1856.
June 12*th*, 13*th*, 16*th*.
1858.
June 17.

BARTONSHILL COAL COMPANY, . APPELLANTS.
ELIZABETH REID, WIDOW, AND HER CHILDREN, ... } RESPONDENTS (*a*).

Liability of Master for Accidents arising from the Carelessness of Servants.—Per Lord Cranworth: For complaints by the public, the Master is responsible. Thus, if a servant drives his master's carriage over a bystander; or if a gamekeeper, employed to kill game, fires at a hare so as to shoot a bystander; or if a workman, employed in building, negligently drops a stone from the scaffold, and so hurts a bystander; in all these cases the bystander is entitled to claim reparation from the master, because the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself or of his servants; p. 283.

Exemption of the Master from Liability where the injury is by one Servant to another.—Per Lord Cranworth: Servants must be supposed to have the risk of the service in their contemplation when they voluntarily undertake it, and agree to accept the stipulated remuneration; pp. 275–284. If, therefore, one of them suffers from the wrongful act or carelessness of another, the master will not be responsible; p. 284.

This, however, supposes that the master has secured proper servants, and proper machinery for the conduct of the work; p. 288.

Fellow-Labourers.—Per Lord Cranworth: To constitute fellow-labourers within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the

(*a*) This case had stood over for two Sessions. See Lord Cranworth's opinion, *infrà*, p. 278.

servant causing, and the servant sustaining, the injury shall both be engaged in precisely the same, or even similar acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge, and those who hammer it into shape, the engineman and the switcher, the man who lets the miners down into, and who afterwards brings them up from the mine, and the miners themselves; all these are fellow-labourers or collaborateurs within the meaning of the doctrine in question ; p. 295.

Per Lord Cranworth : Commentary on the English cases ; viz., *Stretton* v. *The London and North Western Railway Company*; *Priestly* v. *Fowler; Hutchinson* v. *York, Newcastle, and Berwick Railway Company; Wigmore* v. *Jay ; Skipp* v. *The Eastern Counties Railway Company ; Couch* v. *Steel*, p. 284 ; American case, *Farwell* v. *The Boston and Worcester Railway Corporation*, p. 297.

Per Lord Cranworth : Commentary on the Scotch cases ; viz., *Paterson* v. *Wallace*, p. 286 ; *Bryden* v. *Stewart*, p. 286 ; *Sword* v. *Cameron*, p. 289 ; *Dixon* v. *Ranken*, p. 290 ; *Gray* v. *Brassey*, p. 293 ; *O'Byrne* v. *Burn*, p. 294.

MRS. REID'S husband, William Reid, a miner in the employment of the Appellants, being on the 17th of September 1853 in the cage or cradle of the works, for the purpose of ascending the shaft, was drawn up by James Shearer (also in their employment), who, failing to stop the engine when the cage had arrived at the platform, allowed it to be sent with great force up against the scaffolding. The cage, consequently, was overturned, and the unfortunate miner, falling from a height of sixty feet, died immediately after.

The action was by the Respondents, his widow and children, to recover reparation for their loss ; and the question was, whether by the law of Scotland, where the death of one servant has been occasioned by the negligence of another, the master or employer

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of both is answerable. This question was treated on both sides as of great importance.

The Pursuers (Respondents), by the 6th article of their condescendence, averred that—

The Appellants' engineman, Shearer, on 17th September 1853, when raising "the deceased William Reid, along with another workman of the name of M'Guire, up the said shaft by means of the engine and apparatus above mentioned, disregarded his duty, and failed to give due superintendence to the said engine after setting the same in motion, and did not pay due attention thereto by stopping the engine when the bucket or cage, in which was the deceased, arrived at the said pit-head or platform, as it was his custom and well-known duty to do, in order that the deceased might have ascended the shaft and landed at the said pit-head or platform in safety; but, on the contrary, he allowed the cage or bucket and the said two workmen to be dashed against the top of the scaffold or apparatus, whereby the cage or bucket was overturned, and the deceased and M'Guire violently thrown to the ground from a height of sixty feet or thereby. The circumstances above described resulted solely from the neglect and carelessness of the Defenders' engineman, the said James Shearer, and in consequence thereof the deceased was mortally injured, and almost immediately afterwards died."

The Respondents, by their pleas in law, maintained that the death of William Reid having been "attributable to the fault or negligence of the Appellants, or of those for whom they, were responsible, they, the Appellants, were liable to the Respondents in damages."

