *case of Reid*, if the parties in the other case would agree that the appeal should be advanced and be heard by one counsel on each side. We have, in consequence, had the benefit of its being heard by my noble and learned friend on the woolsack, and by my noble and learned friend (LORD BROUGHAM), (the *case of Reid* having been heard by myself only,) and it will be very satisfactory to have their opinion upon the important general principle which is involved in both cases.

From what cause it was delayed over the year 1857 I am not able to say. I was ready at any time to state what I had written in the course of the autumn of 1856, but, for some reason, the other case did not come on. It has now been fully argued on the part of M'Guire, as it had been two years ago on the part of Reid.

With this preface, I shall now proceed to read to your Lordships the opinion which I had proposed to deliver in moving the judgment of the House, if that judgment had been moved at the beginning of the year 1857. In doing so, it is probable that I may refer to cases and arguments which have not been so much pressed in the second case, because I think that the ground which has been taken in the argument, which we have just heard, is not exactly the same that was taken before; but still, I think I shall not be wasting your Lordships' time by stating the view I had taken of the former case.

This was an appeal against four interlocutors of the Court of Session, made in an action

raised by the respondents against the appellants, whereby they sought to recover from them compensation in damages for the loss they had sustained by the death of William Reid, the husband of the respondent Elizabeth Clark or Reid, and the father of the other respondents.

The facts stated by the respondents, Elizabeth Clark or Reid and her children, as the grounds of their claim, were as follows :—That in, and previously to, the month of September 1853, the appellants were the owners of, and were engaged in working, a coal pit called the Dykehead pit, and that William Reid was a miner in their service: That, according to the usual course of working the coals in this pit, the miners were let down into, and drawn up from, the pit in a cage, which was worked by a long rope running over a pulley fixed by machinery at a considerable height above the mouth of the pit, and worked by a stationary steam engine fixed at a few yards distant from the pit: That, on the 17th of September 1853, James Shearer was the engineman employed by the appellants to attend to this engine, and that it was his duty to attend to the drawing up and letting down of the cage, so that the workmen might be moved up and down safely; but that he, disregarding his duty when the cage was coming up with the two workmen in it, of whom Reid was one, negligently omitted to take the proper means for stopping it at or a few feet above the mouth of the pit, where there was a platform on which the men ought to have got out, and allowed it to be carried with great force to the top of the machinery, in consequence of which it was upset, and the men were thrown out and killed on the spot.

On these facts, the respondents being the widow and children of Reid, claimed from the appellants, as the employers of Shearer, by whose neglect the misfortune had occurred, compensation in damages, on the ground that the employers are chargeable with the consequences resulting from the neglect of the servant whom they employ.

The appellants, (defenders below,) by their pleas in law, insisted—first, that no relevant ground of action was stated; and secondly, that these facts alleged were not true. The Lord Ordinary repelled the defence of want of relevancy, and the First Division adhered to the interlocutors of the Lord Ordinary.

The issues were then framed for the purpose of trying the facts, and were settled as follows :—"First, Whether the defenders were, in the month of September 1853, in the occupation, as proprietors or lessees, of the coal pit at or near Baillieston called the Dykehead or Bargeddie pit? and Whether, on or about the 17th day of September 1853, the said deceased William Reid, while in the employment of the defenders in said pit, received severe and mortal injuries through the fault of the defenders in the management of the machinery for lowering and raising the miners or colliers at said pit, or part thereof, in consequence of which he immediately or soon afterwards died, to the loss, injury, and damage of the pursuers." These issues were tried before the Lord President, and evidence was given for the purpose of shewing that the accident arose from the carelessness of Shearer. There was no evidence tending to shew that Shearer was incompetent to the due discharge of his duty. On the contrary, all the witnesses described him as a steady sober man and a skilled workman, who had been acting as engineman in the appellants' service for several years.

At the close of the evidence, the Lord President directed the jury as follows :—His Lordship said: "That if they were satisfied on the evidence, that the injury was caused by the culpable negligence and fault, on the part of Shearer, in the management of the machinery, the defenders were, in point of law answerable." The defenders' counsel excepted to that direction, and asked a direction in the following terms :—"To direct the jury, in point of law, that if the jury are satisfied on the evidence, that the defenders used due and reasonable diligence and care in the selection and appointment of Shearer as engineman, and that Shearer was fully qualified to perform the duties of engineman, and furnished with proper machinery, and all necessary means for the performance of these duties, then the defenders are not in law answerable for the personal fault or negligence of Shearer in the management of the machinery on the occasion mentioned." The Lord President declined to give that direction, and exception was taken.

The bill of exceptions was argued before the First Division of the Court, but it was disallowed; and the Court, by their interlocutor, decreed, that the appellants should pay to the respondents the amount of the damages assessed by the jury. I believe I am wrong in saying the amount assessed by the jury. The amount was agreed upon, but that is immaterial. From this decision the defenders have appealed to your Lordships.

The question for decision is, Whether, in the working of a mine, if one of the servants employed is killed or injured by the negligence of another servant, employed in some common work, that other servant having been a competent workman and properly employed to discharge the duties entrusted to him, the common employers of both are responsible to the servant who is injured, or to his representatives, for the loss occasioned by the negligence of the other?

Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to shew, that the circumstances were such as to make some other person responsible. In general, it is sufficient for this purpose to shew, that the person whose neglect caused the injury was, at the time when it was occasioned, acting, not on his own

account, but in the course of his employment as a servant in the business of a master, and that the damages resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim "*respondeat superior*" prevails and the master is responsible.

Thus, if a servant, driving his master's carriage along the highway carelessly, runs over a bystander, or if a gamekeeper employed to kill game fires at a hare so as to shoot a person passing on the road, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold, and so hurts a passer by,—in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful or careless act as the act of the master—*Qui facit per alium, facit per se.* If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible; and the law does not permit him to escape liability, because the act complained of was not done with his own hand. He is considered, and reasonably considered, as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders. Third persons cannot, or, at all events may not, know, whether the particular injury complained of was the act of the master or the act of his servant. A person sustaining injury in any of the modes I have suggested has a right to say, "I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged to build a house. If you chose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress, if mischief happens to me as their consequence." A large portion of the ordinary acts of life are attended with some risk to third parties, and no one has a right to involve others in risk without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person, by whom, or by whose orders, these risks are incurred, responsible to third parties for any ill consequences resulting from want of due skill or caution.

But do the same principles apply to the case of a workman injured by the want of care of a fellow workman engaged together in the same work? I think not. When a workman contracts to do work of any particular sort, he knows, or ought to know, to what risk he is exposing himself; he knows, if such be the nature of the risk, that want of care on the part of a fellow workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know, whether the master or the servant was to blame. He knows that the blame was wholly that of the servant; he cannot say, that the master need not have engaged in the work at all, for he was a party to its being undertaken.

Principle, therefore, seems to me opposed to the doctrine, that the responsibility of a master for ill consequences of his servant's carelessness is applicable to the demand made by a fellow workman, in respect of evil resulting from the carelessness of a fellow workman when engaged in a common work.

That this is the view of the subject in England cannot, I think, admit of doubt. It was considered in the Court of Exchequer in *Priestly* v. *Fowler*, 3 M. & W. 1, afterwards fully discussed in the same Court in *Hutchison* v. *York, Newcastle*, and *Berwick Railway Co.*, 5 Exch. 349, and acted on by the same Court in *Wigmore* v. *Jay*, 5 Exch. 356. Those decisions would not, it is true, be binding on your Lordships, if the ground on which they rested were unsound. But the circumstance of their having been acquiesced in affords a strong argument to shew, that they have been approved of, more especially as, in the two first cases, the question appeared on the record, and might therefore have been brought before a Court of Error.

I may add, that in the case of *Skipp* v. *The Eastern Counties Railway Co.* in 1853, reported in 9 Exchequer Reports, page 225, a question of a very similar nature to *Hutchison's case* occurred; but the counsel in arguing for the plaintiff tried to distinguish that case from those I have referred to, but did not attempt to impugn their authority; and afterwards, in a case in the Queen's Bench, *Couch* v. *Steel*, reported in 3 E. & B. 402, both Lord Campbell and Mr. Justice Wightman referred to *Priestly* v. *Fowler* apparently with approbation. I think it has been stated at the bar, in the argument in *M'Guire's case*, that there has subsequently been a case brought before the Court of Error in which this doctrine has been recognised.

I consider, therefore, that in England the doctrine must be regarded as well settled. But, if such be the law of England, on what ground can it be argued not to be the law of Scotland? The law is established in England, and founded on principles of universal application, not on any peculiarities of English jurisprudence; and unless, therefore, there has been a settled course of decision in Scotland to the contrary, I think it would be most inexpedient to sanction a different rule to the north of the Tweed from that which prevails to the south. Let us consider whether there has been such a settled course of decision as was contended for by the respondents.

First, it was argued, that two cases have been recently decided in this House inconsistent with the principle contended for by the appellants, namely, *Paterson* v. *Wallace*, 1 Macq. 748; *ante*, p. 389; and *Brydon* v. *Stewart*, 2 Macq. 30; *ante*, p. 447. In the former case, William Paterson, the late husband of the appellant, had been killed by the fall of a large stone while he was

working underground in a mine. An issue was directed to try the question, Whether the death was occasioned by the unsafe state of the roof of the mine, and the negligence and unskilfulness of the owners in having so left it when the workmen were sent to work there? Strong evidence was offered to shew, that though the roof was in a dangerous state, yet its condition was known to Paterson, so that his death, which arose from his working under it, was the consequence of his own rashness, and not of any neglect of the owners. The learned Judge who presided was strongly of that opinion, and he told the jury that the pursuers could not recover, thus withdrawing the case from their cognizance. The defenders excepted to the direction of the learned Judge, but the Court of Session sustained it.

Your Lordships, however, on appeal, considered the exception to have been well founded, and remitted the case with a declaration, that there ought to be a new trial. Of the propriety of the course then taken by your Lordships, there cannot, I apprehend, be any doubt. The question was not as to an injury occasioned by the unskilfulness of a fellow workman, but an injury occasioned by his own rashness, or by the roof not having been properly secured by the owners. The Judges withdrew this question from the jury, deciding the fact against the plaintiffs, and in favour of the owners. This was clearly out of the line of his duty; and the case was therefore remitted for the purpose of being tried again. This case, therefore, affords no ground for contending, that the law of Scotland differs from that of England.

