

the ground that it had been granted under error instead of in a petitory action, the fact of the payment having been made by bill would not have excluded a proof *prout de jure*. But I am of opinion that there are no grounds here for stating the plea. The bill is no longer operative. It is no longer the document of the defenders. It is merely a piece of evidence in an inquiry how the sum of £104 was paid.

At the same time I agree with Lord Deas and Lord Mure that it is not necessary that our judgment should rest upon that ground. For the bill, even if unpaid and still current, would not stand at all in the way of a proof at large being allowed, considering the circumstances under which it is alleged that the overpayment was made.

The following interlocutor was pronounced:—

“Recal the interlocutor of the Sheriff, dated the 26th June 1876; and remit to the Sheriff to allow parties a proof of their averments in common form: Find the pursuer (appellant) entitled to expenses in this Court; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Pursuer—Balfour—Moncrieff.
Agent—John Carment, S.S.C.

Counsel for Defenders—Asher—M'Kechnie.
Agent—Thomas Carmichael, S.S.C.

Saturday, February 10.

SECOND DIVISION.

WOODHEAD v. THE GARTNESS MINERAL CO.
(Before seven Judges.)

Reparation—Master and Servant—Collaborateur—Culpa.

G. contracted with the owners of a coal mine to drive a certain level of coal on receiving payment at a certain rate per fathom and so much per ton for clean coal delivered at the pit bottom. G. engaged W. and other miners to work the contract. At the same time the owners themselves employed a party of miners to sink the shaft to a greater depth. Neither G. nor the men engaged in sinking had anything to do with the ventilation or general arrangements of the mine, which were entirely under the control of the overman or underground manager, in terms of special rules prepared and duly published to all concerned, under sec. 52 of the Coal Mines Regulation Act 1872. The underground manager or overman negligently removed a plank for purposes of ventilation, and W. met his death by falling through the aperture left by the removal of the plank.

In an action for reparation at the instance of W.'s representatives against the mine-owners—held (in conformity with the opinion of a majority of seven Judges) that as both W. and the underground manager were members of an organisation of labour for one common end, and subject to one general control, they

must be considered to be fellow-servants, and that consequently W.'s representatives had no claim against the mine owners—*diss.* the Lord Justice-Clerk (MONCRIEFF), who was of opinion (1) that the defenders were liable if W. was not their servant but the servant of an independent contractor; (2) that G. was an independent contractor, and that W. was his servant, and not the servant of the defenders; and (3) that the provisions of the Mines Regulation Act, and the rules of the pit in terms thereof, did not affect the relations of the parties in this respect.

Observations per Lord President Inglis on the judgment of Lord Chancellor Cairns in Wilson v. Merry & Cuninghame. Observations contra per Lord Justice-Clerk.

Opinion (per L. Justice-Clerk) that the test whether one man is the fellow-servant of another is not necessarily engagement or the payment of wages, but lies in the consideration whether the two men are responsible to the same master, and the same master is responsible for them.

Opinion (per Lord Shand) that on principle the maxim of respondeat superior or qui facit per alium facit per se ought to receive effect only where the act of the servant which caused the accident was expressly authorised by the master, or was the legitimate result of the agency or employment.

Opinion (per Lord Gifford) that a master is liable for his servant's fault only when third parties or strangers are injured thereby; and that where a person has voluntarily placed himself in such a relation to the master or to the establishment or organisation carried on by the master that he must have known that he was exposed to the risk of the negligence of servants, he is no longer to be held a stranger or a third party.

Opinion (per Lord Ormisdale) that the question whether a person is an independent contractor or truly a servant depends chiefly on the rights of control and interference reserved to the other party to the contract.

This was an action brought by Thomas Woodhead, miner in Airdrie, against the Gartness Mineral Company, in which he sought to recover £1000 in name of damages in consequence of his son, the deceased David Woodhead, having been killed, as the pursuer alleged, through the fault of the defenders.

The deceased had in the spring of 1875 worked in a pit started by the defenders near Airdrie, but towards the end of June he was dismissed from their service. The pit in which the accident occurred was comparatively a new one, having been sunk only to the depth of the Virtuewell seam of coal. This seam had been wrought to the west for 20 fathoms, at which distance the coal was found to stop. The shaft was being sunk to a greater depth by a party of sinkers, who at the date of the accident had carried their operations 10 fathoms below the working level. In this condition of the mine, two miners of the name of Gardner contracted with the defenders through their manager Ormiston to drive the east level of the Virtuewell seam 50 fathoms, 6 feet wide, on receiving payment at a certain rate per fathom and so much per ton for clean coal delivered at the pit bottom. The Gardners engaged other miners, among whom was

deceased Woodhead, to work with or under them in performing this contract work. At the time of the accident there were thus two sets of workmen engaged in the mine, one in sinking, and the other, under the directions of the Gardners, in driving the east level. Neither the Gardners nor the men engaged in sinking had any charge of or right of interference with either the ventilation or the general arrangements of the mine. Beveridge, a servant of the defenders, was oversman or underground manager, and took charge of all the arrangements of the mine underground. It was admitted by the pursuer that Beveridge was a competent person for his duty, and that the appointments of the mine were sufficient. The state of the works and of the pit on the 19th of July 1875 was as follows—While the mining operations were being carried on in the east level by the Gardners, there were men employed by the defenders sinking the shaft of the pit, and in consequence the pit was being wrought during the whole 24 hours of each day—by the miners in three shifts during the whole 24 hours, and by the sinkers in two shifts during 16 hours. While the sinkers were at work no coal was raised to the surface. The shaft of the pit was divided by a wooden partition running up the centre, the one division being used by the miners and the other by the sinkers. At the working level the shaft was boarded over where the cage rested by planks fastened to the framework of the shaft. The cage wrought on wooden slides, and between the slide next the coal-face and the coal-face there was a space of from 15 to 20 inches. This space was covered by a plank of about 5 feet long.

On the morning of the said 19th of July this plank had been removed, and Woodhead, when coming to the bottom of the pit at two o'clock for the purpose of ascending, fell through the opening thus caused, and died shortly afterwards in consequence of the injuries received.

The action was tried before the Lord Justice-Clerk and a jury on 22d July 1876. It was proved at the trial that the plank had been removed by Colin Beveridge, the defender's manager, for purposes of ventilation and that in doing so he had been assisted by George Gardner, one of the contractors. It was admitted that Beveridge was a competent person for his duty, and that the appointments of the colliery were sufficient.

The following was the offer made by one of the Gardners, the employer of the deceased, to the defenders, and accepted by them—

“Gartness Colliery, 22d June 1875.

I hereby offer to drive your east level (double or treble, shifting the same when required) a distance of 50 fathoms, 6 feet wide, and to brush to sandstone rib a height of about $4\frac{1}{2}$ feet, for the sum of 7s. per fathom, and 2s. per ton for coal (clean) delivered on the cage at the pit bottom; also to drive your dook a distance of 40 fathoms (double or treble, shifting when required) 6 feet wide, and brushing to the sandstone rib a height of $4\frac{1}{2}$ feet or thereby, for the sum of 10s. per fathom, and 2s. per ton of clean coal, delivered on the cage at pit bottom; also to break the places off the level, at 3s. 6d. per fathom, and 2s. per ton for clean coal delivered on the cage at pit bottom. I likewise agree to put on a bottomer, you allowing me 2s. 6d. per day for same; and I further agree to brush and keep the working-

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places at 4d. per ton (overhead) of output, the coal from level and dook excepted. These rates to be increased or diminished ten per cent for every 6d. per day of rise or fall on the wages during the contract.”

The defenders produced at the trial the Special Rules for the Gartness mine, under the Coal Mines Regulation Act, 35 and 36 Vict. c. 36, and certified by the Government inspector. The following rules were in particular relied upon by them:—

“1. The agent, where one is appointed separate from the owner, shall have, as representing the owner, the care and direction of the mines committed to his charge; and it shall be his duty to take a general supervision thereof; to see that the manager attends to and performs his duties; and generally to act as the owner's representative, and see that the mines are conducted in conformity with the requirements of the Act. 3. Subject to the control and supervision of the manager, the whole operative details shall be under the care and charge of the overman. The overman shall see that the workmen of every class, in their several departments, discharge their duties; and shall receive and attend to all reports made to him as to the state of repair of the air courses, machinery, mid-wall, trap-doors, roads, cubes, and working places. He shall cause remedies to be provided where needed; and shall see the general and special rules faithfully and vigorously enforced; and he shall have power to hire and discharge workmen. 9. The pit-headman, during the several shifts, if more than one, shall, subject to the control and supervision of the manager, have charge of the workmen employed about the pithead, and each workman shall act under his directions. He shall observe that at all times there is sent down the pit a stock of timber for props and other necessary purposes for the use of the miners and other workmen, and report to the manager if at any time he observes, or has reported to him, that there is a deficiency of such timber or other articles. He shall superintend and direct the safe removal from the cage of all loaded hutches arriving at the pithead, and see to the safe replacing of the return hutches on the cage. He shall be in attendance in the morning, or at such other time of the day as the miners' shift commences, and shall see that no person is allowed to go upon the cage until the engineman has ascertained and reported the safety of so doing, in terms of special rule 16. He shall regulate the number of men descending at a time, taking care that not more than four to a single cage, or eight to a double cage, shall ride on such cages respectively, and no one along with a hutch. 28. It shall be the special duty of the roadmen, in their different divisions, if more than one, to observe that an adequate supply of timber for props and other necessary purposes is always ready at the place where the miners are at work, for the use of the miners in supporting the roofs and sides of their working places, and to report to the manager or overman if they shall observe any want of such timber. For the purpose of carrying out this rule, roadmen are empowered to call upon drawers, putters, and drivers, whether employed by the owner or miner, to convey such necessary timber from the pit-bottom, or other place of general delivery to the working places in connection with which they are employed. 52. Such miners and other work-

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men are, and shall be, generally subject to the control and orders of the agent, where one has been appointed, and of the manager and overman; but they shall also be subject to any directions which the roadsman, engineman, fireman, or bot-tomer may give, in their respective departments, for the purpose of preventing the workmen from infringing, or of causing them to comply with, any of the provisions of the Act or of the general or special rules."

In charging the jury the Lord-Justice-Clerk gave the following directions:—" (1) That it is not a sufficient ground in law to exclude liability on the part of the defenders for the negligence of their servant Colin Beveridge, that Beveridge was a competent person, and that the colliery was well appointed, if the deceased was not a fellow-servant with Beveridge under the defenders, but was the servant of an independent contractor. (2) That on the terms of the contract, No. 7 of process, the employers of the deceased were not servants of the defenders, but were independent contractors. (3) That the provisions of the Mines Regulation Act do not create the relation of master and servant between the mineral owner and the servants of an independent contractor under a contract for part of the work in the mine."

His Lordship gave these directions "subject to the opinion of the Court, and with liberty to the defenders to move the Court to enter the verdict in their favour, although returned against them, if the Court should be of opinion that these directions were erroneous, and that the defenders were truly entitled to a verdict."

To these directions the counsel for the defenders excepted, and called upon the Judge to give the following:—" (1) If the jury are of opinion that the defenders exercised due care in selecting Beveridge, and furnished him with suitable means and resources for the performance of his duties, the defenders are not liable to the pursuer for the consequences of the accident although the jury should be of opinion that the accident was caused by the fault of Beveridge. (2) If the jury are of opinion that the defenders exercised due care in selecting Beveridge as oversman or underground foreman, and the Messrs Gardner as contractors for the work specified in the contract No. 7 of process, and furnished the said persons with suitable means and resources for the performance of their work, the defenders are not liable to the pursuer for the consequences of the accident although the jury should be of opinion that it was caused through the joint-fault of Beveridge and both or either of the Gardners."

But the Lord Justice-Clerk declined to give any of the said directions to the jury, to which ruling the counsel for the defenders excepted.

A verdict was then returned in favour of the pursuer, and damages assessed at £160. The case came before the Second Division upon the defenders' Bill of Exceptions and a motion by them to have the verdict entered in their favour.

The Court ordered it to be heard before seven Judges.

Argued for the defenders—The deceased Woodhead must be held to have lost his life through the fault of Beveridge, who was his fellow-workman. That this relationship existed between them is established by an examination of the rules which formed the law of the mine, and by which

it was worked. These rules must be read into the contract between the Gardners and the defenders—and they rendered the employers of the former fellow-workmen with the other men engaged in the common employment of working the mine. All engaged in it were bound together as one family by these rules. It is being under the control of one master which renders men fellow-workmen. Here all were under the control of the owners of the mine, and subject to the directions of their overman. The principle of *Wigget v. Fox and Henderson* applies to the present case. The principle of the doctrine of *collaborateur* may lie in the risk of accidents which a workman undertakes to run; or it may be said that the master is free in the event of an accident because it cannot be shown that there is any breach of contract upon his part to render him liable. If the master secures a competent oversman, he is not bound to do more. It is different with the public, for between them and the master there is no contract at all. The principle of *collaborateur* applies wherever it may reasonably be held that the accident arose out of a danger which the party injured foresaw, and of which he undertook the risk. It is not necessary to establish the actual relationship of master and servant, for the case of a master and servant is a mere illustration of the rule, and it has been applied to the case of a person who had volunteered his assistance and was injured while rendering it—*Degg v. Midland Railway Company*. When it is not a case of master and servant, it may be a question of law depending upon facts and circumstances whether the rule is to be applied, and the facts here warrant its application. Further, it has been established that one of the Gardners, with whom Woodhead must be identified, contributed to the accident. This fact, according to the authority of certain English cases, would free the present defenders—*Thorogood v. Bryan*, and *Armstrong v. Lancashire and Yorkshire Railway Company*.