The Appellants, on the other hand, put in the following pleas in law:—

"1. The Respondents have no relevant or sufficient case to subject the Appellants in damages; 2. The Appellants cannot in law be made responsible for injuries sustained by one of their workmen through the fault of a fellow-workman engaged in the same common employment, it not being alleged, and at any rate it not being the fact, that the latter was an unfit or improper person for such employment."

The *Lord Ordinary* (Lord Handyside), on the 6th December 1854, pronounced an Interlocutor, repelling

the Appellants' pleas in law. In a note he explained his views thus :—

"It may be doubted whether on the facts admitted, the engineman can be held to have been a fellow-workman of the deceased, in the proper legal sense. His province was distinct, his duties were above ground, and the deceased's below, as a working collier; though, popularly, they might be considered fellow-workmen at the same colliery. The Lord Ordinary has made the remark, as the plea of the Defenders is stated in abstract and absolute terms, and he has had hesitation in finding the negative of so broad a proposition; for there may be cases imagined, though none has yet been made the subject of judicial notice, where the *nature* of the *common employment* may be of so *intimate a character* as to form an exception to the general rule—as where two ordinary colliers are working together, and the negligence of one has caused death to the other; and other cases may be fancied. But applying the plea to the facts averred, the Lord Ordinary has repelled the second as well as the first plea of the Defenders. So explained, it appears to the Lord Ordinary that the decisions in the cases of *Sword*, February 13th, 1839; *Dixon*, January 31st, 1852; *Gray*, December 1st, 1852, and *O'Bryne*, July 3rd, 1854, are conclusive against the sufficiency of the pleas which have been repelled, and have recognized, as a general rule of law, the master's liability to those in his employment for the fault of a fellow-workman, with whatever exceptions it may hereafter be qualified."

Against Lord *Handyside's* Interlocutor the Appellants reclaimed to the Inner House; but that Court, on the 27th January 1855, confirmed his Lordship's decision, and sent the case back to him to proceed further; and the following issue was afterwards settled for trial by a jury :—

It being admitted that the Pursuer (Respondent), Elizabeth Clark or Reid, is the widow, and the other Pursuers (Respondents) are the lawful children of the said deceased William Reid, and the Pursuer, Elizabeth Clark or Reid. Whether the Defenders (Appellants) 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 18th day of September 1853, the said deceased, William Reid, while in the employment of the Defenders (Appellants) in said pit received severe and mortal injuries through the fault of the Defenders (Appellants), 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 (Respondents).

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At the trial the Lord President *MacNeill* 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 (Appellants) were "in law liable."

The Appellants' Counsel excepted to this direction, and asked the *Lord President*—

To direct the jury, in point of law, that if the jury were satisfied on the evidence that the Defenders had 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 were not in law answerable for the personal fault or negligence of Shearer in the management of machinery on the occasion mentioned.

The *Lord President* declined to give this direction. The Jury returned a verdict for the Pursuers. Damages 100*l.*

In considering the bill of exceptions, the learned Judges of the First Division of the Court of Session made the following observations :—

The Lord President *MacNeill:* It does not appear to me that these persons can in any proper sense be held to have been fellow-labourers in the same operation. They are as much removed from each other in that respect as were the parties in the case of *Brassey* (*a*); and without going into any discussion as to what the law of England may be, or how far we may be inclined to adopt it, I only repeat what I said in the case of *Brassey*, that I do not think there is any great difference if we knew what is meant by *collaborateur*. But here that does not arise, for the one workman was discharging duties quite different from the others.

The other question is, whether the Defenders are responsible, seeing that they may have used due diligence in the selection of Shearer, and that he was fully qualified to discharge the duties of engineman, that is, qualified generally. Now on that point I have also very little to say. I know of no authority against the law laid down, or in favour of that asked to be laid down. Shearer was performing a duty which a coalmaster owes to his workmen. It is his duty to raise the workmen from the pit, and if he sends

(*a*) *Gray* v. *Brassey*, 15 Sec. Ser. 135.

another person to do that duty, which he himself ought to do, he is responsible; and, therefore, I see no ground for sustaining this exception.

Lord *Ivory:* I am of the same opinion. The exception must be disallowed. The position of Shearer does not properly come up to that of *collaborateur*. There is a superintendence which takes his duties altogether away from common employment with the men below. This party had such duties as to make him his employer's representative, and if he failed in doing what was required of him, the master was liable.

With regard to the other point, it will not do to say there was due precaution used in the selection of the principal man.