The other case—*Brydon* v. *Stewart*—was very similar. There the miners employed at piece work in working the coal while in the pit, into which they had been let down in the usual manner, remonstrated with the underground agent as to the state of the mine, complaining, amongst other things, that air was not adequately admitted, and also that their wages were not sufficient; and on his refusing them redress, they declined to work any longer, and desired to be drawn up again. To this the agent acceded; and James Marshall one of the men, the husband of the appellant, was, in the course of the ascent, thrown over and killed. An issue was directed to try whether the death of Marshall was occasioned by reason of the shaft being in an unsafe state owing to the neglect of the owners. The chief point made on behalf of the owners, and to which a large portion of the evidence was directed, was, that the men were not justified in refusing to work, and that so the drawing them up was not in the ordinary course of their employment. The learned Judge directed the jury, that if they were satisfied, that the men left their work without reasonable cause of complaint, and for purposes of their own, then the owners were not responsible, even though the injury was caused by the insufficient condition of the shaft. But, in case the Court should think that not to be a sound direction in point of law, he told the jury to find, secondly, whether they were of opinion, that the man lost his life owing to the unsafe and insufficient condition of the shaft. The jury found, on the first direction, that the men had no sufficient ground for refusing to work; and on the second, that the death arose from the shaft not being in a safe and sufficient state. The Court of Session thought, that as the men had no ground for leaving their work, the insecure state of the shaft was immaterial, and therefore directed a verdict to be entered for the defenders. Your Lordships came to the conclusion, that the men had a right to leave their work if they thought fit, and that their employers were bound to take all reasonable measures for the purpose of having the shaft in a proper condition, so that the men might be brought up safely; and they, therefore, pursuant to leave reserved by the learned Judge at the trial, directed the verdict to be entered for the plaintiff.

The case, it will be observed, like that which preceded it, turned, not on the question, whether the employers were responsible for injuries occasioned by the carelessness of a fellow workman, but on a principle established by many preceding cases; namely, that when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks.

I think it clear, therefore, that these two cases decided by your Lordships do not bear out the proposition contended for by the respondents.

Let us next consider the cases decided in the Court of Session. The first case relied on by the respondents was that of *Sword* v. *Cameron*, 1 D. 493. There are some earlier cases which it appears to me unnecessary to consider in detail. There the defenders were lessees of a stone quarry, and the pursuer was one of their servants employed there. It was his duty to work at or near a crane. Other servants were employed to blast the rock. The practice was, before firing a shot for the purpose of blasting, to give an order to hap the crane, that is, to cover it, in order to protect it from the effect of the shot. Upon this order being given, the workmen employed at the crane happed it; but it was their duty still to continue to work at or near the crane till the signal was given by the word "fire." It was then the duty of the men employed at the crane to hasten away; sometimes the signal "fire" was given two or three times—sometimes only once. The interval between the happing the crane and the signal to fire varied; sometimes it was only a minute or two—sometimes much longer. On the occasion in question, the signal to hap the crane was duly given, and the crane was properly happed; after which the pursuer remained working, as it was his duty to do. Then the signal was given to fire, whereupon the pursuer, with the other servants who were working at the crane, hastened away as fast as they

could. When the pursuer was at a distance of fifty or sixty yards, the shot was fired, and he was very severely injured by the explosion. There was about the usual interval of time between the order to fire and the explosion—that is, about two minutes; and it was stated to have frequently occurred, that, by the effect of the explosion, stones which had exploded from the shot flew over the heads of the retreating workmen. The defenders were held to be liable in damages for the injury thus caused to the pursuer.

This case may be justified without resorting to any such doctrine, as that a master is responsible for injuries to a workman in his employ, occasioned by the negligence of a fellow workman engaged in a common work. The injury was evidently the result of a defective system, not adequately protecting the workmen at the time of the explosions. It is to be inferred, from the facts stated, that the notices and signals given were those which had been sanctioned by the employer, and that the workmen had been directed to remain at their work near the crane until the order to fire had been given; and then, that after the interval of a minute or two, the explosion should take place. The accident occurred not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security. The case, therefore, is no authority for the proposition now insisted on by the respondents.

Then came the case of *Dixon* v. *Ranken*, 14 D. 420, in 1852. There the accident occurred in consequence of a rope giving way, which had been used to fasten one of the spokes or arms of a crab. A crab is described in the report of the case as a perpendicular axle, made to revolve by means of horizontal spokes or arms fixed in it, which are moved round by the force of men pressing upon them. By means of this revolution of the axle, and a rope and pulley connected with it, heavy weights are raised from the mine with which the crab is connected. A man named Neilson, with several others, all workmen in the employ of Dixon, were set to work the crab at the pit where they were engaged, for the purpose of raising some heavy materials. There were no teeth or checks to prevent a retrograde movement of the spokes in case the pressure should be withdrawn. And on the occasion when the accident in question happened, something had gone wrong in the machinery, which made it necessary, while the weight was suspended, to send to the smithy for a new nut or bolt. While the operation was thus suspended, one of the men engaged in working the crab fastened one of the spokes by a rope to some other part of the machinery in order to prevent the recoil or reverse movement, until the nut or bolt should be obtained, and the work could be recommenced. This operation, from the weakness of the rope, was ineffectually performed, and the persons who were in charge of the crab took no measures to make the spokes secure. After the spokes had been thus fastened, most of the workmen retired from the crab; but Neilson, one of them, remained at it, and the rope having suddenly given way, the spokes recoiled with great violence, knocked him down and killed him. The Court of Session held that Dixon, the master, was responsible.

