1858.
June 14*th*, 15*th*, 17*th*.

BARTONSHILL COAL COMPANY, . . APPELLANTS.
JANE McGUIRE, WIDOW, ... RESPONDENT.

Master's Liability to the Public for Injury done by a Servant.—Per the Lord Chancellor: A master is liable for any injury or damage done to the public through the negligence or unskilfulness of servants acting in the master's employ. The reason is, that every act done by the servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se*; p. 306.

Master's Exemption from Liability to one Servant for Injury done to him by a Fellow-Servant.—When the injury caused by the negligence or unskilfulness of a servant is sustained, not by the public, but by another servant acting in the same employment under the same master, the master is not liable, unless there be proof of general incompetency on the part of the servant causing the injury, or of insufficiency or defectiveness in the machinery furnished by the master; p. 307.

Per Lord Brougham: The two servants (the injurer and the injured) must be in the same common employment, and engaged in the same common work under that common employment; p. 313.

Per the Lord Chancellor: It is necessary to ascertain whether the servants are fellow-labourers in the same common work; because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment; p. 307.

Practice.—An Interlocutor or judgment decerning for payment of damages awarded by the verdict of a jury is appealable; p. 305.

When a judgment or decree is appealed from to the House of Lords, all or any of the Interlocutors may be complained of, although they may not have been previously submitted to the Inner House of the Court of Session ; p. 314.

THE summons and condescendence alleged that on the 17th September 1853 James Shearer, the Appellants' engineman, " when raising the deceased, James McGuire, along with another workman of the name of Reid (*a*), up the shaft by means of the apparatus which was then under his charge, disregarding his duty, failed to stop the said engine when the bucket or cage arrived at the platform, and caused or allowed it to continue working, whereby the said cage or bucket and the said two workmen came into collision with the top of the scaffold, and the said bucket or cage being overturned and broken, the said James McGuire was thereby violently thrown to the ground from a height of sixty feet and received injuries, in consequence of which he immediately or soon afterwards died."

The Respondent, the widow of McGuire, claimed damages for the loss of her husband against the Bartonshill Coal Company in their character of master or employers of Shearer, the author of the mischief.

Mrs. McGuire's plea in law was as follows :—

The deceased, James McGuire, having sustained mortal injury, in the manner and from the causes above set forth, through the fault or negligence of the Defenders, or of another or others for whom they are responsible, the Defenders are liable to the Pursuer in *solatium* and damages.

The Company, in their defence, denied generally the facts alleged by the widow. They further put in the two following pleas in law :—

I. The Pursuer has no relevant or sufficient case to subject the Defenders in damages as concluded for.

II. The Defenders cannot, in law, be made responsible for injury sustained by one of their workmen through the fault of a fellow-

(*a*) See *suprà*, p. 268. Reid and McGuire were both victims of the same accident, which, though melancholy, has settled the law.

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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.

On the 6th December 1854 the parties came to an arrangement, "that the cause should, so far as regarded the first and second pleas of the Defenders, abide the decision thereof in the action at the instance of Mrs. Reid against the Company, and that the same judgment should be pronounced in both causes."

On the 31st January 1855, the *Lord Ordinary* pronounced an Interlocutor whereby he repelled the first and second pleas in law for the Defenders.

Afterwards his Lordship approved of the following issues:—

Whether the Defenders were, in the month of September 1853, in the occupation, as proprietors or lessees, of the coal pit called the Dykehead or Bargeddie Pit? and whether, on or about the 17th day of September 1853, the said deceased James McGuire, while in the employment of the Defenders in the 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 Pursuer? Damages laid at 400*l*.

On the 22nd March 1855, at the conclusion of the trial of Mrs. Reid's case, a verdict for 100*l*. was, by arrangement, returned in favour of the present Respondents.

Following out the arrangement, a bill of exceptions (being the same, *mutatis mutandis*, as that in Mrs. Reid's case (*a*)) was *pro formâ* lodged in the present case.

On the 3rd July 1855 the Second Division of the Court of Session disallowed the bill of exceptions, and found the Company liable in expenses.

On the 5th July 1855 the Second Division pronounced judgment as follows:—"In respect of the

(*a*) See *suprà*, p. 270.

verdict found by the jury on the issues in this cause decern against the Defenders (the Company) for payment of 100*l.* in name of damages, with expenses."

And on the 19th July 1855 the Second Division "decerned for the taxed amount of expenses, and allowed a decree to go out and be extracted in the name of the agent disburser thereof."

Against the Interlocutor of the *Lord Ordinary* of the 31st January 1855, and against the interlocutors of the Second Division of the 3rd July 1855, of the 5th July 1855, and of the 19th July 1855, the Company appealed to the House.

Sir *Richard Bethell*, Mr. *Anderson*, and Mr. *Craufurd* for the Appellants.

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

The argument is fully stated and examined in the following opinions :—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*) :

I think it will be unnecessary for your Lordships to hear the reply.

This case being the same in its circumstances as that of *The Bartonshill Coal Company* v. *Reid*, upon which your Lordships have just heard the carefully considered opinion (*c*) of my noble and learned friend, (an opinion in which I entirely concur,) it will be unnecessary for me to 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 (*d*), abide the decision

(*a*) Mr. Inglis.
(*b*) Lord Chelmsford.
(*c*) See the last case, p. 278.
(*d*) *Antè*, p. 302.

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thereof in Reid's action and that the same judgment should be pronounced in both causes 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.