Argued for the pursuer—The test of common employment in all such cases is the receipt of wages from a common source. The question is, Were the parties the hired servants of a common master and employed in a common employment. Now, Woodhead never could have sued the defenders upon a contract of employment. The masters were the Gardners. The profits of his work went to them. These, again, had no control over Beveridge, the defenders' overseer. The rule made by statute for the purpose of securing safety to those working in the mine cannot have the effect of altering the relationship between the parties. If the mere fact of a general superintendence were to render all subject to it fellow-servants, the result would be startling, for any place where a number of contracts are being carried on—as in the erection of a large building—there must be a general superintendant, to secure the observance of rules and maintain order. But is it to be said that this renders all the men employed by separate contractors fellow-workmen? The general superintendant may have a power of dismissal, but it is limited. He can remove a workman disobedient to the rules laid down, but he has no right to interfere with his work or treat him as his workman. The fact that an employer has not been held liable for the wrong done by a contractor's servant, supports the contention of the pursuer.

In all cases to which the doctrine of *collaborateur* have been applied there has been the element of a common master. Common employment if under different masters is not sufficient.

Authorities cited—*Wigget v. Fox and Henderson*, February 20, 1856, 25 L. J., Exch. 188; *Sadler v. Henlock*, January 22, 1855, 24 L. J., Q. B. 138; *Stephen v. Thurso Police Commissioners*, March 3, 1876, 3 Ret. 535; *Wyllie v. The Caledonian Railway Company*, January 27, 1871, 9 Macph. 463; *Bartonhill Coal Company*, June 1856, 3 Macq. 266; *Degg v. Midland Railway Company*, February 21, 1857, 26 L. J., Exch. 171; *Abraham v. Reynolds*, January 12, 1860, 5 H. and N. 143; *Wilson v. Merry & Cuninghame (H. of L.)*, May 29, 1868, 6 Macph. 84; *Gregory v. Hill*, December 14, 1869, 8 Macph. 282; *Adams v. Glasgow and South-Western Railway Company*, December 7, 1875, 3 Ret. 215; *Calder v. Caledonian Railway Company*, June 16, 1871, 9 Macph. 833; *Reedie v. London and North-Western Railway Company*, July 6, 1849, 1 W. H. and G. 244; *Quarman v. Burnett and Another*, 1840, 6 Meeson and Welsby, 499; *Murray v. Currie*, November 16, 1870, 6 L. R., C. P. 24; *Knight v. Fox*, November 5, 1850, 5 W. H. and G. 721; *Hutchinson v. The York, Newcastle, & Berwick Railway Company*, May 22, 1850, 19 L. J., Exch. 296; *Morgan v. Vale of Neath Railway Company*, July 4, 1864, 33 L. J., Q. B. 260, and 1 L. R., Q. B. 155; *Warburton v. Great Western Railway Company*, 1866, 2 L. R., Exch. 30; *M'Lean v. Russel, Macnee & Company*, March 9, 1850, 12 D. 887; *Shiells v. Edinburgh and Glasgow Railway Company*, July 4, 1856, 18 D. 1199. Upon the question of contributory negligence, the following cases were quoted:—*Thorogood v. Bryan*, 18 L. J., C. P. 336; *Armstrong v. Lancashire and Yorkshire Railway Company*, 1858, 3 Meeson and Welsby, 244.

At advising—

LORD PRESIDENT—This is an action of reparation, raised by the father of a miner who was killed while working in a coal-mine belonging to the defenders. The pursuer claims damages from the defenders on the ground that his son was killed through the negligence of a servant of the defenders.

The pit in which the accident occurred was comparatively a new one, having been sunk only to the depth of the Virtuewell seam of coal. This seam had been wrought to the west for 20 fathoms, at which distance the coal was found to stop. The shaft was being sunk to a greater depth by a party of sinkers, who at the date of the accident had carried their operations 10 fathoms below the working level. In this condition of the mine, two miners of the name of Gardner contracted with the defenders through their manager Ormiston to drive the east level of the Virtuewell seam 50 fathoms, 6 feet wide, on receiving payment at a certain rate per fathom, and so much per ton for clean coal delivered at the pit bottom. The Gardners engaged other miners, among whom was deceased Woodhead, to work with or under them in performing this contract work. At the time of the accident there were thus two sets of workmen engaged in the mine, one in sinking, and the other, under the directions of the Gardners, in driving the east level. Neither the Gardners nor the men engaged in sinking had any charge of or right of interference with either the ventilation or the general arrangements of the mine. Beveridge,

servant of the defenders, was oversman or underground manager, and took charge of all the arrangements of the mine underground. It was admitted by the pursuer that Beveridge was a competent person for his duty, and that the appointments of the mine were sufficient.

It is in evidence that contracts of the same kind as that which the Gardners had with the defenders are quite common in practice, and that it is also a common practice for individual miners to employ and pay their own drawers, the owner of the pit and his managers having nothing to do with the drawers as far as engagement and payment of wages are concerned.

It is not disputed that this mine falls under the operation of the Coal Mines Regulation Act, 35 and 36 Vict. cap. 76, and that special rules were prepared and duly published to all concerned, under sect. 52 of the statute, "for the conduct and guidance of the persons acting in the management of this mine, or employed in or about the same, to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine."

The duties of Beveridge, the overman, are by rule 3d defined thus—"Subject to the control and supervision of the manager, the whole operative details shall be under the care and charge of the overman. The overman shall see that the workmen of every class, in their several departments; discharge their duties; and shall receive and attend to all reports made to him as to the state of repair of the air-courses, machinery, mid-wall, trap-doors, roads, cubes, and working-places. He shall cause remedies to be provided where needed, and shall see the general and special rules faithfully and vigorously enforced; and he shall have power to hire and discharge workmen."

Very special and detailed rules are prescribed for the conduct of "miners and other workmen." Among other things it is provided by rule 52 that they "shall be generally subject to the control and orders of the agent, where one has been appointed, and of the manager and overman; but they shall also be subject to any directions which the roadsman, engineman, fireman, or bottomer may give, in their respective departments, for the purpose of preventing the workmen from infringing, or of causing them to comply with, any of the provisions of the Act or of the general or special rules."

If persons in the position of the deceased, employed by contractors like the Gardners, or those contractors themselves, were held to be exempt from any of the special rules, the policy of the statute and the object of the special rules would in many cases be entirely frustrated. But that such persons are as much within the provisions of the statute and the special rules as miners and workmen employed and paid directly by the owner of the mine, is made clear, not only by the general purview of the rules, but particularly by a provision in rule 28, that for the purpose of carrying out a direction as to conveying wood for props to the working-faces, all drawers, putters, and drivers, "whether employed by the owner or the miner," are to be subject to the orders of the roadsman.

The death of the miner Woodhead was caused by the negligence of the oversman Beveridge, in having incautiously removed a plank while making an alteration in the arrangement of the venti-

lation of that part of the mine which was at the time occupied by the sinkers.

With reference to this state of the facts, as disclosed in the evidence, the Lord Justice-Clerk directed the Jury—" (1) That it is not a sufficient ground in law to exclude liability on the part of the defenders for the negligence of their servant Colin Beveridge, that Beveridge was a competent person, and that the colliery was well appointed, if the deceased was not a fellow-servant with Beveridge under the defenders, but was the servant of an independent contractor. (2) That on the terms of the contract, No. 7 of process, the employers of the deceased were not servants of the defenders, but were independent contractors. (3) That the provisions of the Mines Regulation Act do not create the relation of master and servant between the mineral owner and the servants of an independent contractor under a contract for part of the work in the mine."

The defender excepted to these three directions, and their exception raises a question of the greatest importance in this branch of the law: Whether the owner of a coal mine is responsible for the negligence of the oversman of the mine causing injury to a miner employed and paid wages, not directly by the owner, but by a contractor for piece-work, such as the Gardners? If this liability attaches to the owner of the mine, its effect and extent must, I apprehend, be the same as if the person injured had been a stranger travelling along a highway above ground, injured by an explosion or similar disaster caused by the negligence of the mine-owner's servants, employed either under ground or at the pit head.

The law on this subject has undergone a great deal of discussion during the last twenty years, both here and in England, and I agree with the observation of Lord Colonsay in *Wilson v. Merry & Cuminghame*, that it has been developed and matured, not only by this ample discussion, but also by the constant occurrence of new classes of cases requiring its application. As his Lordship most forcibly remarks,—“The constantly increasing scale in which mining and manufacturing establishments are conducted, by reason of new combinations and applications of capital and industry, has necessarily called into existence extended organisation for management, more gradations of servants, more separation or distribution of duties, more delegation of authority, and less of personal presence or interference of the master. The principles of the law, however,” he adds, “have sufficient elasticity to enable them to be applied notwithstanding such progressive changes in the manner of conducting business.”

As the result of the whole authorities, it appears to me that one of the conditions, subject to which every man must become a member of one of these great organisations of labour, is, that he shall take on himself all the perils naturally incident to the work he undertakes, without looking to any one else to guarantee him against, or indemnify him for, injury sustained from the occurrence of such perils. This does not interfere with the principle of personal liability for the consequences of personal wrong or negligence, but it excludes all notions of what, for the sake of distinction, I shall call secondary responsibility.

I would not have it supposed that this principle

is limited in its application to what I have called great organisations of labour. It is equally applicable I think to smaller establishments, and to every kind of establishment—equally to a common joiner's shop, or to a domestic establishment, where the members of the family, the guests, and the servants, are daily exposed to risks caused by one another. But the principle is more clearly illustrated when considered in its application to the great organisations of mining or manufacturing industry. If two miners are employed and paid by the same master, and while they are hewing at one working face the one by negligence injures the other, the master is not answerable, because it is said they are engaged in a common employment,—that is to say, they are engaged in the same work, as servants of the same master. But if the legal principle were applicable to this case only, it would cease to be a principle, and degenerate into a mere artificial and arbitrary rule. It is not because the wrong-doer is, in a technical sense, the servant of the same master, that the master is not answerable. It is of no moment to the injured workmen whether his injury be caused by a servant of the same master or by one who has undertaken some function in the mine upon what is called an independent contract. The injury in either case is the same. The personal liability of the wrongdoer is, the same. But the mine-owner is free from responsibility, not because the injured and the injurer are both his own hired and paid servants, but because he is not personally in fault, and has not warranted the injured workman against the perils of the work. On the other hand, if there was personal fault of the mine-owner in selecting for the work an incompetent person, from whose incompetency the injured workman suffered, the owner would be equally liable whether the incompetent person selected by him were a servant or what is called an independent contractor. In all cases his liability must rest on personal fault, and where there is personal fault it will be attended by liability.

This reasoning is, perhaps, so far not directly applicable to the circumstances of the present case. But it is, I think, useful in elucidating the principle to which all the decided cases must be referred, if the law as now developed and matured is to be reasonable and consistent.

In the present case the injured miner is said to have entered the mine not as the servant of the mine-owner but of the contractors, the Gardners; therefore it is inferred that if a servant of the mine-owner injure him by his negligence, the mine-owner shall be answerable, on the footing that the injured man is a stranger to the mine-owner. If this be so, then the Gardners must be answerable in like manner for the negligence of the miners employed by them, on the complaint of any person employed by the mine-owner, or of any person employed by an independent contractor, as, for example, in this mine, by the contractor for the sinking of the shaft, an operation carried on simultaneously with Gardners' driving of the east level. The result would be to create each squad of workmen into a distinct organisation, and these separate organisations must, in this view, be taken to be strangers to each other as much as if they were working in separate mines. Nay, each miner who employs and pays his own drawer would make a separate establish-

ment, and each miner would be answerable for the negligence of his own drawer; while the mine-owner would be answerable for any servant of his who by negligence inflicted an injury on a drawer, but would be exempt from liability though his servants by negligence killed any number of miners.

Such results, which appear to me dangerous if not also absurd, are reached only by overlooking the great principle, as I venture to call it, that a workman encounters and undertakes on entering a mine all the risks naturally incident to the work—a principle which seems to me necessary to exclude all secondary responsibility.

The whole persons engaged in a mine form one organisation of labour for one common end (however different their functions may be), and are all subject to one general control, exercised by the mine-owner or those to whom his authority is delegated. This community of labour and of subjection to control arises from the very nature of the work and from the necessity of providing against danger and ensuring for that purpose the maintenance of discipline. But it is systematised and made even more directly binding on all by the statute and the special rules enacted under its authority. The persons employed in a mine, superior and inferior, contractor and workmen, of whatever class or whatever their functions may be, are by those rules erected, so to speak, into one community, who have all their relative duties assigned to them, and who owe each to his neighbour many duties which it would be impossible to enumerate. To such a community as this, and to its individual members, the mine-owner is under certain well-defined obligations, but to hold that his obligations and liabilities to the individual workmen depend on whether they are technically his servants or employed by a contractor for piece-work in some limited portion of the mine, while it would be inconsistent with legal principle, would also, I think, introduce great confusion where it is desirable that everything should be as clear as possible, and where the statute makes the inter-dependence of the whole community and their necessary reliance on one another for safety the regulating principle of their association and the basis of all the special rules for their guidance.