The Lord Justice Clerk went very fully into the question of a master's liability for injury to his workmen, occasioned by the negligence of fellow workmen, and clearly and emphatically stated, that the law of Scotland recognised no such distinction as that which had been acted on in England; and Lord Cockburn stated to the same effect. I feel therefore that, in advising your Lordships to come to the conclusion, that the same principles which have led to the English decisions ought to prevail in Scotland, I have to encounter the very high authority of the eminent Judges whose names I have first mentioned. But this cannot be avoided; and I think it will appear, that the opinion of the Lord Justice Clerk and Lord Cockburn have not by any means been universally assented to in Scotland. The decision itself might perhaps be justified, even though the English rule was admitted; for the evidence went to shew, that the machinery was defective, and that no proper precautions had been taken by the owners to put it into such a condition as would prevent unnecessary risk to the lives of those who were employed in the mine; and Lord Murray expressly stated that to be the ground on which he rested his decision. If the owners had failed in taking due precautions to have proper machinery, this would exclude the operation of the principle established by the English cases. Lord Medwyn, the other Judge by whom the case was decided, declining to express any opinion on the doctrine established by the English cases, intimated a strong doubt whether the facts warranted any judgment against Dixon, the owner. Lord Medwyn considered the result of the evidence to be, that Neilson, when he lost his life, was not acting in the service of his master; but that, on the contrary, after the action of the crab had been stopped, he remained, contrary to express orders, lounging on the spokes, and so exposed himself unnecessarily to the danger of that which eventually deprived him of his life. If this were so, the decision was certainly wrong. But it is unnecessary to go into any inquiry on that head. The judgments of the Lord Justice Clerk and of Lord Cockburn clearly went on the ground, that the death had resulted from the negligence of a fellow servant, while the person injured was acting in the service of his master. Those two eminent Judges held, that in such a case the master was liable. Lord Medwyn and Lord Murray, on the other hand, took care to explain, that they gave no opinion as to the ground, on which the Lord Justice Clerk and Lord Cockburn proceeded.

The next case was that of *Gray* v. *Brassey*, 15 D. 135. There the summons stated that Brassey was contractor for the maintenance of the Caledonian Railway, and that it was the duty of the defendant, as such contractor, or of those acting for his behoof, to use all requisite precautions for the safety of the workmen employed by him; that it became the duty of the pursuer, as one of the workmen, to uncouple one of the waggons on the line, and, on his stepping on the break for that purpose, it slipped down with him, in consequence of there being no block on it, which it was the duty of Brassey, or those acting in his behoof, to have seen attached thereto; that the consequence was, the pursuer fell, and was so injured, that he lost his leg, and that this injury arose from the culpable neglect of Brassey, or of Simpson as his manager.

The question was as to the relevancy of the summons. The Lord Ordinary, and afterwards the Court of Session, held it to be relevant. The summons stated, that the accident happened not from the negligence of a fellow workman, but because Brassey, the employer, or those for whom he was responsible, had omitted to attach a block to the break, where it ought to have been attached. The Judges certainly did not proceed on the ground that a master is, in all cases, liable for injury occasioned to a workman from a fellow workman. On the contrary, the Lord President in his judgment said, that, with very trifling exceptions, he agreed with the law as laid down by the Court of Exchequer in *Hutchison* v. *The York, Newcastle, and Berwick Railway Co.* He considered the question to turn on what is to be regarded as common service. He intimated, that it is not enough, that the servant injured, and the servant causing the injury, should be servants of the same master. They must be employed in the same work. And he observed truly, that if a gentleman's coachman were to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger. Lord Ivory is even more distinct; he clearly intimates that if the meaning of the defendant's plea was, that though the master in the choice of his servants and the sufficiency of his machinery was free from blame, he may yet be made liable for any injury to a workman, he thinks such a plea may be bad. The opinions thus enunciated are, as I conceive, in strict accordance with the doctrine of the English cases.

The only other case relied on was that of *O'Byrne* v. *Burn*, in 1854, 16 D. 1025.

There the plaintiff was a girl employed by the defendant in his clay mill. She was altogether inexperienced, having been only nine days in the defendant's service, and she was therefore unaware of the risks from the machinery. Anderson, acting under Burn as the manager of the works, put her to remove some waste clay while the rollers were in motion. This was a duty which Anderson ought to have performed himself; and it ought not to have been done at all till he had caused the movement of the rollers to be suspended. The pursuer, in attempting to move the waste clay, in obedience to Anderson's orders, sustained a very severe injury from the rollers in making the attempt. And she raised an action against Burn for damages. The Lord Ordinary held the allegations relevant, so as to entitle her to issues for trial of the cause.

This might have been quite right. It may be, that, if a master employs inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not within the meaning of the rule in question—employed in a common work with the superintendent. They are acting in obedience to the express commands of their employer, and if he by the carelessness of his deputy exposes them to improper risks, it may be, that he is liable for the consequences.

On this review of the cases, therefore, it appears to me that there is no clear settled course of decision in Scotland, imposing on this House the necessity of holding the law of that country to be different from that of England; and I think that general principle is altogether in favour of the rule established here. When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks. I do not at all question what was said by the Lord President, that the real question in general is, What is common work? It is not necessary for this purpose, that the workman causing, and the workman sustaining, the injury, should both be engaged in performing the same or similar acts. The driver and guard of a stage coach—the steersman and the rowers of a boat—the workman who draws the red hot iron from the forge, and those who afterwards hammer it into shape—the engineman and the signalman on a railway—are all engaged in one common work. So in this case as to the engineman and the miners; they are all contributing directly to the common object of their employer in bringing the coal to the surface.