Lord *Curriehill:* Shearer's duty was that of engineman, and the party who was killed had nothing at all to do with the management of the machinery. His business was to excavate coal from the pit, a line of business entirely different from that of engineman. In the one case, the collier is working for his master, while in raising the workmen from the pit the master is working for the colliers; and it is in the performance of that duty he has failed. These are reciprocal duties and obligations, and the duties being essentially so different, I do not see how that question, which has been the subject of so much discussion in England, arises here; and the judgment now pronounced will not decide it.

Lord *Deas:* There are cases in which a master is liable to his servant for the fault or negligence of another of his servants, of which *O'Byrne* v. *Burn*, 8th July 1854, affords an instance. I do not say that there may not be a case of common employment in which one servant shall be held to take the risk of the fault or negligence of a fellow-servant. No such case has yet occurred for decision in Scotland, and I wish to give no opinion upon it till it occurs. But such is not the nature of this case, in which it was the duty of the master to convey the miners safely up and down the pit without subjecting them to injury from fault or negligence; and if he delegated this duty to another as his representative, he became equally liable for the fault and negligence of that representative as for his own.

Thus it appeared that the five Judges, who disposed of the case below, were unanimous. The Company appealed.

The *Solicitor General* (*a*), Mr. *Anderson*, and Mr. *Craufurd* for the Appellants. This case is of the first impression. The question how far a servant can obtain reparation from his master for injuries

(*a*) Sir R. Bethell.

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occasioned by the negligence of a fellow-servant is new in Scotland. But it has been long settled in this country, that such a demand is unsustainable, *Priestly* v. *Fowler* (*a*). The English law negatives the master's liability, on the principle that the servant undertakes the risk of the service, *Wigmore* v. *Jay* (*b*).

[The LORD CHANCELLOR (*c*): That certainly was the opinion of the Court of Exchequer.]

The last case on the point was that of *Stretton* v. *The London and North-Western Railway Company* (*d*), before Lord *Campbell.* There the defence was, as here, that the Company had employed a steady man. Lord *Campbell* interposed, and said the evidence was for the Defendants.

[The LORD CHANCELLOR: I think the Company may be held to undertake that they employ proper servants.]

In *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company* (*e*), it was held that a master is not liable if the servant who caused the injury was a person of ordinary skill and care. Here the man Shearer was proved to have been remarkable for steadiness and experience.

We deny that there is any case or authority in the law of Scotland to justify this decision, which is not only opposed to English, but to American law, *Farwell* v. *Boston and Worcester Railway Corporation* (*f*).

The contention that the deceased and Shearer were not in the strict sense *collaborateurs* is frivolous. There was no superintendence exercised by Shearer over the miners.

(*a*) 3 Mee. & Wel. 1.
(*b*) 5 Exch. Rep. 354; Weekly Reporter, 254, 2 Feb. 1856.
(*c*) Lord Cranworth.
(*d*) 16 Com. Bench, 40; Weekly Reporter, 17 March 1855.
(*e*) 5 Exch. Rep. 349.
(*f*) 4 Metcalfe, 42. See *infrà*, p. 316.

In the American case already cited a driver was killed through the carelessness of the switchman of a railway. There the service was different. The men were not in strictness *collaborateurs;* their employers were the same; and on the principle that the servants must be taken to have had a common risk in their common contemplation, no responsibility arose against the company.

[The LORD CHANCELLOR: It is desirable that this question should be settled. I see no reason why one rule should not prevail.]

The *Lord Advocate* (*a*) and Mr. Serjeant *Byles* for the Respondents.

By the Roman and French law, as well as by the Scotch, masters are liable, not indeed for the crimes, but for the delicts and *quasi* delicts of their servants (*b*). *Sword* v. *Cameron* (*c*) shows that the distinction where the injury is by a fellow-servant is unknown in Scotland. In *Dixon* v. *Ranken* (*d*), the *Lord Justice Clerk*, alluding to this doctrine or peculiarity of English law, says: "I am glad that our law is different." To this effect is *O'Byrne* v. *Burn* (*e*).

The decisions of this House may also be cited as confirmatory of the view for which we contend; *Wallace* v. *Patterson* (*f*), *Bryden* v. *Stewart* (*g*).

Our general proposition is that the master undertakes to his miners that they shall be safely let down and safely brought up. This is his contract. Then if he

(*a*) Mr. Moncreiff.

(*b*) 3 Pothier on Obligations, 81; Bell's Princ. section 2031.

(*c*) 13 Feb. 1839, 1 Sec. Ser. 493.

(*d*) 31 Jan. 1852, 14 Sec. Ser. 420.