It seems to me that the principle which I have been endeavouring to expound is necessarily evolved in the consecutive judgments of the House of Lords in *Bartonshill Coal Company v. Reid* (3 Macq. 266), of the Second Division of this Court in *Wright v. Roxburgh & Morris* (2 Macph. 748), and of the First Division and the House of Lords in *Wilson v. Merry & Cuninghame* (5 Macph. 807, and 6 Macph. 84). In the last-named case the present Lord Chancellor said—"I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or *collaborateur* of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow-workman. But the case of a fellow-workman appears to me to be an example of the rule and not the rule itself. The rule, as I think, must stand upon higher and broader grounds." After defining the master's duty as consisting in the selection of competent persons to superintend and direct the

work, and in furnishing them with adequate materials and resources, his Lordship continues—"When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is in my opinion not liable, although the two workmen cannot technically be described as fellow-workmen."

In the *Bartonshill* case the injured man was a miner working below; the wrongdoer was the engineman at the pithead charged with working the engine for letting down and bringing up the miners to and from their work. In *Wright v. Roxburgh & Morris* the injured men were ordinary miners, and the wrongdoer was underground manager charged with the ventilation of the pit, whose fault consisted in an imprudent and reckless act committed in a different and lower level from that in which the injured men were working. In *Wilson v. Merry & Cuninghame* the wrongdoer was underground manager, and had not been in the employment of the mine-owner at the same time as the injured miner. In all of these cases it was contended that the injured and the injurer were not fellow-workmen. But this technicality was entirely disregarded, and the risk from which the injured parties suffered was nevertheless held to be one of the risks of the mine which all persons employed in and about the mine take on themselves without any recourse against the mine-owner.

It was suggested in the course of the pursuer's arguments that since these cases occurred judgments have been pronounced by both Divisions of this Court inconsistent with the interpretation now put on these prior cases; and it will be proper, therefore, before I conclude, to examine these more recent judgments.

In *Wyllie v. Caledonian Railway Company* (9 Macph. 463) the pursuer was engaged in delivering cattle to the Railway Company, to be carried by them. He was acting on behalf of his master, to whom the cattle belonged, and was assisted by the servants of the Railway Company in putting or driving the cattle into trucks, when a train coming into the station struck against the trucks into which the cattle were being put, and injured the pursuer. The occurrence was due to the fault of the servants of the Railway Company in charge of the train which struck the trucks. The pursuer sued the Company for damages, and one defence was that the pursuer was a volunteer in the service of the Railway Company for the time, and so was engaged in a common employment with the persons who caused the injury. The First Division held that the pursuer was in the same position as if the cattle had been his own; that he was giving, and the Railway Company's servants were receiving, delivery of the cattle under a contract of carriage; and therefore repelled the defence. The pursuer, I think, was as much a stranger to the Railway Company as if he had been helping an invalid lady into a first-class passenger carriage and had been injured by a sudden and violent motion of the carriage caused by the fault of the Railway Company's servants.

In *Calder v. Caledonian Railway Company* (9 Macph. 833), the North British Railway Company, having running powers over a portion of the Caledonian line, duly despatched a train in terms of arrangements between the companies, which was driven by the pursuer, and which came into collision with a Caledonian train on the Caledonian line through the fault of a pointsman in the Caledonian Company's service, in consequence of which the pursuer was injured. It was held by the First Division that the North British engine-driver (pursuer) being the servant of that company only, and the pointsman being the servant of the Caledonian Company only, the former was a stranger on the Caledonian line as much as a person driving a carriage along a turnpike road is a stranger to the Road Trustees and their servants, and that the Caledonian Company must be as much answerable for injury done to the pursuer by their servants as the trustees of the turnpike road would in the case supposed be answerable for the upset of the carriage by the fault of their servants.

The case of *Adams v. The Glasgow and South-Western Railway Company* (3 Ret. 215) was in its circumstances substantially the same as the last-mentioned case, and my brother the Lord Justice-Clerk in giving judgment observed—"That the fact that the latter company had the right of running over the rails of the former, and was subject to the rules of the former in doing so, had no more effect in making the deceased the servant of that company than the use of a private wharf or pier, or the use of a private road, would convert the persons using it into servants of the proprietor."

Clearly, therefore, none of these cases in the least degree disturbs or touches the principle on which, I think, the case now before us ought to be decided.

But there is a case of *Gregory v. Hill* (8 Macph. 282) which stands in a somewhat different position. Whether the facts of that case may be so represented as to justify the decision consistently with the principle established by the *Bartonshill* case, by *Wright v. Roxburgh*, and by *Wilson v. Merry & Cuninghame*, it is not of much use to inquire; for I am bound to say that the grounds of judgment adopted by the Judges then sitting in the Second Division who decided *Gregory v. Hill* are not reconcilable with the principle which I hold to be involved in those previous cases. But *Gregory v. Hill* is a single judgment; and when a question of importance like the present is referred to a Court of seven Judges, no single judgment of either Division can be allowed to be of conclusive authority, particularly when the single judgment was pronounced by the Division making the reference to the Court of seven. I am therefore not only justified, but bound, to say that, great as is the deference I owe and willingly pay to the very able and learned Judges who sat in *Gregory v. Hill*, including my brother the Lord Justice-Clerk, I cannot concur in their judgment.

For the reasons which I have now explained, at greater length than I should have wished, but which I hope may be excused by the importance of the case, I am unable to concur in the law laid down by the presiding Judge. On the contrary, I am of opinion that the law applicable to the

case is well stated in the first head of the directions which the defenders asked his Lordship to give the jury, and which was refused.

LORD JUSTICE-CLERK—The propositions which I laid down to the jury are in substance two, although they are somewhat expanded in the directions given. The first was, that the defenders were liable if the person injured was not the servant of the Gartness Company, but was the servant of an independent contractor. The second was that on the terms of the contract in this case Gardner was an independent contractor, and that the deceased was his servant, and not the servant of the defenders; and that the provisions of the Mines Regulation Act, and the rules of the pit under them, did not affect the relations of the parties in this respect.

I remain of opinion that these directions were sound. As to the second of them, I felt at the trial, and still feel, that this is rather a slender example of an independent contract; and if the judgment now proposed had gone no further than to find that Gardner occupied a somewhat hybrid position, half servant and half contractor, and so was a fellow-servant with Beveridge, I should not have done more than indicate my dissent. But the first of these propositions covers so much ground, and the views on which it is challenged are so wide in their operation, that, holding as I do, that the point is conclusively settled by a long series of adjudicated cases, I think it right to state my opinion a little in detail.

The liability of a master for personal injuries caused to another by the negligence of a servant, depends very much on the measure of care and precaution as regards others which the master himself is bound to observe in the use of his property or the exercise of his rights. The standard by which this is regulated is not absolute or uniform, but will vary according to the relation which the master has to the thing done, the person who is injured in the doing of it, and the consideration in respect of which it is done. In general, if a man so uses his property as to injure a stranger, that is, one who has no participation in or connection with the act itself or him who does it—one who is where he is entitled to be, and doing what he is entitled to do—the liability will be absolute; nor does it signify to the person injured whether the act was done carefully or negligently, or whether it was done by a servant or not. The wrong consists in the doing of the act itself, and is proved to be a wrong by the result.

On the other hand, and at the other end of the scale, are instances where a known risk is voluntarily encountered, not in the discharge of any duty or obligation, but on a footing purely gratuitous. In cases such as these, the liability may be reduced to the lowest measure of care or precaution which a prudent man might be expected to take for himself, or which in the circumstances might have been reasonably contemplated; and sometimes it may disappear altogether.

The present case relates to a class distinct from either of these; and we may discard altogether illustrations drawn from them, as throwing no light on the question before us. We have to deal with a case in which the parties were not strangers to each other, because both were participant in the

the act done. Neither was the risk encountered gratuitously. It was encountered in the execution of an onerous contract, for a valuable consideration. When two persons enter into a mutual and independent engagement that a certain operation shall be performed, either by both jointly or by one on the premises of the other, and that for a valuable consideration, neither can complain against the other of the accidental consequences of the act, for they have both agreed that it shall be done. But each is bound to the other that his part of the contract shall be carefully and skilfully performed, and is of course liable for negligent or unskilful performance; and this liability is incurred to every one who is lawfully engaged in the execution of the contract for the behoof of the other party to it. The negligence of one of the parties to the contract, in its execution, is not an incident of the contract, but a breach of it. The law on this head is clearly settled, and the master's liability flows directly from the obligation to perform the contract. Nor can it make any difference, as has been often decided, whether the contract is to be performed by both parties jointly or by one on the premises of the other. In the latter case the party to the contract who comes on the premises of the other undertakes for himself and his servants that they shall work carefully; and the other undertakes that, as far as he and his servants are concerned the premises shall be safe for the contractor and his men. Of all this there is no room for doubt.

It is in this class of cases, namely, cases in which the risk is encountered in consideration of an onerous contract, that an exception has been admitted in England, and has been extended to Scotland since the *Bartonshill* case, founded on the peculiarity of the contract of service. It is held that when a master engages several servants to work for his interest, he does not come under any obligation for the acts of the fellow-servants towards each other beyond taking reasonable care that the servants are competent for their work; thus removing the case out of the class of mutual contract, and reducing it to the category of cases in which the risk is voluntarily and gratuitously encountered. This exception has been defended on various grounds; sometimes it has been said that the limitation of the master's liability is the consideration for the wages given, and sometimes that the servant knows of his risk and must be held to undertake it by his contract. But these are not legal principles, but legal inferences. The wages form the consideration for the stipulated service, whatever that may be; and the fact that a person knows of the risk, and voluntarily encounters it, may or may not lead to the inference that he undertakes it, according to the nature of his relation to the wrongdoer or his master. These, however, are not represented as principles so much as deductions drawn from the peculiarities of the contract of service. But whatever be the foundation of this exception, of which I shall say a word afterwards, the exception and its limits and definition have been clearly settled by a uniform course of decision.

I have no intention of going over the well-trodden ground of authority on this subject; but as it seems to be supposed that the observations made in the House of Lords in the case of *Wilson v. Merry & Cuninghame* in 1868 have shadowed out or formulated some new principle applicable

to such cases, I shall select my illustrations from cases for the most part subsequent in date to that judgment.

I take the definition of the exception from the reported opinions of two high authorities in two very recent cases. The case of *Howells v. Landores Steel Company* was decided in 1874, six years after that of *Wilson v. Merry & Cuninghame*. It raised precisely the same question as occurred in that case, namely, whether a colliery manager was a fellow-servant with the workmen in the pit? There could have been no dispute that both were occupied in the same undertaking, and belonged to the same community, whatever that may mean; and if there is any foundation for the defenders' contention here this fact was conclusive of the case, and it was immaterial whether the men were fellow-servants or not. Lord Blackburn, however, did not so treat it. It had not occurred to him that the judgment in *Wilson v. Merry & Cuninghame* went beyond the law applicable to fellow-servants, and he so applies the precedent. "It is a rule of law," he says, "that a master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is employed; but then there is this exception, which has been established by a series of decisions, that with regard to a fellow-servant the master is not held so responsible, because this negligence is taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment." Applying this clear statement of the law, and the exception, to the case before him, Lord Blackburn proceeds—"It is essential for the plaintiff's case to make out that Thomas (the manager) was a servant of the defendants, and I think he was; and I cannot see anything in section 26 to make him, although a servant, yet not a fellow-servant." Of the decision in *Wilson v. Merry & Cuninghame* he says—"The decision of the House of Lords is distinct, at least as far as this, that the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow-servant."

Now this, although delivered in an English case, is high and conclusive authority to this extent, that it represents the matured opinion of the Common Law Courts in England. If sound, these views seem to establish these three matters—First, that the liability of the master is the rule, and exemption the exception; Secondly, that the exemption does not cover the case of two persons working at the same occupation, if they are the servants of different masters; and Thirdly, that the Court of Queen's Bench had not discovered in the case of *Wilson v. Merry & Cuninghame* any rule under which common occupation without common service would have liberated the master of the wrongdoer, because otherwise the question decided could not have arisen.