I am therefore of opinion, that the exception to the ruling of the Lord President at the trial ought to have been allowed; and consequently, that the third and fourth interlocutors appealed against ought to be reversed. I think further, that the first and second interlocutors appealed against ought to be reversed, on the ground that no relevant case is stated on the part of the pursuers.

The case, as made in the sixth article of the condescendence, attributes the accident entirely to the neglect and carelessness of Shearer the engineman; and as there is no statement in that

article, that the appellants had failed to exercise due care in the selection of an engineman, or that they had any reason for distrusting the competency or carefulness of Shearer, no case is there stated inferring liability on their part to the pursuer. It may be, that, looking to the three next articles of the condescendence, a relevant case, if the averments which they contain are sufficiently specific, is stated. But I do not feel called on to go into any consideration on this head; for the Lord Ordinary, by his note appended to the interlocutor of the 6th of December 1854, expressly states, that the discussion as to relevancy had been taken, and he evidently means exclusively taken, on the sixth article of the condescendence. Indeed, this must have been so; for otherwise the issues, as framed, to which both parties assented, and which must have been intended to exhaust the whole subject, put the claim of the pursuer entirely on the fault of the appellants (*i. e.* of Shearer, their servant) in the management of the machinery, not at all on the neglect of the appellants (if there had been neglect) in providing proper machinery and a competent engineman. Unless, therefore, the appellants are responsible for the carelessness of Shearer, (which, in my opinion, they are not,) no relevant case is stated.

Before I dismiss the case, I am anxious to refer to a very able and elaborate judgment of Chief Justice Shaw on this subject, in a case which was decided in the year 1842, in the Supreme Court of Massachusetts. I allude to the case of *Farwell* v. *The Boston and Worcester Corporation*, 4 Metcalfe 49. The plaintiff in that action was an engineer in the service of the defendants, and was engaged in running a passenger train on their line. In consequence of the neglect of one Whitcomb, another servant of the defendants, one of the switches had been improperly left across the line, and the consequence was, that the engine was carried off the line, and the plaintiff was severely injured. It was admitted, that Whitcomb was a careful and trustworthy man, who had long been entrusted with the care of the switches. On these facts, the Court held that the defendants were not responsible to the plaintiff. The Chief Justice, in a very able judgment, discussed the whole subject. He held, that the plaintiff and Whitcomb must be considered as servants engaged in one common work under the defendants, and that every servant engaging in a service attended with danger, must be supposed to take upon himself the risk of all perils incident to the service he is undertaking, including those arising from the carelessness of fellow servants employed in the same work. The whole judgment is well worth an attentive consideration. It is sufficient for me to say, that it recognises, and in the fullest manner adopts, the English doctrine, resting as it does on principles of universal application.

I therefore move your Lordships, that all the interlocutors appealed against be reversed.

Sir Richard Bethell.—And that the defenders be assoilzied from the conclusions of the summons?

LORD CRANWORTH.—And that the defenders be assoilzied from the conclusions of the summons.

Sir Richard Bethell.—And with costs?

LORD CRANWORTH.—It is a pauper case.

Sir Richard Bethell.—They do not sue *in formâ pauperis*. I humbly submit that the defenders should be assoilzied, and with costs, and that any costs that we have paid should be repaid to us.

LORD CRANWORTH.—Those costs should be repaid. But I do not know whether it is quite a proper case for giving costs. Former cases had warranted the pursuers in supposing, that they were entitled to succeed.

Sir Richard Bethell.—I do not suppose it is a matter of any consequence—we should never get a shilling. It would only be important as shewing your Lordship's opinion upon the case.

LORD CRANWORTH.—For that very reason, I think we ought not to give any costs.

LORD BROUGHAM.—I think there should be no costs.

First, second, third, and fourth interlocutors reversed; defenders below assoilzied; damages and expenses (if any) paid under interlocutors below to be repaid.

Case of M'Guire.

LORD CHANCELLOR CHELMSFORD.—My Lords, I think it will be unnecessary for your Lordships to hear the reply in this case, being the same in its circumstances as that of the *Bartonshill Coal Co.* v. *Reid*, upon which your Lordships have just heard the carefully considered opinion of my noble and learned friend, in which I entirely concur. I will therefore not trespass at any length upon your Lordships' attention. By consent of the parties, for the purpose of avoiding unnecessary expense, it was ordered that this cause should, so far as regarded the first and second pleas of the defenders, abide the decision thereof in Reid's action, and that the same judgment should be pronounced in both cases on these two pleas. Afterwards a further arrangement was entered into, that *Reid's case* should alone be tried, and that the same verdict and procedure should be held as pronounced and taken in both cases. Following out this arrangement, a similar bill of exceptions as in *Reid's case* was *pro formâ* lodged, and similar issues

framed; and the *case of Reid* having been tried, and a verdict given in favour of the pursuers, by arrangement, a verdict for £100 was entered in this case in favour of the respondent. And the interlocutors of 5th July and 19th July 1855 were pronounced, by which "the Lords, in respect of the verdict found by the jury on the issues in this cause, decern against the defenders for payment of £100 in name of damages." That was the interlocutor of the 5th July 1855. Afterwards, by another interlocutor of the 19th July, they decerned the expenses against the appellants.