(*e*) 8 July 1854, 16 Sec. Ser. 1025. See also *Gray* v. *Brassey*, 15 Sec. Ser. 135.

(*f*) *Suprà*, vol. 1, p. 748. (*g*) *Suprà*, p. 30.

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employs another to do that which he is bound to do himself, and that other by his negligence occasions the death of a miner, the master is no less answerable than if he had himself done the mischief. The English cases (we say so with reverence) are not the perfection of reason. The language of Lord *Abinger* in *Priestly* v. *Fowler* is not above criticism; neither are the remarks of Baron *Alderson* in *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company.* We contend that the illustrations suggested by the learned Judges in these cases are more puzzling than very instructive; and it is questionable whether such judicial exercitations have not on other points, as well as on this, carried the English law further than good sense will go along with it; and whether, indeed, they have not procured for that law a reputation of narrowness and technicality with which the jurisprudence of the sister country is certainly not chargeable.

The doctrine that servants engaged in a common employment under the same master must be supposed to undertake the risk, and to be their own insurers, seems of very doubtful expediency in dangerous occupations. Take' children in a factory where there are steam boilers. Are they to insure themselves? Is this to be implied? Better not too readily to infer such contracts; wiser will it be to hold the master answerable *generally* for the negligence of his servants. Dangerous occupations, even in England, may well form exceptions to a somewhat singular rule, if it be a rule.

Another exception may be admitted where there is no community in the risk. The engineman, who winds the miners up and down, is in no danger. He is safe and at his ease. The peril is theirs alone. They are as helpless as the coals in the cradle, and as much at his mercy. Whether the machine be animate

or inanimate, the master is bound to watch it, and to see that it be in proper order. If he do not, he is liable, or ought to be held so. If the machine be made of iron and wood, he must remember that iron and wood rot and decay. If it be human, he must not forget human frailty. This principle of unceasing responsibility it seems at all events to be the principle of the Scotch law to enforce. Suppose a master employs a man to select his servants. Would he be permitted to say, I have selected the selector, and I am free, whatever happens? No; not even in England would he be suffered to escape by such an artifice. Therefore, it is far from being clear to us that the direction of the learned Judge complained of in this case would not be good law, even in England.

Then, again, there is the point that the men were not *collaborateurs*. Who can say that the engineman who winds the wheel and the miners who fill the cradle are in a common employment? The pit was, perhaps, five hundred feet deep. Suppose the miners contracted to pay for being safely sent down and safely brought up. A fair way of putting it is to say that the master was employed by the servant. This corresponds with the view taken in the late case before this House (*a*). Then, if the master was employed by the servant, can there be any doubt of the master's liability in the present case? We submit that there cannot, and that the judgment is right.

[The LORD CHANCELLOR: I am quite sure that what was meant in the Court of Exchequer was, that if men engage for certain wages in a work of great

(*a*) *Bryden* v. *Stewart*, *suprà*, p. 30; in which case it was held by the House, that "the master who lets the workman down his mine is bound to bring him up safely."

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risk, it is to be supposed that the risk forms an element in their contemplation in agreeing to accept the stipulated remuneration.]

The *Solicitor-General* in reply. From the remarks of the Scotch Judges in this and other cases, it does not appear that the Scotch law may not be the same as that of England. If so, this decision cannot be sustained.

1856. *June* 13*th*. *Lord Chancellor Cranworth's opinion.*

The LORD CHANCELLOR:

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

With reference to the law of England, I think it has been completely settled 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. 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,—that 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

externally the whole, and the whole is considered as one body united in the master.

But the case is different when the question arises within the circle of the master and servants. The law of England considers that the person who undertakes the service undertakes it 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 occupation. The Court of Exchequer 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, consisting 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.

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 the law of Scotland now is, upon this question. 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, we endeavour to trace our way as well as we can between conflicting analogies, hoping to arive at a sound decision.

It is said that the law 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

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13*th June* 1856.

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 cases, intended to be a decision at variance with the English cases. That, however, 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), as to make it your Lordships' duty, as the ultimate Court of Appeal, to hold that the law is really different in the two countries.

The case involves questions of very considerable interest and importance; and I must therefore ask your Lordships some further time to consider it.