The same lesson may be learned from the still more recent and not less authoritative exposition of the rule in the case of *Rourke v. Whitemess Colliery Coy.* (3rd May 1876, L.R. Div. 2, C.P. 1, p. 556). The facts of that case had some analogy to the present. In that case a mining company, as here, were working their colliery by a contractor; and they put the services of their own engineer, who was their servant, at the disposal of the contractor. The engineer slept at his post, and one of the contractor's men was injured. Now, here

was the precise case we have before us, excepting that the engineer was directly under the contractor's orders. Both were engaged in the same occupation at the time of the occurrence, and there could not have been a more favourable opportunity for giving effect to the supposed exception built on *Wilson v. Merry & Cuninghame*. But Lord Coleridge found no novelty in the law applicable to these facts. He said—"The case raises a question which it is always difficult to deal with, though the principles on which it depends are well established. The doubt arises from the difficulty of ascertaining whether the facts bring the case within one or other of two well-defined rules." He then states the facts, and continues—"If under these circumstances the plaintiff and Lawrence were both in the employ of Whittle, the plaintiff is, upon the principle laid down in *Priestley v. Fowler* and several subsequent cases, debarred of his remedy. If Lawrence was not in Whittle's employ, then the defendants are liable." This is precisely the law laid down and excepted to in the present case, and certainly shows that Lord Coleridge found no such doctrine as that contended for, in the case of *Wilson v. Merry & Cuninghame*. Indeed, the opinion quoted is entirely inconsistent with the existence of any such rule.

The received canon, therefore, requires service under the same master to bring any case within it. It is also necessary that the injury should have been received while both were engaged in the work of the common service. This has been often held, the latest example being the case of *Howell v. Bovill* (16th Feb. 1876, 1 C.P.D., 161).

But when we turn from the exception to the rule, some broad lines of distinction are sufficiently evident, and have always been recognised. When servants work under the same master, they are working in one interest, and for the benefit of the same man. They are appointed and paid by the same man; but, what is much more important, they are responsible to the same man, and the same man is responsible for them. I take it that this element in a common contract of service lies at the root of the exception based on it. The same person is responsible for the conduct of the servants towards third parties, and he is also responsible to his own servants that each shall be chosen with reasonable care. In common service each servant represents the same master. But when two persons enter into a contract for the execution of work to be done either by the servants of both or by the servants of one, there is no such identity of relations or interest. Each party to the contract is liable for his own servants, but he is not liable for the servants of the other. The servants of each work for the interest of their own master, and represent him only. As neither selects the servants of the other, neither can have any responsibility as to their qualifications. And thus it is fixed, first, that neither is liable for the neglect of the servant of the other party to the contract; and secondly, that each is liable for the neglect of his own servant if the servant of the other is thereby injured.

The first of these points has long been put at rest by separate decisions, applicable to contracts of the nature of that before us—contracts, namely, for work to be done on the premises of the other party to the contract. The case of *Rupson v. Cubitt* may be taken as an example of the rest. The owner of the premises in that case was held

to have no responsibility for the gas-fitter's servants any more than he would have had for the servants of anyone else. The second point, which is its necessary counterpart—the liability of the contracting party for the negligence of his own servant, if the servant of the other is injured thereby in the course of executing the contract—has been the subject of a uniform series of decisions relating to contracts of all classes and in every variety of circumstances in which the question could arise. I shall allude to seven of these—three in the English Courts and four in our own—which have established these principles beyond controversy.

The first, the well-known case of *Abraham v. Reynolds*, in 1860, related to a contract of hiring. A corn-dealer hired a horse, cart, and man from a carrier, and in loading the cart at the warehouse the carter was injured by the fault of the servants of the corn-dealer. Both were engaged at the same time in executing the contract; their occupation therefore was the same, but the Court held that the carter was not a fellow-servant, and found the corn-dealer liable for his servant's negligence.

The second case I consider of importance as well as of authority in this discussion. It is that of *Indermaur v. Dames*, in 1868, decided in the Court of Exchequer Chamber in England. In that case the doctrine was clearly laid down by Justice Willes—a very high authority—(1) That one who works for an independent contractor is in a position entirely different from that occupied by a casual visitor; and (2d) that where work is contracted to be done by one man on the premises of another the obligation of the latter to take care by himself or his servants that the premises are safe is precisely the same as that incumbent on the contractor and his servants to work safely. The case in which these important principles were fixed was a very simple and conclusive example of them. The plaintiff was a journeyman gas-fitter, who was employed by a contractor in the execution of a contract to fit up two patent regulators in the defendants' works. The operation was all but completed, and the plaintiff went to the premises to see whether the apparatus was working properly, and fell through an open trap in the building. The main defence was that the contract was completed, but this was not sustained. The obligation on a person who has made a contract for work to be done on his premises, to see that these premises are safe for the persons who are to work on them, is laid down in the most unreserved terms both by Mr Justice Willes in the Court of Common Pleas, and by Chief-Baron Kelly in the Exchequer Chamber.

Before adverting to the cases in our own Courts subsequent to that of *Indermaur*, all of which affirmed the same principle, I pass over an interval of seven years, to a case decided in 1875, in which all the authorities were reviewed in the Court of Queen's Bench. The case was one in which, within the limits of compulsory pilotage, a licensed pilot was killed in the act of going on board a vessel by the carelessness of the crew in permitting one of the ship's boats to fall on him. The Court held the owners liable, on the ground that the pilot was not a fellow-servant with the crew. Lord Blackburn's observations harmonise so completely in all respects with the views I have endeavoured to explain, that I quote the follow-

ing important passage:—"The law is to a certain extent determined by the case of *Indermaur v. Dames*. There is an obligation on the part of the occupier of property, whether fixed or moveable, to those who at his invitation, express or implied, come on that property, to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. And that obligation extends to the workmen sent by a tradesman to repair part of the machinery. Mr Justice Willes, in delivering judgment in that case, after referring to the undisputed law that there was such an obligation on the part of a shopkeeper to his customer, and that there was no such obligation to a servant, proceeds to give the reason of the judgment in these terms—"The class to which the customer belongs includes persons who go, not as mere volunteers or licensees or guests or servants, or persons whose employment is such that danger may be considered as bargained for, but who go on business which concerns the occupier, and upon his invitation, express or implied." In *Morgan v. Vale of Neath Railway Co.*, which was earlier in date than *Indermaur v. Dames*, the reason why a servant cannot sue his master for negligence of a fellow-servant was put on the ground that it was an implied part of the contract between master and servant that the servant should, as between them, take upon himself such risks. In the more recent case of *Wilson v. Merry & Cuninghame* in the House of Lords, in a Scotch case, it was decided that the owners of a colliery were not responsible to their servants for an injury occasioned by the negligence of the general superintendent of the mine, to whom the defendants had delegated their whole power and authority. It does not appear from the report that the cases of *Morgan v. Vale of Neath* and *Indermaur v. Dames* were brought to their Lordships' notice; but the Lord Chancellor (Lord Cairns) seems to us to have arrived by independent reasoning at the principle that the exemption from liability was from the contract between the master and his servant, and to base his judgment upon it. He says—"The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with the business." "At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business."

This judgment embraces in a very incisive and succinct manner all the legal propositions which we are now considering. The first sentence states a general doctrine, which, if sound, is all which is necessary for the decision of this part of the case; and the remarks made on the case of *Wilson v. Merry & Cuninghame* entirely corroborate the impression I have indicated.

The four cases to which I mean to refer from our own decisions, are—(1) *Gregory v. Hill*, (2) *Wyllie v. Caledonian Railway*, (3) *Calder v. Caledonian Railway*, and (4) *Adams v. Glasgow and South-Western Railway*. But for the remarks your Lordship has made, I should have thought the first of these the clearest of the series. It was the case of a contract for the joiner-work of a house in the course of construction, and the contractor's servant was injured by the negligence of the servant of the

proprietor, who was engaged in doing the mason-work of the house. I should have thought that there could be no simpler example of the rules laid down in the case of *Indermaur* and in the opinion I have just quoted; nor do I see that any other judgment could have followed excepting in direct violation of them. It was a unanimous judgment of the Second Division, and carried the weight due to the names of Lord Cowan, Lord Benholme, and Lord Neaves. It had one distinctive feature. In it was propounded for the first time the notion that *Wilson v. Merry & Cuninghame* had altered or enlarged the former law, and this contention was deliberately considered and overruled. I quite agree with your Lordship in thinking the decision to be entirely at variance with the view on which it is proposed to decide this case, but it was in conformity with the preceding as well as the subsequent cases. For it is a mistake to suppose it was a solitary judgment. The next case was that of *Wyllie*, in which the servant of a customer was injured by the servant of a carrier, while both were engaged in putting goods into a truck, under a contract of carriage. The same contention was again maintained, and again overruled. Lord Ardmillan in deciding the case said—"None of the authorities quoted to us support the propositions maintained by the defender's counsel in this case, and the decision in the case of *Wilson v. Merry & Cuninghame*, however important and authoritative, is not here in point. The case of *Abraham v. Reynolds*, has, I think far more direct and important application to the present case than any of the other cases quoted to us, and the opinions of the Judges in the case of *Gregory v. Hill*, pronounced in a case less favourable to the pursuer, are in accordance with the principles explained by Chief-Baron Pollock and the other Judges in Exchequer in the case of *Abraham*." I do not stop to analyse the cases of *Calder* and of *Adams*, the details of which are familiar to your Lordships, and which were decided on precisely the same general and broad ground. In the case of *Calder*, the Sheriff, Mr Dickson, founded his judgment on the cases of *Abrahams v. Reynolds* and *Gregory v. Hill*, and his judgment was affirmed and his views generally approved of by the Court. And in deciding the case of *Adams*, the last of the series, my brother Lord Ormidale, who was not one of the Judges who decided the case of *Gregory*, while referring to the case of *Calder*, took occasion to say—"This judgment is entitled to all the more weight that it followed on the case of *Gregory v. Hill*, decided not two years before, on the same grounds and to the same effect." The case of *Gregory v. Hill* has been founded on in many other cases, and has never, so far as I know, been called in question until now.

These opinions are important, not only as confirming the case in question, which as I humbly think it does not require, but as showing that the whole series proceeded on one broad ground, and that the distinctions which have been since discovered had no part in the decisions.

This concludes my summary of the authorities, which are all in one direction. There is neither authority nor dictum the other way. It will not escape observation that in every one of these cases the parties contracted voluntarily and in the full knowledge of the risk. But that element was the very foundation of the claim against the master of the wrong-doer, who knew when he sent his ser-

vant to perform his contract that he would be answerable if the servant failed through negligence to perform it and injury resulted from his failure.

I think in this branch of the law, of all others, we ought *stare decisis*. The canon we have may be liable to exception on principle, but it is at least intelligible and practical, for it never can be difficult to say whether one man is the servant of another. I cannot say so much for the new rule. What is or what is not common occupation may give rise to tenfold perplexity, as the use of phrases which do not express any legal relation always does. I do not know what is meant by being a member of a community. If a firm of ironmasters undertake to construct an iron roof over a railway station, I presume their workmen must work so as not to endanger the servants of the railway company. Are the servants of the railway company and the company itself not equally bound because the firm has become a member of the same community?

Before concluding my remarks on this head, I would point out the true import of the observations of the Lord Chancellor in the case of *Wilson v. Merry & Cuninghame*. They are supposed to create some obligation or invitation to us to formulate some rule in this case, never judicially announced or applied before, for the future administration of this branch of the law. The same thing was attempted, as I have said, in the cases of *Gregory* and of *Wyllie*, but met with no encouragement from the Court. I think, and have always thought, that this view proceeds on a misapprehension of the true scope of these remarks, which, rightly understood, are not only weighty from the quarter from which they came, but in the highest degree just and salutary. They give no sanction whatever to what is now proposed. The Lord Chancellor simply said that there were other cases in which a person by voluntarily encountering a known hazard might liberate a master from absolute liability for his servant's fault, besides that of servants under the same master. I entirely appreciate the importance of the remark, as embodying or indicating considerations which have been rather overlooked.

I have already said that the effect of the rules of law on the relations of fellow-servants to each other and to their master is to eliminate that case from the category of mutual contract, and to reduce it to that of the third class of instances to which I referred in the outset. This third category stands quite apart both from the case of a stranger who has done nothing to invite the risk, and from that of the contractor who undertakes for a valuable consideration to encounter it. But when we come to consider the case of persons who voluntarily expose themselves to hazard, not in pursuance of any duty or obligation, or for any valuable consideration, but on a footing purely gratuitous, a different set of principles comes into play. If, from curiosity, or love of science, or desire for adventure, a man attends a hazardous experiment, or ascends a dangerous pass, he does so at his own risk; and he has no right to demand at the hand of the conductor of the experiment who permits his presence, or the owner of the mountain pass who from friendliness sends a guide or a ghillie with him, more at the utmost than reasonable care—such care as he would take for himself. The reason is obvious. The master in such cases is under no obligation to

do the act at all; and a man is not entitled to convert acts of civility or hospitality into an excuse for fastening on his friend or his entertainer a responsibility which he would otherwise never have incurred. In this way may be solved all these illustrations as to guests and visitors which obscure rather than illuminate this question. If a committee of the British Association choose to go down a coal-pit, they must take the safeguards of the mine as they find them. It would be an entirely different thing if the owner had engaged, for ordinary professional remuneration, the services of a medical man to visit the pit periodically. The distinction manifestly lies in the element of contract and valuable consideration I do not say, and the reverse has been held, that the moral obligation implied in invitation or encouragement may not amount, in special cases, to legal obligation. But that requires some element equivalent to a direct undertaking. It is thus apparent that the principle of presumed acceptance of the risk which obtains in the case of fellow-servants has a much wider application. But it has no place in cases of onerous contract. In the present case the contractor, if he was a contractor, undertook that his men should not endanger or injure the servants of the Gartness Company, and the Gartness Company undertook that the pit should be safe for the contractor and his men, as far as they or those they employed were concerned.