Your Lordships will, I think, entertain very little doubt that the understanding and intention of the parties in these arrangements were, that the decision of this case should abide the event of *Reid's case*, meaning, of course, the *final* event. The respondent, however, endeavoured to enforce the verdict, and compelled the appellants to present their appeal, and now has urged upon your Lordships various objections to its competency. Perhaps it might have been the most correct course, under all the circumstances, to have declined to hear this appeal, and to have left the case to be determined by the event of *Reid's case*. But your Lordships having decided upon hearing the argument, it will be necessary to consider, and to dispose of, the objections which have been urged to the competency of the appeal arising upon the Scotch Judicature Acts.

It has been objected, that there can be no appeal against the Lord Ordinary's interlocutor of the 31st Jan. 1855, because it had not been reviewed by the Judges sitting in the Division to which the Lord Ordinary belongs, according to the 15th section of 48 Geo. III. c. 151, and that the interlocutor of the Court of Session of 3d July 1855 disallowing the exceptions, cannot be appealed from, because no appeal was presented to your Lordships within fourteen days after the interlocutor had been pronounced; and, in these respects, your Lordships will probably think, that the objections are well founded.

The respondents then insist, that although it is competent to the appellants to appeal against the interlocutors of 5th July and 19th July 1855, and though in general an appeal against a final interlocutor will bring up all the intermediate interlocutors, yet that this is not the case with respect to the interlocutor disallowing the exceptions to which the provisions of the act 55 Geo. III. already referred to, apply. And they refer your Lordships to the case of *Melrose* v. *Hastie*, in 1 Macq. 698, which appears to be a direct authority in favour of their argument. But then, admitting as they do the competency of the appeal against the two final interlocutors, the question is, whether this does not open the whole case to your Lordships' consideration. This must depend not upon the terms of the condescendence, upon which so much stress has been laid, but upon the form of the issues. The second issue raises no question as to the defectiveness of the machinery, but attributes the injury to the fault of the defenders in the management of the machinery. Then, when the Lords, in respect of the verdict found by the jury, decern against the defenders for payment of £100 in name of damages, they appear to me to be pronouncing a judgment in point of law as applicable to, or arising out of, the facts found by the jury, and it becomes a case completely within the 9th sect. of 55 Geo. III. c. 42, which it is lawful and competent to bring under review by appeal to your Lordships' House.

Having thus cleared the way from the technical objections which have been interposed to prevent your Lordships deciding the questions of law in this case, I consider it necessary to offer very few observations upon them after the careful and elaborate opinion of my noble and learned friend, in which I have already expressed my entire concurrence.

The questions to be decided are—First, whether James M'Guire, the deceased, and James Shearer, were fellow labourers, engaged in one common employment; and secondly, if they were, whether the death of M'Guire, having been occasioned by the carelessness and negligence of Shearer in the course of this employment, without any proof of general incompetency for his duties, or of defectiveness of the machinery, their mutual employers are liable in damages for the event. It has long been the established law of this country, that a master is liable to third parties for any injury or damage done through the negligence or unskilfulness of a servant acting in his master's employ. The reason of this is, that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and, consequently, to be the same as if it were the master's own act, according to the maxim, *Qui facit per alium, facit per se.*

A little more than twenty years ago, it was attempted, for the first time, to apply this principle to the case of an injury sustained by a servant from his fellow servant, employed together in the same work; and it was decided in the case of *Priestly* v. *Fowler*, 3 M. & W. 1, that an action could not be maintained against the master under such circumstances. This case was followed and confirmed by subsequent decisions, which have been all brought before your Lordships in the course of the argument.—*Hutchison* v. *The Newcastle, York, and Berwick Railway Co.; Wigmore* v. *Jay; Wiggett* v. *Fox;* and *Degg* v. *The Midland Railway Co.;* and other cases which have been cited.

In the consideration of these cases, it did not become necessary to define with any great precision what was meant by the words, "common service" or "common employment;" and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case, to ascertain whether the servants are fellow labourers in the

same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence, in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases in deciding whether a common employment exists, but, in general, by keeping in view what the servant must have known, or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at.

The Lords of Session, in the *case of Reid*, decided, "That Shearer and the deceased were not *collaborateurs*, because Shearer had the superintendence of the machinery for lowering and raising the men and the materials from the mine, a superintendence which took his duties altogether from common employment with the men below, and that the deceased's business was to excavate coal from the pit, a line of business entirely different from that of engineman." But, my Lords, it appears to me that the deceased and Shearer were engaged in one common operation, that of getting coals from the pit. The miners could not perform their part unless they were lowered to their work, nor could the end of their common labour be attained unless the coal which they got was raised to the pit's mouth. And, of course, at the close of their day's labour, the workmen must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware, that all this was incident to it, and that the service was necessarily accompanied with the danger, that the person entrusted with the machinery might be occasionally negligent, and fail in his duty.