The case of Reid having been tried, and a verdict given in favour of the Pursuers; by the arrangement, a verdict for 100*l.* was also entered in the present case in favour of the Respondent. And an Interlocutor was 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*l.* in name of damages." That was the Interlocutor of the 5th of July 1855. Afterwards, by another Interlocutor of the 19th of July, they awarded 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 have urged upon your Lordships various objections to its competency. Perhaps it might have been the more correct course, under all the circumstances, to decline to hear this Appeal, and to leave the case to be determined by the event of Reid's case. But your Lordships having resolved to hear 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

of January 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 the 48th George 3rd, chapter 151; and that the Interlocutor of the Court of Session of the 3rd of 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 the 5th of July 1855, and the 19th of 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 of the 55th George the 3rd, already referred to, apply; and they refer your Lordships to the case of *Melrose and Company* against *Hastie and Company* in your Lordships' House (*a*), 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*l.*

An Interlocutor or judgment decerning for payment of damages awarded by the verdict of a jury is appealable.

(*a*) *Suprà*, vol. 1, p. 698.

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in the 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 section (*a*) of the 55th of George the 3rd, chapter 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 McGuire, the deceased, and James Shearer were fellow-labourers engaged in one common employment; and, secondly, if they were, whether (the death of McGuire 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 common employers are liable in damages for the event.

Per the Lord Chancellor :— A master is liable for any injury or damage done to the public through the negligence or unskilfulness of servants acting in the master's employ. The reason is, that every act done by the servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se*.

It has long been the established law of this country that a master is liable to third persons 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 is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se.*

(*a*) The 9th section is as follows :—"That in all cases wherein the Court shall pronounce a judgment in point of law, as applicable to or arising out of the finding by the verdict, it shall be lawful and competent for the party dissatisfied to bring the same under review, by appeal to the House of Lords."

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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* (*a*), 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; *Hutchinson* v. *The Newcastle, York, and Berwick Railway Company* (*b*), *Wigmore* v. *Jay* (*c*), *Wigget* v. *Fox* (*d*), and *Degg* v. *The Midland Railway Company* (*e*), and other cases which have been cited (*f*).

When the injury caused by the negligence or unskilfulness of a servant is sustained, not by the public, but by another servant acting in the same employment under the same master, the master is not liable, unless there be proof of general incompetency on the part of the servant causing the injury, or of insufficiency or defectiveness in the machinery furnished by the master.

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.

Per the Lord Chancellor:— It is necessary to ascertain whether the servants are fellow-labourers in the same common work; because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment.

(*a*) 3 Mee. & Wel. 1. (*b*) 5 Exch. Rep. 354.
(*c*) 5 Exch. Rep. 354. (*d*) 1 Exch. Rep. 833.
(*e*) 1 Hurls. & N. Exch. Reports, 773.
(*f*) See the last case.

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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 (*a*) 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 for 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 the 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 intrusted 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

(*a*) See the last case.

that if something were deducted out of the workmen's wages for their conveyance to and from their work, the master would be liable? My Lords, 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) subject to the very act, through the negligent 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 were 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

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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 servant, 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 show 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 show that there is any real difference in the law of the two countries. In *Sword* v. *Cameron* (*a*), 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* (*b*) 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. *Rankin* (*c*); for there it was

(*a*) 1 Sec. Ser. 493. (*b*) 11 Sec. Ser. 1159.
(*c*) 14 Sec. Ser. 420.

said by the *Lord Justice Clerk* :—"It appears that with that disregard for the safety of workmen which seems eminently to characterise 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, *specially* and *peculiarly* when his machinery is defective in not having the checks which exclude any reasonable chance of danger." In *O'Byrne* v. *Burn* (*a*) 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 Defender, and intrusted 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 *McNaghton* v. *The Caledonian Railway Company* (*b*) 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 the engine-driver and the person who arranged the switches. It is in this case, however, more than in any other that the language of the Judges

(*a*) 16 Sec. Ser. 1025. (*b*) 19 Sec. Ser. 271.

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is directed in too unqualified terms against the exemption of masters from liability for injuries happening between fellow-servants.

Lord Chancellor's opinion.

The conclusion, as my noble and learned friend has clearly shown, 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.

My Lords, for these reasons I cannot help concluding that the Appellants in this case were not liable for the death of McGuire, occasioned by the negligence of Shearer, and that therefore the Interlocutors of July 1855 are wrong, and ought to be reversed.

Lord Brougham's opinion.

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 come 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

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he states upon which there may be some doubt, such as the case of *McNaghton* against *The Caledonian Railway Company* (*a*). As my noble and learned friend has just stated, the decision in that case could well stand with our reversal of this 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 misstated, 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 shall be men in the same common employment, and engaged in the same common work under that common employment.

Per Lord Brougham :— The two servants (the injurer and the injured) must be in the same common employment, and engaged in the same common work under that common employment.

Lord Cranworth's opinion.

Lord CRANWORTH : My Lords, I have so fully expressed my opinion of this question in the case of Reid (*b*), that I do not think it necessary in the present

(*a*) 19 Sec. Ser. 271. (*b*) *Suprà*, p. 278.

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Lord Cranworth's opinion.

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. But upon looking at the Act, I cannot doubt that your Lordships have jurisdiction upon the third (*a*) and fourth (*b*) interlocutors and upon the first (*c*) 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 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 inter-

When a judgment or decree is appealed from to the House of Lords, all or any of the Interlocutors may be complained of, although they may not have been previously submitted to the Inner House of the Court of Session.

(*a*) 5 July 1855, *suprà*, p. 302.
(*b*) 19 July 1855, *suprà*, p. 303.
(*c*) 31 January 1855, *suprà*, p. 302.

locutor 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.

JUDGMENT.

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal in Parliament assembled, That the said Interlocutor of the Lord Ordinary in Scotland, of the 31st of January 1855, and the said Interlocutors of the Lords of Session there of the First Division, of the 5th and 19th of July 1855, 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.