I must, however, before concluding, say a word on the second question—Was Gardner an independent contractor? I think he was, although the contract is a limited and homely one.

He undertook to execute a specific and definite operation, namely, to prepare the level which he was to drive for the operations of the colliery. This he was bound and entitled to complete by himself and his own servants. It was not an engagement for piece-work.

The true test of whether one man is a fellow-servant of another is not necessarily either engagement or payment of wages. It is, whether the two men are responsible to the same master, and the same master is responsible for them. If a servant is allowed to engage a man under him, the master is as much responsible for the sub-servant as he is for the principal servant. But here it seems clear that Woodhead was responsible only to Gardner, and that Gardner only was responsible for him, as was found in the case of *Reedie v. London and North-Western Railway*, in 1849.

The Mines Regulation Act, and the consequent rules, are of no moment, except as making the owner's liability to keep the pit safe, more clear. The rules are such as every master may make for the regulation of his own premises, and do not affect his liabilities to independent contractors or their servants, and certainly do not make the latter servants of the owner in any sense. This was necessarily implied in the cases of *Adams* and of *Caldar*, in which the company running over the line of the other was entirely subject to the by-laws of the latter, and seems to have been directly decided in the case of *Reedie*, above referred to, and in the recent case of *Warburton v. Great Western Railway Co.*

On these grounds, I cannot concur in the judgment proposed.

LOED DEAS—This case belongs to a branch of the law which can hardly be said to stand in a satisfactory position, and I am not surprised that there should be some difference of opinion about it.

If the maxim *culpa tenet suos auctores* were held to be the general rule in questions of liability for fault or negligence, the law would be consistent and of easy application. But when that maxim is applied exceptionally to relieve a master from liability to his servant for the fault or negligence of a fellow-servant, it will not justify this exception simply to say that a servant undertakes all the risks incident to his contract of service. You must go further, and affirm that one of the risks so undertaken, as incident to the contract of service, is the risk of injury from the fault or negligence of fellow-servants. That is really an exceptional application of the maxim *culpa tenet*, and when you reject the rule it is not easy to justify the somewhat invidious exception. To say the risk is included in the wages is not to my mind a satisfactory explanation. But be this as it may, a course of decisions not to be gone back upon has settled it as a principle in the contract of service that the servant thereby undertakes to relieve the master from responsibility for the fault or negligence of others duly selected, engaged in the common service; and by that principle we are now to be guided.

The maxim *respondet superior* might be reasonable enough in times when masters had slaves, serfs, and dependents so completely at their beck and desirous to humour their masters that you could not distinguish whether they were acting according to the pleasure of their masters or upon their own uninfluenced responsibility. But the development of intelligence among the lower orders, the spread of education, and the progress of law and order, have so largely changed all this as to render it matter of regret that statutory authority had not introduced a more extensive application of the maxim *culpa tenet*, than that which has been less satisfactorily introduced by judicial decision.

Meantime we must take it, as I have said, as a fixed principle in the law of master and servant, that the servant undertakes to relieve the master of all injury from the fault or negligence of others employed in the common service, and understood to be reasonably qualified to be so employed.

The only inquiry therefore in every case—and consequently the only inquiry in this case—is what is to be regarded as the common service?

I do not think that inquiry is fully satisfied by ascertaining who hires and who pays the servant. These may often be important elements in the question of liability, but they are not essential or conclusive elements. There may be sub-servants, or assistants hired and paid by servants, and yet both the hirers and the hired may be engaged in a common service, the risks of which are to be held as undertaken by each of them respectively.

We see from the evidence in the present case that it is a common practice in pits for coal miners to employ and pay their own drawers; and we see this practice recognised and regulated by rule 28 of the statutory regulations applicable to mines generally. The authority of the pitheadman to require the necessary timber to support

the roofs and sides of the workings to be carried gratuitously by the miners to the places where it is required to be used, is by that rule explained to extend to drawers, putters, and drivers, whither employed (and of course paid) by the owner of the mine or by the miners themselves. It would be very incongruous if the classes of persons thus employed and paid were to be regarded and dealt with as not entitled to the same rights, and not subject to the same risks, with the other workmen in the mines.

I am disposed to think that they are all on the same footing. At all events, I am of opinion that the service of which the deceased undertook the risks was the common service of the mine. He was not only bound by the general and special rules of the Coal Mines Regulation Act, but he signed the special rules and accepted a copy thereof as rules brought to his personal knowledge, and by which he and his fellow-workmen were to be regulated. He saw on the first page of these rules who his fellow-workmen were to be—it being there explained that the word “miners” means every person “employed in the mine, in the cutting or excavation, or removal of coal, ironstone, shale, fire-clay, or other minerals, metals, or materials,”—and he saw also that the words “manager” and “oversman,” meant the general manager and oversman in authority over himself and all the other workmen in the mine. If, then, he undertook the risks of any service at all, surely he undertook the risks of the general service of the mine.

By article 2 of the special rules, the mine is declared to be under the control and daily supervision of the manager; and, subject to this general supervision, rule 3 places the whole operative details, and the superintendence of the workmen of every class, under the oversman, who, by rule 5, is specially charged with the ventilation, in terms of general rule No. 1 of the statute, and bound to observe the other general rules of section 51 of the statute, “so far as these, from their nature, can be observed by himself.”

By rule 9 (of the special rules) the pitheadman, subject to the control and supervision of the manager, has the charge and direction of the workmen employed at the pithead. He is to “superintend and direct the safe removal from the cage of all loaded hutches arriving at the pithead, and see to the safe replacing of the return hutches on the cage,” and he is in like manner to regulate the number and see to the safety of the men descending in the cages, no matter from what department of the mine the loaded hutches or the men may come.

In the present case we see from the evidence that at the date of the accident, although the sinkers hired by the defenders were employed in one part of the mine, and the miners, including the deceased, hired by the contractors to drive the east level, were employed in another part of the mine, coal was habitually being sent to the pit bottom and brought up from both sets of excavations, and of course the men employed at both were habitually ascending and descending under the control and charge of the same pitheadman, who, by rule 10, is taken bound, independently of the manager or oversman, once at least in every twenty-four hours carefully to inspect all the appliances for raising and lowering the cages, and if any defects are discovered, to

stop the raising and lowering of the men and materials till these are remedied.

In like manner, the engineman, the roadsman, and the fireman, are all invested with powers in their respective departments to interfere with, direct, and control the miners (which means, as we have just seen, all persons employed in cutting, excavating, or removing minerals, metals, or materials in or from the mine) in whatever way may appear necessary to secure safety, order, and efficiency in the working of the mine. They may for these purposes cause the men to desist from working, or they may on some occasions even order them to do other work than their own. For instance rule 28, which lays on the roadsman the duty of providing an adequate supply of timber to support the roofs and sides of the workings, bears—"For the purpose of carrying out his rule, roadsman are empowered to call upon drawers, putters, and drivers, whether employed by the owner or miner, to convey such necessary timber from the pit bottom or other place of general delivery to the working places in connection with which they are employed."

Then we have sort of a summing up of the provisions I have been noticing in rule 52, which is expressed thus—"Such miners and other workmen are and shall be generally subject to the control and orders of the agent, where one has been appointed, and of the manager and overman; but they shall also be subject to any directions which the roadsman, engineman, fireman, or bottomer may give in their respective departments for the purpose of preventing the workmen from infringing or ceasing to comply with any of the provisions of this Act, or of the general or special rules."

Under all these circumstances, I really cannot doubt that the service of which the risks were accepted by the deceased was the general service of the mine, unless it can be shown that the single fact of his wages being payable by the Gardners as contractors places him in a different category from that in which he otherwise would have been.

The question upon that point can hardly, however, be said to arise purely, for the 2s. per ton specified in the contract with Gardner to be paid to him by the defenders for clean coal from his excavations, delivered by him at the bottom of the pit, was to be increased or diminished ten per cent. for every sixpence per day of rise or fall on the wages during the contract; so that the defenders were substantially in the position of contributing to the wages paid by the Gardners to their men.

I consider it, however, unnecessary to rest upon this speciality. I find nothing in the decided cases to lead me to think that the mere payment or non-payment of wages affords a conclusive test one way or other of the class of persons who in cases of this kind are to be regarded as fellow-workmen or *collaborateurs*. We see from the evidence in the present case that it is a common practice in pits for coal-miners to employ and pay their own drawers, and in rule 28, which I have already quoted for a different purpose, we have a recognition of the practice, in a more extensive form, of miners employing (and of course paying) assistants or men under them, such as drawers, putters, and drivers, over whom the roads-

man, and by necessary inference also the manager, and oversman, are to have precisely the same powers when they are employed by the miners as when they are employed by the owner of the mine. It would be very anomalous if incidental arrangements of this kind should be held to vary and disturb the general relation to the owner and to each other of the body of workmen in the mine.

Take, for instance, the position of Samuel Gardner himself. The contract bears "I likewise agree to put on a bottomer, you allowing me 2s. 6d. per day for same"—that was just in substance an undertaking by the defenders to pay the bottomer's wages. Suppose that had been done, I do not see how the position of the bottomer in questions like the present, as to the liability of the defenders either by him or for him, could consistently have been distinguished from the position of others employed in the mine. As it happened, Samuel Gardner himself acted as bottomer, and his wages of 2s. 6d. per day have been credited to him and his brother, so that he was himself in reality the paid servant of the defenders.

It will not be understood that I rest upon the fact that the rules I have referred to were introduced by Act of Parliament. If these had been proposed *ex proprio motu* by the owners of the mine, printed and distributed so as to be thoroughly and personally known to the men and agreed to by them, I should have attributed to them the same effect, with this difference only, that it might then have been open to consider whether they contained anything contrary to the principles of the common law by which the men might have been taken at a disadvantage, which enquiry the statutory origin of the rules entirely excludes.

I have not thought it necessary to enter upon a review of the authorities and decisions upon this branch of the law in Scotland and in England. As counsel in the case of *Maclean v. Russell, M'Nee & Coy.*, 9th March 1850, 12 D. 887, I had occasion to become acquainted with all these authorities and decisions prior to that date, and I have since had occasion on repeated occasions judicially to reconsider them, along with the subsequent cases, except two or three very recent cases, which, in or so far as not cited at the bar, have been kindly brought under my notice by one or other of your Lordships. They have been fully cited and commented on at the bar and on the bench, and I shall only notice one of them—*Gregory v. Hill*, 14 December 1869, 8 Macph. 282, because I think myself bound to say, with all respect for those by whom that decision was pronounced, that I concur in thinking it cannot be supported.

On the whole, I am of opinion that the law laid down by the presiding Judge at the trial was not correct, and that the law which his Lordship was asked to lay down would have been correct.

LORD ORMDALE—The argument which we have heard in this case has had reference to the defenders' Bill of Exceptions alone, in the first instance; and it is therefore for the Court now to determine whether and how far the Bill ought to be allowed or disallowed.

The defenders maintain their exceptions on the grounds (1) That they are not liable to the pur

suer for the consequences of the death of David Woodhead through the fault of their underground manager Colin Beveridge, in respect that these persons were at the time of the accident fellow-servants of the defenders, engaged in the same common work; and (2) That even supposing Woodhead and Beveridge were not fellow-servants of the defenders when the former was fatally injured, the defenders are not liable, in respect that, engaged as they were at that time, working in the same pit for the purpose of putting out the coal, the injury received by the one through, the fault of the other was an incident of the work, the risk and consequences of which the sufferer must, in a question with the defenders, be held to have himself undertaken.

1. Of the soundness of the first of these grounds of non-liability, where the circumstances are sufficient fairly to raise it, there can be no doubt, having regard to the numerous decided cases on the subject. It is sufficient, however, to refer to the cases of the *Bartonshill Colliery Co. v. Reid*, and of *Wilson v. Merry & Cuninghame*, both of which were ultimately decided in the House of Lords. In these cases the distinction was fully explained between the position of parties directly answerable for their own wrongful acts, to whom the maxim *culpa tenet suos auctores* applies, and parties who may be liable, not for the wrongful acts of themselves directly, but of their servants, on the principle *qui facit per alium facit per se*, or of parties who, though standing in the relation of masters or employers to the wrongdoer, may nevertheless escape liability for the acts of the latter on the ground maintained for the defenders in the present case, that the individual injured and he who caused the injury were fellow workmen or *collaborateurs* within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant or workman through the wrongful act of another.

The question in the present case, under the first branch of the defenders' argument, is whether they are to be held, in respect of the doctrine of *collaborateur*, as explained in the case referred to, free from responsibility for the consequences of the injuries sustained by Woodhead through the culpable negligence of their oversman Colin Beveridge. The latter was at the time the servant of the defenders, and it is expressly admitted that he was "a competent person for his duty, and that the appointments of the colliery were sufficient." It is also an indisputable fact that Woodhead and Beveridge were, when the former was injured, engaged in the same pit of the defenders, and in the prosecution of the same work and object, viz., the operations necessary for turning out the coal. In these circumstances, it seems to follow, on the authority of the cases which have been referred to, that the deceased David Woodhead must be held to have undertaken all the risks arising from the fault of Beveridge or others employed along with him in the same common work and object. But, then, it was argued that while Beveridge was the servant and engaged at the time of the accident in the service of the defenders, Woodhead was the servant, not of the defenders, but of the Messrs Gardner, who were engaged in the pit as independent contractors. Whether the circumstance of the Messrs Gardner being independent contractors, supposing it were true, can operate against the defenders to the effect of

making them liable in the present action, is the question which will be afterwards considered, in dealing with the second branch of their argument. But it must be first ascertained how the fact stands.