The Lord Advocate put the case of a master undertaking to convey his workmen to their place of work in the morning, and to bring them home in the evening, as being similar to the present one of lowering the workmen to their work, and taking them up when it is over. And he asked whether it could be doubted, that, if something were deducted out of the workmen's wages for their conveyance to and from their work, the master would be liable. Now, in the latter case supposed, it may be very probable that the master would be liable for damage to the workmen by the negligence of his servants in the course of the journey, because he has for this purpose converted himself into a carrier for hire. And so it may be, if the employer in this case had entered into an express contract with the miners to lower them into and raise them from the mine, he might have put off the mere relation of master for this duty, and undertaken that of a contractor. But we are here dealing with no such special and precise cases, but with an engagement in a service subject to all the necessary incidents of it, and as essential to, and forming a part of, that service—the very act, by negligence in the performance of which, by one of the servants engaged in the common work, the death has been occasioned.

Whatever difficulties may occur in some cases in determining, whether the parties are engaged in a common employment, I feel no doubt, that the relation in which Shearer and the deceased stood to each other, would satisfy the strictest definition which could be given of the term.

It only remains to make a few observations on the second question, as to the liability of the employers of Shearer and the deceased to the damages which have been found by the jury for the fatal consequences of Shearer's negligence. If this case had arisen in this country, it would be unnecessary to do more than to refer to the different decisions upon the subject in which, founded as they are on reasons which recommend themselves to the judgment, your Lordships would probably have acquiesced. But it is said, that whatever may be the law in England, which has only recently broken in on the principle of the liability of the master for negligence of his servants, there is no such law existing in Scotland. I own I was surprised to hear the assertion made, because I had assumed, that the authorities in England had been based upon principles which were not of local application, nor peculiar to any one system of jurisprudence. The decisions upon the subject in both countries are of recent date, but the law cannot be considered to be so; the principles upon which these decisions depend, must have been lying deep in each system, ready to be applied when the occasion called them forth. It will be unnecessary for me, after the complete and satisfactory manner in which my noble and learned friend has investigated the cases which have been decided in the Scotch Courts, to follow him minutely in the same course, and shew that all of them are reconcileable with the decisions in England, and that, with the exception of occasional *dicta* of some of the Scotch Judges, there is nothing in them to shew, that there is any real difference in the law of the two countries. In *Sword* v. *Cameron*, 1 D. 493, the system of blasting in the quarry which had been established had been habitually defective; and, therefore, the injury which resulted might as much be attributed to the employers, as if they had supplied defective machinery, for which undoubtedly they would have been answerable. The case of *Sneddon* v. *Addie*, 11 D. 1159, was a case of damage through insufficient machinery, upon which it is conceded that the employers would be liable. And this was also the case in *Dixon* v. *Ranken*, 14 D. 420, for there it was said by the Lord Justice-Clerk, "It appears that, with that disregard for the safety of workmen, which seems eminently to characterize all the

machinery management and other operations in a great many coal and other pits, the crab has no teeth or checks to prevent a reverse movement, and that is said to be a common defect." And again he says, "The recklessness of danger on the part of the men is a result of the trade in which the master employs them, and he is bound, in all such cases, to hire superintendence which will exclude such risks as occurred here, especially and peculiarly, when his machinery is defective in not having the checks which exclude any reasonable chance of danger." In *O'Byrne* v. *Burn*, 16 D. 1025, it was hardly possible to apply the principle of the servant having undertaken the service with a knowledge of the risks incident to it. She was an inexperienced girl employed in a hazardous manufactory, placed under the control, and, it may be added, the protection of an overseer, who was appointed by the defendant, and entrusted with this duty. And it might well be considered, that by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed. The case of *M'Naughton* v. *The Caledonian Railway Co.*, 19 D. 271, may be sustained, without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work. The deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned, were the engine driver and the person who arranged the switches. It is in this case, however, more than on any other, that the language of the Judges is directed in too unqualified terms against the exemption of masters from liability for injuries happening between fellow servants.

The conclusion, as my noble and learned friend has clearly shewn, is, that there is no decision in the Scotch Courts which is not capable of being reconciled with the authorities upon this subject in our Courts; although there are occasional dicta of the Judges, which strongly tend to raise a distinction between them. I am satisfied, that the principle, upon which the English Courts have proceeded, is the correct one, and ought to be applied to this case, and I am fortified in this opinion by the case mentioned to your Lordships, by my noble and learned friend, as having been determined in the Court at Massachusetts; because the Judges in America are in the habit of investigating general principles most closely, and applying them with great accuracy to the cases brought before them, so as to make them of general use and application. For these reasons, I cannot help concluding, that the appellants in this case were not liable for the death of M'Guire, occasioned by the negligence of Shearer, and that, therefore, the interlocutors of the Court below, of July 1855, are wrong, and ought to be reversed.

LORD BROUGHAM.—My Lords, I entirely agree in the opinion which has been expressed by my noble and learned friend. I had some little doubt at first as to the Scotch law, upon reading the elaborate note of Lord Ardmillan; but when I came to examine his note, I find that he states cases, some of which, past all doubt, would not fall within the English rule of exemption, any more than they would within the Scotch rule. Other cases he states, upon which there may be some doubt, such as the case of *M'Naughton* v. *The Caledonian Railway Company*. As my noble and learned friend has just stated, the decision in that case could not well stand with our reversal of the decision, and with what I consider to be the established rule of law upon the subject.