1858. *June* 17.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, in this case, which was heard now, I regret to say, exactly two years ago, in the month of June 1856, I formed a strong opinion at the hearing; but at the close of the argument, I intimated that I would not finally deliver my opinion 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. That happened in the middle of June 1856. The Session closed in July, and the conclusion at which I had arrived being that in truth the Pursuers were not entitled to anything, I felt that it was a delay that was of no importance to them, that it should stand over that I might during the recess consider the question. I accordingly did so, and inasmuch as this was a

matter of general application of the law, I committed to paper the entire view which I had formed of this case, which I was prepared to deliver to the House, at the commencement of the following Session of 1857. But it was then intimated to me, that inasmuch as there was another case (*a*) in which there was another party having the same interest as the parties who had been heard, namely, the representative of McGuire, who stands in the same position with reference to this question as the representatives of Reid, the judgment in this case should be postponed until the other had been heard. I thought it might be expedient that that course should be taken; and the proposition I made was, that I would not deliver any opinion or submit 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 that appeal being heard by my noble and learned friend now sitting on the woolsack (*b*), and by my two other noble and learned friends (*c*), (the case of Reid having been heard when I was myself the only Law Peer present); and it will be very satisfactory to have their opinion upon the important general principle which is involved in both cases.

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 in Reid's case, if that judgment had been moved, at the beginning of the year 1857.

This was an Appeal against four Interlocutors of the Court of Session pronounced in an action raised by the Respondents against the Appellants, whereby they sought to recover from them compensation in damages

(*a*) See next case, p. 300. (*b*) Lord Chelmsford.
(*c*) Lords Brougham and Wensleydale.

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for the loss they had sustained by the death of William Reid, the husband of the Respondent, Elizabeth Clarke or Reid, and the father of the other Respondents.

The facts stated by the Respondents, Elizabeth Clarke 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 large 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 distance 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 two workmen in it, of whom Reid was one, negligently omitted to take the proper means for stopping it at 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 the facts alleged were not true.

The *Lord Ordinary* repelled the defence of want of relevancy; and the First Division of the Inner House adhered to the Interlocutor of the *Lord Ordinary.*

Issues were then framed for the purpose of trying the facts, and these 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 showing that the accident arose from the carelessness of Shearer. There was no evidence tending to show 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 law answerable." Defenders excepted to that direction, and

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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.

This 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 below have appealed to your Lordships' House.

The question for decision is, whether, if, in the working of a mine, 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 intrusted 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 anyone 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 show that the circumstances were

such as to make some other person responsible. In general it is sufficient for this purpose to show 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 damage 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 carelessly fires at a hare so as to shoot a person passing on the ground, 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 indefinitively) 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 as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business. 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

Per Lord Cranworth:— For complaints by the public, the Master is responsible. Thus, if a servant drives his master's carriage over a bystander; or if a gamekeeper employed to kill game fires at a hare so as to shoot a bystander; or if a workman employed in building negligently drops a stone from the scaffold, and so hurts a bystander; in all these cases the bystander is entitled to claim reparation from the master, because the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself or of his servants.

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your being engaged in building 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 persons, and no one has a right to involve others in risks 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 persons for any ill consequences resulting from want of due skill or caution.

Per Lord Cranworth :— Servants must be supposed to have the risk of the service in their contemplation when they voluntarily undertake it.

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 the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks 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 the master need not have engaged in the work at all, for he was party to its being undertaken.

If, therefore, one servant suffers from the wrongful act or carelessness of another, the master will not be responsible.

Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the 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.

Per Lord Cranworth :— Commentary on the English cases.

That this is the view of the subject in England cannot I think admit of doubt. It was considered

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by the Court of Exchequer in *Priestly* v. *Fowler*, afterwards fully discussed in the same Court in *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company*, and acted on by the same Court in *Wigmore* v. *Jay*. 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 show that they have been approved of; more especially as in the first two 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 Company*, in 1853 (*a*), a question of a very similar nature to *Hutchinson'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* (*b*), both Lord *Campbell* and Mr. Justice *Wightman* refer to *Priestly* v. *Fowler*, apparently with approbation.

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, as established in England, is 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

(*a*) 9 Exch. Rep. 223. (*b*) 3 Ellis & Bl. 402.

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Per Lord Cranworth:—Commentary on the Scotch cases.

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* (*a*), and *Bryden* v. *Stewart* (*b*).

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 or unskilfulness of the owners in having so left it when the workmen were sent to work there. Strong evidence was offered to show 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 the fall of a part of the roof. And what the jury had to decide was, whether the death

(*a*) *Suprà*, vol. 1, p. 748. (*b*) *Suprà*, vol. 2, p. 30.

of the workman was occasioned by his own rashness, or by the roof not having been properly secured by the owners. The Judge withdrew this question from the jury, deciding the fact against the Pursuers, 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, *Bryden* 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 application 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

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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 pit not being in a safe and sufficient state. The Court of Session thought that as the men had no good ground for leaving their work, the insecure state of the shaft was immaterial, and therefore directed the verdict to be entered for the Defenders, and assoilzied them from the conclusions of the action. 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 Pursuer.