Now, the question of fact whether the Messrs Gardner were independent contractors, or merely the servants of the defenders engaged in their pit in piece work, depends upon whether, and how far, they were under the control and subject to the interference of the defenders. It is not enough to make them independent contractors that they had the power of engaging, paying, and dismissing the workmen acting immediately under them, for if that were enough it is obvious from the evidence of the witnesses Ferrie and Jack in the present case that every miner in every coal-pit would stand in the position of an independent contractor. The true test is the right of control and interference which the defenders possessed in reference to the Messrs Gardner and their men. That this is so, is, I think, well and clearly illustrated by the recent Scotch case of *Stephen v. The Commissioners of Police of Thurso*, 3d March 1876, and the still more recent English case of *Rourke v. The Whitemess Colliery Company*. In both of these cases the question whether certain individuals were independent contractors or merely the servants of other parties, was held to depend upon whether the latter had reserved and exercised a control over the operations of the former.

Did, then, the defenders in the present case, while they contracted and arranged with the Messrs Gardner to carry on a certain portion of the work in their pit, retain and reserve to themselves such a power of control and interference as to prevent the Messrs Gardner being held as independent contractors. That they were not independent contractors, or anything more than parties engaged by the defenders to do part of the work in their pit, to be paid for by the piece, appears to me to be made sufficiently clear by the evidence in the case, including the rules under and by which the whole work was regulated and carried on. Thus, Samuel Gardner, one of the alleged independent contractors, a witness adduced by the pursuer, says—"Up to and at the time of the accident the only person who acted for the Company and looked after the machinery and ventilation of the pit was Colin Beveridge, who discharged the duties of underground manager, roadsman, and foreman." The evidence of the same witness in regard to the engagement by him of a bottoomer, the payment of his wages and the control of him in regard to his work and duties, denotes very plainly, I think, that the true relation of the Messrs Gardner to the defenders was merely that of parties who had engaged to work in their service by the piece, and not as independent contractors. And George Gardner, again, the other alleged independent contractor, who gives similar testimony, states among other things—"We had no charge in regard to the ventilation and safety of the arrangements of the pit; Ormiston (the defenders' manager) and Beveridge (their oversman or underground manager) giving such directions about these matters as they thought fit."

If any doubt remained, looking merely at the parole evidence, it is, I think, entirely removed by the rules and regulations to which all the persons in the pit were subject in carrying out the

operations. I refer to the special regulations established by the authority of section 52 of the Mines Regulation Act (35 and 36 Vict. cap. 78), and not the general regulations specified in section 51. The latter are set out specifically in the Act itself, and are indispensable in any mine to which the Act applies, but the former are left to be prepared by the owner himself of the mine, subject to the approval of a Secretary of State, "to suit the particular state and circumstances of such mine." Accordingly, the special rules so prepared and approved of in reference to the defenders' mine, bear that they are "for the conduct and guidance of the persons acting in the management of this mine, or employed in or about the same, to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine." The regulations so established for the conduct and guidance of all persons in the defenders' pit were, it is not unimportant to observe, subscribed by the deceased David Woodhead, as appears from the evidence of the manager Ormiston. As might be expected, therefore, these regulations cannot be examined, in connection with the evidence in this case, without it being seen that they lead to the conclusion that the Messrs Gardner, and those who were immediately under them at the time of the accident, including David Woodhead, were subject in all things relating to their work and conduct in the defenders' pit to the orders and guidance of the defenders' manager Ormiston, and their oversman or foreman Beveridge; and if so, it would be difficult to conceive a case in which the interference and control of the defenders with the alleged contractors could be greater or more unmistakable. To be satisfied of this, it is only necessary to observe the terms of rules 2 and 3, as to the duties incumbent on the manager and oversman on the one hand, and the terms of rules 52, 55, 69, 70, and 71, taken as examples out of many others, of the duties of the miners or workmen on the other.

Nor am I able to understand the view which was pressed in argument for the pursuer, that these regulations were not intended to serve any other than police or public objects. These may be, in one sense, the objects of the rules, but that they were also intended to regulate the whole working of the colliery, and the conduct and co-operation of all the persons engaged in carrying on that work for behoof of the defenders, cannot, I think, be doubted. Thus, by rule 3 it is provided "that subject to the control and supervision of the manager, the whole operative details shall be under the care and charge of the oversman;" while by rule 52 it is provided that "the miners and other workmen shall be generally subject to the control and orders of the manager and oversman." Accordingly, it was held in *Howells and Others v. The Landore Siemens Steel Company (Limited)*, 4th Nov. 1874, 10 Law Rep., Q.B. 62, in reference to the liability of a master for a fatal injury caused by a servant to a fellow-servant, that the fact of the manager who caused the injury being appointed pursuant to the Coal Mines Regulations Act 1872, did not put him in a different position from what he would have held had he been simply appointed manager; and consequently that the defendants were not liable to the representatives of the deceased for his death.

I must own my inability, therefore, to under-

stand how—having regard to the rules referred to, enforceable as they are by the defenders, their manager, oversman, and other head people—the Messrs Gardner can be regarded as independent contractors, or as anything else than persons working under the control and subject to the orders of the defenders. And if this be the true position of the Messrs Gardner, and of the workmen immediately under them, it follows, in accordance with well established law, that David Woodhead, the workman who was fatally injured, and Colin Beveridge, who by his culpable negligence caused the injury, must be regarded as fellow-workmen, engaged in the same common employment, and that consequently the pursuer, whatever may be his claim for reparation against Beveridge, has none against the defenders. The case of *Wigget v. Fox & Henderson* is a precedent for this, if precedent were necessary, very much in point. In that case there were principal contractors—Messrs Fox & Henderson—who had undertaken to execute the whole of certain work in connection with the Crystal Palace, and as to these parties, occupying a perfectly independent position, no question arose. But under them part of the work was contracted to be done and paid for by the piece, by Moss and others, as sub-contractors, and although the parties thus sub-contracting had their own men to do the piece work, these men were held to be the fellow-servants of the principal contractors, and one of the former having been killed by the fault of the latter, it was decided that the principal contractors were not liable for the consequences, in respect that the workman who received the fatal injury was a fellow-servant of the workman who caused the injury. In the course of the discussion it was remarked by Baron Martin, in regard to the position of Moss—"The relation of master and servant existed between the defendants and him, and I am of opinion that an action by a stranger for the negligent act of Wigget would have been properly brought against Fox and Henderson, and not against Moss. The test is whether the defendants could interfere in the work done by Wigget. Now, it is clear from the regulations that they could. I observe that is the test applied by Crompton J., in *Sadler v. Henlock* (24 L. J., Q.B. 188). He says the real test is whether the employer has any control over the persons employed, and whether the payment is by the day or piece can make no difference." Accordingly, in delivering the judgment of the Court Baron Alderson stated—"Here both servants were at the time of the injury engaged doing the common work of the whole contract, and for the contractors the defendants; and we think that the sub-contractor and all his servants must be considered as being for this purpose the servants of the defendants whilst engaged in doing the work, each directing and limiting his attention to the particular work necessary for the completion of the whole work; and that otherwise we should not give full effect to the principle which governs such cases." So, accordingly, it appears to me that in the present case Woodhead, who received the fatal injury, and Beveridge, by whose negligence the injury was caused, must be held to have been at the time of the accident fellow-workmen in the employment of the defenders, who are consequently, on the doctrine of *collaborateur*, not liable for the consequences.

The only difference of any materiality founded

on by the pursuer between the case of *Wigget v. Fox & Henderson* and the present, was, that while in the former the sub-contractor's men were paid by the defenders, in the latter the Messrs Gilchrist's men were paid by them, and not by the defenders. But it has been shown that this is of little or no importance in determining whether parties are independent contractors or not—that question being governed by other considerations, and especially by the control or interference exercised on the part of the defenders. Besides, the allusion in the contract in the present case to wages, and in the pay-sheets to deductions for "doctor" and "school," taken in connection with all the other circumstances as disclosed in the notes of evidence, show plainly, I think, that the Messrs Gilchrist, and those immediately under them, were in reality just ordinary workmen of the defenders; and if so that is enough for the determination of the case in favour of the defenders.

2. But it was further maintained by the defenders, under the second branch of their argument, that even supposing the relation of fellow-servants did not exist between Woodhead and Beveridge, or, in other words, assuming that while the latter was the servant of the defenders, the former was the servant of the Messrs Gardner as independent contractors, still the defenders would not be liable to the pursuers, in respect that Woodhead, by working in the same pit along with Beveridge, in operations necessary for putting out coal for the defenders, whether technically a servant of theirs or not, must be held in the present question with them to have undertaken all the risks of the work and workmen in the pit, including the risk of negligence on the part of Beveridge. This contention was maintained in argument by the defenders on the same ground substantially as that on which the doctrine of *collaborateur* is rested; and in support of their contention reference was made by them to the opinion of Lord Chancellor Cairns in the case of *Wilson v. Merry & Cunninghame*, to the effect that he did not think "the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or *collaborateur* of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow-workman, but the case of a fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader ground." Now, although in the great number of the cases of claims of reparation for injuries to workmen which have occurred it was enough for the decision that the parties—he who was injured and he who had caused the injury—were fellow-servants in a strictly technical sense, the principle itself upon which the decision proceeded was such as necessarily to apply to other and different circumstances, where no such relation as that of fellow-servants could be said to exist. It is not that the party who causes the injury and the party who suffers by it were fellow-servants engaged at the time of the accident in the same common work, that the master or employer of both is not responsible for the consequences. That is merely a statement of circumstances, and of itself announces no principle of liability or non-liability. But the principle of non-liability aris-

ing out of such circumstances is, that the injured party by engaging with others in the same work—or to use a figurative expression which I observe has been used in other analogous cases, having embarked in the same boat—must be held to have undertaken all the risks and dangers incident to the position in which he has so voluntarily placed himself.

This is a principle which, on the mere statement of it, suggests many and various cases, depending on circumstances, different from that of the injured and injuring parties being fellow-servants engaged under the same master in the same common work. Thus, for example, take the case of a person going into a coal-pit or other dangerous work with the permission, or even on the invitation—for that, I apprehend, would make no difference—of the owner, for the purpose of prosecuting some scientific inquiry, and while there receiving serious injury, caused by the culpable negligence of one of the workmen, who was generally competent and fit for his duty—it is clear, I think, beyond any serious question, that, for the same reason and on the same principle as that which is applicable to the present or any other case where the injured and injuring parties stand in the relation of fellow-servants engaged in the same common work, no action would lie at his instance against the owner. Or, suppose the case of a friend of the owner of a yacht or carriage voluntarily accompanying him on a pleasure sail or drive, being injured through the negligence of one of the crew of the yacht or the driver of the carriage, it can scarcely be doubted that an action for damages against the owner would be untenable. In all such cases, and they might be multiplied indefinitely, the same principle or rule, that the injured party must be held to have undertaken, in a question with the owner, all the natural risks and perils incident to the position in which he had voluntarily placed himself, would apply.

Independently, however, of mere hypothetical examples, the rule or principle in question has been recognised by the Courts in several litigated cases besides that of *Wilson v. Merry & Cunninghame*, in such a manner as to show that it is not confined to that of fellow-servants engaged under the same master in the same common employment, In *Southgate v. Stanley* (25 L. J., Exch. 339), which was a case, not of master and servant, but of householder and guest, it was held that an action did not lie at the instance of the latter against the former for negligence which might have been that of one of the servants in the house. The ground upon which the Court proceeded is thus stated by Chief-Baron Pollok—"I think," said his Lordship, "this case rests on the same general principle which governed the Court in deciding the circumstances under which a servant cannot maintain an action against his master, and which now stands as the law on the subject. Mr Gray truly stated the principle on which such cases rests to be, that persons in one establishment are sailing in the same boat, and that no action will lie by one servant against a master for the act of his fellow-servant. So, a son cannot bring an action against his father, nor can a person who volunteers his assistance bring an action on account of some mischance happening through a servant or other member of the family, because he is himself for the occasion one of the family." And the same views were expressed by the same learned Judge in the case of *Abraham v. Reynolds*

(5 Hurl. and Nor. 149). So, in *Degg v. The Midland Railway Company* (26 L. J., Exch. 173), and in *Potter v. Franklin* (31 L. J., 2 B. 30), it was held that a master was not liable for the consequence of injuries caused through the negligence of his servants to persons voluntarily assisting them, although not strictly their fellow servants, or servants at all of the master.