As an illustration of what I have said respecting Lord Ardmillan's note, I will just point out how he has mis-stated, or, at least, misapprehended the English law. He gives a number of instances, and he says: "If the absolute rule maintained by the defenders is well founded, the masters would, in all these cases, be exempt from responsibility; a very startling result to a Scotch lawyer, for whatever support to such a rule may be found in some of the decisions of the Courts, and more particularly in some of the *dicta* of the learned Judges in England, there is neither precedent nor authority in the law of Scotland in favour of it, and the Lord Ordinary is humbly of opinion, that an absolute and inflexible rule releasing the master from responsibility in every case, where one servant is injured by the fault of another, is utterly unknown to the law of Scotland." But, my Lords, it is utterly unknown to the law of England also. To bring the case within the exemption, there must be this most material qualification, that the two servants must be men in the same common employment, and engaged in the same common work under that common employment.[1]

LORD CRANWORTH.—My Lords, I have so fully expressed my view of this question in the former appeal, in the *case of Reid*, that I do not think it necessary, in the present case, for me to do more than say, that the only point upon which I had any doubt, was as to the competency of the appeal, and the jurisdiction of this House. But, upon looking at the act, I cannot doubt

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[1] This qualification as to the two fellow servants being engaged at the time in a common employment—that is to say, in one specific part of work—was for some years supposed to attend the rule laid down by this decision; but it was afterwards abandoned on a subsequent case of *Wilson* v. *Merry*, L. R. 1 Sc. Ap. 326, *post*, and it has since been deemed law, that it is enough, that the two servants were the servants of the same master, whatever their relative degree, and though not engaged in the same specific part of work.

that your Lordships have a perfect jurisdiction upon the third and fourth interlocutors, and upon the first interlocutor also. It was argued that the first interlocutor could not be brought here by appeal, because it was an interlocutor of the Lord Ordinary, which had not been taken to the Inner House. But it would be a great misfortune indeed, if that circumstance should exclude from review by this House an interlocutor of this sort, which could not go to the Inner House, because it was, by consent of all the parties, agreed, that the proceedings in the other case should govern the decision in this case. Of course, there could not be an appeal to the Inner House upon that. But on looking at the act, I find that there is nothing whatever to exclude such an interlocutor from the review of your Lordships. What is said is, "Nor shall any appeal to the House of Lords be allowed from interlocutors or decrees of Lords Ordinary, which have not been reviewed by the Judges sitting in the Division to which such Lords Ordinary belong. Provided that, when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords, from all, or any of the interlocutors that may have been pronounced in the cause." So that it includes everything. In a common case, your Lordships might be slow to listen to an appeal against an interlocutor, which had not been brought under the cognizance of the Inner House, but your Lordships can have no such feeling with respect to an interlocutor which could not be brought before the Inner House, in consequence of an agreement to which the two parties had come with respect to the course of proceeding. Indeed, it would be contrary to all good faith to listen to such an objection, when the clear intention of the parties was, that the result of the one case should govern the result of the other.

Lord Advocate.—I do not understand your Lordships to reverse the interlocutor disallowing the exceptions. It is not a matter of interest to the parties, but I think it right to suggest to the House, that that would be a deviation from established practice.

LORD CRANWORTH.—I think that to reverse that interlocutor would be establishing a bad precedent, because it is not properly before us.

Interlocutors of 31*st January*, 15*th July, and* 19*th July* 1855, *reversed, and defenders below assoilzied; damages and expenses (if any) paid under the interlocutors below to be repaid.*
Appellants' Agent, John Leishman, W. S. *Respondents' Agent*, David Manson, S.S.C.

JUNE 18, 1858.

ALEXANDER HAMILTON, *Appellant*, *v.* THOMAS ANDERSON, *Respondent.*

Judge—Contempt of Court—Sheriff-Substitute—Reparation—Damages—Summons—Relevancy —*A sheriff-substitute having, in the course of making up a record, ordered a particular statement by the defender to be expunged as untrue, and as reflecting on him as a Judge, the agent of the defender refused to do so, explaining in a minute his reasons to be, that the statement was relevant for the defence, that it was true, and that it was not intended as disrespectful to the Court. The sheriff-substitute, without further notice, suspended the agent for a month from his functions as a procurator before the Court; but the sheriff, on appeal, recalled this deliverance, and reponed the agent, who brought an action of damages for reparation, averring malice and want of probable cause.*

HELD (affirming judgment), *That the procedure of the sheriff-substitute was a judicial act, not in itself incompetent, or in excess of jurisdiction; and he was not liable.*[1]

The pursuer appealed, maintaining, in his case, that the judgments of the Court of Session should be reversed, because—"1. The order or warrant under which the appellant was suspended from his functions of procurator was inconsistent and self-contradictory, bearing to proceed upon disobedience of an order against the appellant, which order was never made. 2. The suspension of an agent for the neglect of an order on his clients was wholly irregular and unwarrantable. 3. The suspension was issued and ordered to take instant effect, without any premonition to the appellant—without any notice being given of any such step being in contemplation—and without any legal certioration from which such a result could be anticipated. 4. There was no contempt committed, and, consequently, no jurisdiction to punish for contempt. 5. It was the duty of the sheriff-substitute himself, if he thought the passage in question to be irrelevant or unnecessary, to have expunged it himself, in terms of the Statute 16 & 17 Vict. c.

[1] See previous reports 18 D. 1003; 28 Sc. Jur. 459. S. C. 3 Macq. Ap. 363; 30 Sc. Jur. 608.