This 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.

The master must secure proper servants, and proper machinery for the conduct of the work.

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

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of Session. The first case relied on by the Respondents was that of *Sword* v. *Cameron* (*a*). (There are some earlier cases which it appears to me unnecessary to consider in detail.) In *Sword* v. *Cameron* 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 near it, 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 about fifty or sixty yards the shot was fired, and he was struck, and 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.

(*a*) 1 Sec. Ser. 493.

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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 till 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 or Neilson* in 1852 (*a*). 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

(*a*) 14 Sec. Ser. 420.

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 stop and 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 new nut or bolt should be obtained, and the work should 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 spoke 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 recognized 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 just mentioned. But

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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 were admitted. For the evidence went to show 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 *Medwin*, 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 *Medwin* 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 *Medwin* and Lord *Murray*, on the other hand, took care to explain

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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* (*a*). There the summons stated that Brassey was contractor for the maintenance of the Caledonian Railway, and that it was the duty of the Defender, 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 that 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 that 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 this 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-workmen, 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 *Hutchinson* v. *The York, Newcastle, and*

(*a*) 15 Sec. Ser. 135.

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Berwick Railway Company. 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 on 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 Defender'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 from the act of a fellow-workman; he thinks such a plea would 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 (*a*). There the Plaintiff was a girl employed by the Defender in his clay mill. She was altogether inexperienced, having been only nine days in the Defender'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 remove the waste clay in obedience to Anderson's orders sustained a very severe injury from the rollers in making this attempt. And she raised an action against Burn for damages. The *Lord Ordinary* held

(*a*) 16 Sec. Ser. 1025.

the allegations relevant, so as to entitle her to issues for trial of the cause.

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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. But in the present case there appears to me to be no doubt but that Shearer and the miners were engaged in a 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 the 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 hammer it into shape, the engineman who conducts a train and

Per Lord Cranworth :— To constitute fellow-labourers within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing, and the servant sustaining, the injury shall both be engaged in precisely the same, or even similar acts. Thus the driver

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and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge, and those who hammer it into shape, the engineman and the switcher, the man who lets the miners down into, and who afterwards brings them up from the mine, and the miners themselves; all these are fellow-labourers or collaborateurs within the meaning of the doctrine in question.

the man who regulates the switches or the signals, are all engaged in common work. And so in this case, the man who lets the miners down into the mine, in order that they may work the coal, and afterwards brings them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common 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 (*a*) and fourth (*b*) interlocutors appealed against ought to be reversed: I think, further, that the first (*c*) and second (*d*) 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

(*a*) 3rd July 1855.—The Lords disallow the bill of exceptions, and find the Defenders liable in the expenses incurred by the Pursuers in the discussion thereon.

(*b*) 5th July 1855.—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*l.* to Mrs. Reid, and 200*l.* among the children, in name of damages: Find the Defenders liable to the Pursuers in the expenses incurred by them, and appoint an account thereof to be lodged, and remit to the auditor to tax the same and to report.

(*c*) 6th December 1854.—The Lord Ordinary, having heard parties' procurators, repels the first and second pleas in law for the Defenders.

(*d*) 27th January 1855.—The Lords adhere to the Lord Ordinary's Interlocutor reclaimed against.

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 have 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 Railway Corporation* (*a*). 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 Whitcomb, another servant of the Defendants, one of the switches had been improperly left across the

(*a*) 4 Metcalfe, 49. See this judgment, *infrà*, p. 316.

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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 intrusted with the care of the switches. On these facts the Court held that the Defendants were not responsible to the Plaintiff. The *Chief Justice* 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 on 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 recognizes, 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 showing your Lordships' 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.

JUDGMENT.

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal in Parliament assembled, That the said Interlocutors complained of in the said Appeal be and the same are hereby reversed, and that the Defenders below (Appellants here) be assoilzied from the conclusions of the summons, and that the Respondents (Pursuers) do repay to the Appellants (Defenders) damages and expenses, if any, which have been paid by the Appellants (Defenders) under the said Interlocutors hereby reversed. And it is further *Ordered*, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment.

HOLMES, ANTON, AND TURNBULL—DEANS AND ROGERS.