I am disposed to think, therefore, that the defenders cannot be made responsible for the injuries caused to the deceased David Woodhead by Colin Beveridge, whether these two persons are to be held to have been fellow-servants engaged at the same time in the same common work under the same master or not, it being sufficient that at the time of the accident they were engaged in the same pit, belonging to the same parties, and working for the attainment of the same object, although the one (Beveridge) had the defenders themselves as his immediate master, and the other (Woodhead) had for his immediate masters the Messrs Gardner, as both must be held to have been engaged in the same establishment, or embarked as it were in the same boat, and had undertaken the dangers and risks naturally incident to the position in which they had so voluntarily placed themselves. Nor do I think the cases of *Calder v. The Caledonian Railway Co.* and *Adams v. The Glasgow and South-Western Railway Co.*, cited for the pursuer, are authorities to the contrary, for in both these cases, which were peculiar in their circumstances, it was held that the person injured and the person causing the injury were neither fellow-servants nor engaged in the same common employment, but stood rather in the relation of strangers to each other. The case, however, of *Gregory v. Hill*, which was also and chiefly relied upon by the pursuer, is certainly a more formidable authority to get over, for there it seems to have been held that the immunity of an employer for the consequences of an accident caused by the fault of his workmen can only arise where the person injured and the person injuring were at the time of the accident engaged as fellow-servants in the same common work, under a contract of service to the same common master. But it appears to me that this is a view which cannot be sustained consistently with the other cases to which I have referred, or with the exposition of the true principle given in the House of Lords in the case of *Wilson v. Merry & Cuninghame*.

Having regard, then, to all the authorities, and considering that, notwithstanding the decision in *Gregory v. Hill*, and the remark which I appear to have made in regard to that decision on a former occasion, the present case has been remitted for the decision of seven Judges, I assume that I am not precluded from expressing the opinion I have formed.

The result is, that in accordance with the views I have now expressed, the first and second exceptions to the directions which were given at the trial, and the first exception to the directions which were refused to be given, will fall to be allowed. The remaining two exceptions do not appear to me to require to be dealt with.

LORD MURE—As I have come to the same conclusion as the majority of your Lordships, and substantially on the same grounds, I do not think it necessary to do more than state shortly the general

import of my opinion. The rule, the application of which is here in question, as I understand it, is this, that where workmen are engaged in one common employment, with a common object, and subject to the same regulations and control—more especially in a case of the present description, where the employment is known to be attended with considerable risk, arising in many, if not most, instances from the negligence of fellow-workmen—each workmen engaged in that employment is held to have had that risk in view when he undertook the employment, and is not therefore entitled to demand reparation for injuries caused by the negligence of a fellow-workman from the employer of that workman.

The law was so laid down by Lord Cranworth in the case of the *Bartonshill Coal Company*, when his Lordship, in moving the reversal of the decision of the Court of Session, said (3 Macq. 284)—“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. Principle, therefore, seems to be opposed to the doctrine that the responsibility of a master for the ill consequences of his servants' 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.” And again, when illustrating what constituted a fellow-workman in the sense of the rule, his Lordship said (p. 296)—“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 coal to the surface.”

Such is the clear opinion of Lord Cranworth; and the law is laid down in very similar terms by Chief-Justice Shaw in the American case of *Farwell v. Boston Railway*, mentioned by Lord Cranworth with approbation, as reported in the same volume of Macqueen, p. 317-319. This rule has no doubt been so laid down in cases where the labourers were the servants, in the strict sense of the word, of the same master. But the rule was said by Lord Cranworth, in the *Bartonshill* case, to be one of universal application; and it has apparently been so dealt with. Because about the date of that decision, viz., in 1857, in the case of *Degg v. The Midland Railway*, (1 Hurl. and Nor. 773) the rule was held to apply to a party who was a stranger, who voluntarily assisted the servants of a railway company, and who was injured by the railway company's servants. It was there strongly contended that the rule had no application except in the case of hired servants acting under the same employer, but that contention was rejected, on the ground that the party injured voluntarily undertook to assist when

in the knowledge of the risk he might run. This is, I think, a decision to the effect that it is not essential in order to free a master from liability for a claim of this description that the party injured should be a servant, in the strict acceptation of the term, directly employed and paid by the same master as the workman who causes the injury. In the subsequent case of *Abraham v. Reynolds* (5 Hurl. and Nor. 143) Chief-Baron Pollock lays it down distinctly that the rule is one which in his opinion cannot be limited to the case of a master and his servants. For he says (p. 148) —“The case of master and servant is only one of a class. The question has hitherto arisen in cases between master and servant; but it appears to me that the learning on this subject has not been exhausted.” And there is, I conceive, authority to the same effect in the opinion of the present Lord Chancellor in the case of *Merry & Cuninghame*, which have been read by your Lordship.

I do not therefore think that the decisions can be held to have restricted the rule to the case of parties standing towards each other in the relation of paid servants of the same master, and I am of opinion that the question as to the further application of the rule is quite open for decision. That being so, it humbly appears to me that the circumstances of this case are of a description which seem not only to admit of, but to call for, its application; and I have come to this conclusion for substantially the same reasons as those which have been so clearly explained by your Lordship in the chair. There can, I think, be no doubt upon the evidence in this case that the deceased was under an organisation of the nature described by your Lordship. He was a party who at the time of his death had voluntarily undertaken all the ordinary risks of a workman in the defenders' colliery, and had subjected himself to the special rules and regulations applicable to that work, which it is proved were duly posted up for the guidance of the miners who were there employed. It is in evidence, moreover, that the deceased had been engaged as a miner in the works shortly before the occurrence in question, under the direct employment of the defenders, but that, in consequence of some temporary change in the arrangement for working the coal in the east level, his services had been transferred to contractors, who had undertaken to work the coal in that part of the pit, subject to the existing organisation. Now, had the accident occurred at the time when the deceased was employed and paid directly by the defenders, it cannot admit of doubt, upon the decided cases, that no claim for reparation would have lain against the defenders, and I am unable to find any satisfactory grounds for holding that the mere circumstance that the deceased was then working as one of a contractor's gang, and was not paid directly by the defenders, should make any difference in the application of the rule. The deceased was still subject to the regulations established by the defenders for the conduct of their works, to the same extent as he was when employed directly by them; and having thus voluntarily continued under the supervision and direction of the underground manager, roadman, and overseers employed by the defenders, and undertaken all contingent risks, it appears to me that the case comes fairly and directly within the operation of the rule.

LORD GIFFORD—The two leading questions of law in this case (for there is no dispute as to questions of fact) are—*First*, Was the deceased David Woodhead, in the legal acceptation of the words as applicable to cases like the present, a fellow-workman or *collaborateur* with Colin Beveridge, through whose negligence he was killed? and *Second*, Assuming that David Woodhead was not in the legal sense of the words a fellow-workman or *collaborateur* with Beveridge, still was he, David Woodhead, in such a position and in such circumstances as to bar him and his representatives from making the defenders answerable for the *culpa* of Beveridge? If either of these legal questions is answered in the affirmative, then the verdict cannot stand, for in such case the defenders must be held in point of law not answerable for the negligence of Beveridge.

In reference to the first of these questions, *viz.*, Whether the late David Woodhead and Colin Beveridge were or were not in the eye of the law fellow-workmen or *collaborateurs* in this pit No. 2, I have come to be of opinion, though not without some hesitation, that this question must be answered in the affirmative. I think that David Woodhead and Colin Beveridge were *quoad* the present question fellow-workmen or *collaborateurs*. Of course the difficulty is that they had separate and independent masters. The two men were not selected and employed and were not paid, directly at least, by the same employers. Beveridge no doubt was the servant of the defenders, but the defenders did not employ David Woodhead. They did not select him; he was selected and employed by the Gardners alone. It was a mere accident that he had formerly been employed in the pit. He might have been at the time of his engagement an entire stranger to it—brought by the Gardners from a distance without any previous consultation with or notice to the defenders. The defenders do not even seem to have approved of the employment further than by allowing Woodhead to work. They had nothing to do with his wages either as to amount or as to conditions of payment, and undoubtedly Woodhead might have been dismissed by the Gardners alone without the consent of, or even against the will of, the defenders. Still further, the defenders seem to have had no immediate control over the details of Woodhead's work, provided only he complied with the general and special rules of the pit. The Gardners might have employed Woodhead in any part of their contract work—in driving the level through stone or clay—in brushing the roof—in excavating coal—or in any other incident of the work. With all this the defenders had nothing to do, for certainly Woodhead was not their proper or immediate servant, and all that they could insist in besides obedience to the rules was the execution by Gardner of his special contract. It was said that under special rule 3 Beveridge might have dismissed Woodhead, and probably this is true, because the oversman has general power to engage or dismiss all workmen; but this is only to secure the safety of the pit. Such absolute power must be vested somewhere, and if Beveridge dismissed Woodhead without cause or reason, and without alleging or shewing that in his judgment dismissal was necessary for safety, Beveridge or the defenders might be liable in damages. It seems to be clear that, apart from the regulations, the servant of an independent

contractor could not be held to be the servant in any proper or even in any legal sense of the defenders.

But it does not follow that because the two men have not the same direct employers, or are not under the direction of the same person as to their proper work, and are not paid by the same person, they may not yet be in the sense of the law "fellow-workmen or *collaborateurs*." In every extensive work certain servants or workmen often require to hire at their own expense their own assistants, whom they pay, and with whom, except indirectly, the master has no concern. It is in evidence in the present case that it is a common practice in all mines—more common than the reverse—"for individual miners to employ and pay their own drawers," and the coal-masters have nothing to do with the drawers except in exceptional circumstances. So it used to be common in some districts for agricultural labourers to have each their own bondager or apprentice, with whom the farmer had nothing to do, but whose work was paid for to the ploughman or principal servant. Such practices will always be common where workmen are paid by piece or by amount of output, as in mines, for it enables the skilled miner to make the most of his acquired dexterity while mere labouring work is done by his assistant; and yet I cannot doubt that the miner and his drawer would be held as fellow-servants in a claim by either of them for damages against the master. In the strictest possible meaning of the word, they would be *collaborateurs*, liable to each other for their individual faults, but neither of them having a claim against the master for the fault of the other. The present case is a more difficult case than that of hewer and drawer, but it only differs in degree, because the contract with the Gardners, and their contract with their assistants, were a little more extensive and a little more express. In substance, the Gardners were just miners and colliers, working by the piece. Instead of day-wages for themselves and assistants, they were to be paid 7s. per fathom and colliers' wages at 2s. per ton for coal put out from the level or in the course of driving it. It was a small contract 50 fathoms of level and 40 fathoms of dook, and though so many as 15 or 16 men were employed besides the two Gardners, that was because the work was urgent, and they required to work in shifts five or six at a time. I am of opinion that in the circumstances of the present case the sub-workmen hired by the Gardners were really simply fellow-workmen or *collaborateurs* with the Gardners themselves, and by consequence, and in so far as the present question is concerned, fellow-workmen with Beveridge, the underground oversman. I really cannot regard the case as different from what it would have been if the work had been in no hurry, and the two Gardners, who were to work, and did work themselves, had each hired his subordinate drawer or assistant. This might have been the case either if the work had not been pressed, or if Gardner's contract had been a little smaller. It would be very difficult to hold that in a question with a pit-owner a miner's drawer or a piece-worker's assistants are strangers or third parties, to whom the mine-owner is liable for the *culpa* of all his servants.

Of course there may be special cases figured

where the contract is so large, or the position of the contractors so independent, or his right to occupy the mine so exclusive of that of the owner, that different rules might come into play. I confine myself to the circumstances of the present case, and I hold, though I confess not without difficulty, that in the circumstances here Beveridge and Gardner and Woodhead were all, in the eye of the law, fellow-workmen or *collaborateurs* in pit No. 2, and this notwithstanding the fact that they were all under separate arrangements as to engagement, payment of wages, and details of work. It does not require payment of wages, or even contract of employment at all, to constitute the relationship of fellow-servants or *collaborateurs*. A volunteer or person who willingly, or it may be from pure good nature, assists servants in doing their work, though gratuitously and without any contract, becomes a fellow-servant to this effect, that he has no claim on the master for the fault even of another servant whom he was not assisting—*Degg v. Midland Railway Co.*, 26 L.J., Exch. 171; *Potter v. Falkner*, 31 L.J., Q.B. 30. These cases—and there are others—show that the personal bar excluding the claim of damages against the master may be reared up even where there is no contract of service with the plaintiff, and no wages of any kind either stipulated for or due.

I desire here specially to notice that it by no means follows that because David Woodhead and Beveridge are held fellow-servants or *collaborateurs* in regard to the present claim against the mine-owner, that therefore David Woodhead would be held as in other questions or to all effects the servant of the defenders. It is quite possible that by assuming the place of a fellow-workman or *collaborateur* David Woodhead might bar himself from making the present claim against the defenders, and yet in a question with a third party he might in no sense be held a servant of the defenders at all. In short, it is possible that persons may be fellow-servants or *collaborateurs* in the same work without being servants of the same master, or perhaps without being servants at all in the strict and proper sense of the word; and in determining, as upon the whole I now do, that David Woodhead and his representatives have no claim upon the defenders, because in substance David Woodhead and Colin Beveridge were fellow-servants or *collaborateurs*, I do not in the least fix or determine that the defenders would have been liable to third parties for the fault or negligence of David Woodhead. In short, a party may, by volunteering to act with servants, and in various other ways—and agreeing to serve contractors in such a mine as this seems to be one of the ways—bar himself from holding the mine-owner liable for the *culpa* and negligence of his servants, and yet he may not in any sense become the servant of the mine-owner, so as to make that mine-owner liable to third parties for his, the contractor's, servants' faults.

But these considerations naturally lead me to consider the second legal question raised in this case, which is—That, apart from Beveridge and Woodhead being fellow-servants or *collaborateurs*, and even supposing that they were not so in the legal sense of these words, was their relative position such that Woodhead could not claim against the defenders for reparation for the fault or ne-

gligence of Beveridge, but can only claim reparation against Beveridge himself, to whom alone can be ascribed personal or individual fault?

This question may be stated more generally thus—In what cases is a master or employer liable in reparation or damages for the fault or *culpa* of his servant where no fault or *culpa* of any kind can be imputed to the master himself?

Now, before answering this question, I remark that the general rule of law is that *culpa tenet suos auctores tantum*. As a general equitable principle, no one ought to be made responsible for the fault or crime of another, with which fault or crime he has nothing to do, and for which he is not in any way to blame. In so far as proper criminality is concerned—that is where there is dole or malice in the criminal alone—no one but the criminal himself is punished therefor; and this is the law of most civilised countries, exceptions or seeming exceptions being introduced very sparingly, and to secure some advantage or supposed advantage to the public. But these exceptions are so rare, at least among civilised nations, that they may be left out of view; and it may be taken as an almost absolute rule that the criminal alone is answerable for his crime. No one is to be punished for the offence of another. Accordingly, even where a master is answerable for the fault of his servant, the rule is not so far pressed as to make the master answerable for his servant's crime or intentional wickedness. In such cases the general rule applies—*culpa tenet suos auctores tantum*. Of course, if the crime has been incited or induced or commanded by the master, the master will be responsible for all the consequences, and will indeed himself be punishable criminally (but that will not be because he is answerable for his servant's crime), for in such cases the master himself is criminal—an accomplice, or, as we say, art and part in the crime.

But undoubtedly one exception is admitted to this very general rule, that *culpa* or fault holds or makes answerable the person in fault, or the wrongdoer alone, and that is the case where a servant in the proper exercise of his employment causes by his fault or negligence injury to a stranger or third party. In such a case the master will be answerable to the stranger or third party in civil consequences, just as if the master himself had committed the fault or negligence; and the real question in the present case is, How far this exception extends, and, in particular, does it extend to cases where the person injured stood in a relation to the servant in fault similar to the relation in which the late David Woodhead stood to Beveridge, the defenders' overman?

I am quite aware of the difficulty and danger of laying down general rules, or, indeed, of going beyond the specialities of the particular case with which we are dealing, and yet I feel compelled in the present case, in order to decide satisfactorily the precise question before us, to seek for some general principle which may be applicable to all similar questions. I do not think it would be satisfactory to proceed upon specialities, for I am of opinion that a very general question is fairly raised here, and one calling for the announcement and application of a general principle. I am disposed to state the general principle thus:—That a master is only responsible for injuries or damages occasioned by the fault of his servant

when the injury is so occasioned to third parties or strangers, members of the public, with whom the master has no contract, and who are not placed in any special relation to the master in reference to the employment of the servant in fault. It is not in every case that a master is liable for his servant's fault or negligence. This rule is subject admittedly to very many limitations. For example, as already noticed, the fault must be committed when the servant is in the course of his ordinary employment. The rule does not extend to faults committed while the servant is not acting as such—when he is absent from his service on leave—when he is not in any sense on duty, or when he is acting on his own account and not on that of his master. Again, the master is not responsible when the fault of the servant amounts to proper crime—when it is intentional and malicious, although I am aware there are cases where the master's responsibility has been extended to acts done recklessly or in momentary anger.

And so, in like manner, the master is not liable to every person who may be injured by the fault or negligence of his servants even when acting in the proper course of his employment. It is now quite fixed that the master is not liable when the person injured is the fellow-servant and acting in the same common employment with the servant who is in fault. But there is the highest authority for saying that this is not the only case in which a master is not responsible for his servant's fault. It is not the rule or principle, but only an instance or example thereof, and in seeking for the rule I do not think we can stop short of this, that a master is liable for his servant's fault only when third parties or strangers are injured thereby. Of course this still leaves the question open, Who is to be considered a third party or a stranger in such circumstances? and I think the only answer that can be given to this is, that where a person has voluntarily placed himself in such a relation to the master or to the establishment, or organisation carried on by the master, that he must have known that he was exposed to the risk of the negligence of servants, then he can no longer be held a stranger or a third party, and action against the master will be denied.

Many instances occur of such relationships. Thus, although a master will be liable if his coachman negligently runs down or injures a pedestrian in the public street, he will incur no liability, to a friend whom he has invited to ride with him in his carriage and who is injured by the carelessness of his generally competent coachman.—The foot-passenger on the public road is a stranger, but the friend or acquaintance who has accepted a drive in the carriage will not be considered such. In like manner, a guest who accepts of my hospitality will have no action against me although he has been injured by the fault or negligence of my butler or footman or cook, for he is not a stranger but a guest, and he must have had in view the risks of the carelessness of my servants. He takes this risk himself, provided only that the servants were competent and selected with reasonable care. The illustration often given—that the scullion whom the cook has through carelessness scalded will have no action against her master—will equally apply though the cook's carelessness has accidentally scalded or injured not her fellow-

servant but her mistress' daughters or children. No action will lie at their instance any more than at that of the kitchen-maid against the master of the house. It would be quite otherwise if the cook or the butler's carelessness have injured a passer-by on the public street.

I take then the case of a master being liable for the fault or negligence of his servant to be a very limited exception to the far more general, and indeed almost universal, rule, that in cases of crime or *delict* or *quasi-delict* or *culpa*, it is the person to blame who must alone bear the consequences. The master is not responsible, except in the solitary case where an entire stranger who has entered into no relation with the master is injured by the servant's fault, occurring in the ordinary course of the servant's duties.

Now, applying this to the case of a coal-pit or mine like the present, it will very seldom happen that any one voluntarily entering such a mine can claim the position of a stranger. There should be no strangers in a coal-pit. Possibly the Government inspector who goes there in discharge of his public duty might be held a stranger or entitled to a stranger's privilege; and possibly other cases may be figured—for example, the public officers of justice executing a warrant or in search of a criminal;—but leaving such special cases out of view, I am of opinion that all the miners, in the statutory sense of that word, and that all the contractors and sub-contractors and their servants, who become parties to the general rules and parts of the general organisation of such a mine, must be held to take their risk of the accidental negligence or mistakes of all the officials—all of whom they have the means of knowing, and regarding whom they may make any inquiries they please, and that the owners of the pit or the company engaged in working it are not liable for such accidental fault or carelessness unless it can be shown that they are personally to blame for having employed improper or incompetent persons. Everyone who enters a pit, whether as a permitted visitor actuated only by curiosity or by love of science, or as a workman who accepts employment there and makes himself acquainted with its organisation, must take the risk of the carelessness of all the employees, and can only claim damages from the persons who are actually in fault.

It is on this view that the general and special rules under which the mine in question was worked become of importance. All these rules have the force of statute, and were specially assented to and subscribed by the deceased David Woodhead. They show that the pit No. 2 was worked as one undertaking and establishment, organised on one system, governing all persons employed in any way in or about the workings, so that all who accepted employment there were members of one federation or organised body, and as such all were engaged, although it might be in separate departments, in carrying out one common end. In such a case I think every one who enters the pit as a member of the organisation must be held to accept the risk of the accidental carelessness or negligence of other members, and that his only remedy lies against the individual wrong-doer.

On these grounds I think the verdict must be entered-up for the defenders.

LORD SHAND—The jury by their verdict in this

case have found in substance that the death of the pursuer's son was caused by the fault of Beveridge, the defenders' underground manager; and, giving effect to the directions of the learned Judge who presided, this necessarily led to a verdict against the defenders on the issue. The defenders did not by their directors, or otherwise than by servants, interfere in the arrangements or management of the pit in which the accident took place, and it is not suggested that they were themselves guilty of any fault or negligence. It is not alleged that there was want of care in the selection of servants, or in placing at the disposal of these servants all that was required for the safe conduct of the operations. Indeed, it was expressly admitted at the trial that Beveridge was a competent person for his duty, and also that the appointments of the colliery were sufficient. The ground of liability is thus simply fault on the part of the defenders' servant without any fault on the part of the Company; and in these circumstances I am of opinion that the defenders are not liable in damages, that the 1st and 2d exceptions are well founded, and that the first direction asked by the defenders should have been given.

The directions given made the verdict turn entirely on the question whether Beveridge, the underground manager, was a fellow-servant of the deceased. These directions were substantially (1) that if Beveridge was not a fellow-servant with the deceased the defenders were responsible for his fault; (2) that the contention on the defenders' part that Beveridge was a fellow servant was excluded by the terms of the contract with the Gardners, by whom the deceased was directly employed; and (3) that the Mines Regulation Act, including, I presume, the special rules framed in compliance with the Act, did not affect the question. The directions in effect stated that, inasmuch as Beveridge was not a fellow-servant of the deceased, the defenders were responsible for his fault. With much deference to the learned Judge, this direction seems to me *prima facie* to be open to the objection that it is at variance with the latest authoritative statement of the law in the leading case of *Wilson v. Merry & Cunninghame*, in which the Lord Chancellor said—"I do not think the liability of the master to his workman can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or collaborateur of the sufferer. . . . The case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds." A similar view had been previously expressed by Chief-Baron Pollock in the case of *Abraham v. Reynolds* in the Court of Exchequer in England in 1860, when he stated that the case of master and servant was only one of a class, and that the learning on the subject was by no means exhausted. Unfortunately, though the cases which have occurred for decision have been very numerous, no general rule or principle by which future cases may be tested and decided has yet been laid down. The difficulty in the way of doing so is now increased by the circumstance that it is far from easy to reconcile a number of the decisions with one another, or to extract from them and to formulate any rule of clear, general, and certain application.

The ground of action in this class of cases is fault, and the broad principle applicable to that ground of liability is expressed by the rule *culpa tenet suos auctores*.

It cannot, I think, be doubted that this rule is founded on reason. It gives expression to a sound legal principle, and is in accordance with good sense. It appears to me to be most difficult to find a good reason for holding any person who is himself free from fault liable for the consequences of the fault of another, in the absence of any contract or obligation, either express or to be inferred by direct and necessary implication, to undertake such liability. The rule has however been made the subject of a large class of exceptions, or perhaps it should rather be said, the rule has been virtually set aside in a large class of cases, in which the law has professed to give effect to another general principle, viz., *qui facit per alium facit per se*, or, as otherwise expressed, *respondet superior*. The cases to which I refer are those in which an injury has been sustained through the fault of a servant by a stranger to the master. If the question were still open, and the principle to be applied to these cases had now to be fixed for the first time, it appears to me that the rule *culpa tenet suos auctores* is the sound one, and that liability on the ground of fault, apart from contract, ought not to be imposed on any one who has not been personally guilty of fault. The other principle, of *respondet superior*, is in my opinion carried beyond its reasonable scope and extent, and is indeed misapplied, when it is used to create or infer liability for any acts of an agent or servant except such as are truly authorised either expressly or as the legitimate result of the agency or employment. The Lord-Justice Bramwell in giving the opinion of the Court of Exchequer in the case of *Degg v. The Midland Railway Company* in 1857, indicates the view now stated, in these words—“The law, for reasons of supposed convenience more than on principle, makes a master liable in certain cases for the acts of his servants, not only in cases of the nature of contract, which depend on different considerations, but in cases independently of contract, such as negligent driving in the public streets when damage is thereby done.” In the case of the *Bartonshill Coal Company* the reason for imposing liability and applying the maxim *respondet superior* is thus stated by Lord Cranworth—“The master is considered as bound to guarantee third parties 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. The person sustaining injury in any of the modes I have suggested has the right to say—I was no party to your carriage being driven along the road, or your shooting near the public road, or to your being engaged in building a house; if you choose 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. These considerations are as a rule sufficient to justify the wisdom of the rule which makes the person by whom or by whose orders these risks are increased respon-

sible to third persons for any ill consequences resulting from want of due skill or caution.” The reasons thus given for disregarding the principle embodied in the maxim *culpa tenet suos auctores*, and imposing liability on the master, humbly appear to me rather to explain the grounds upon which an exception to the general rule has been introduced, than to afford good reasons for its introduction or adoption. The suggestion that third persons may not know whether the particular injury complained of was the act of the master or of the servant, obviously places the rule on no higher grounds than those of expediency. It affords no good reason for the injustice of holding one person who is free from fault responsible for the fault of another. Again, the fact that a large portion of the ordinary acts of life—such as using the public road with a cart or carriage, shooting game upon inclosed land, building a house on ground adjoining the highway, and the like—are attended with some risks to third persons, and so require the exercise of care, does not appear to me to afford a good reason for imposing liability on those who are in the performance of such ordinary and legitimate acts only—who are themselves exercising an ordinary common-law right with due care on their part, and who are thus guilty of no fault. If I direct my coachman to drive along a public road in a manner or at a pace dangerous to others, liability for injury caused will justly follow, both on the ground of personal fault, of culpa, and on the principle *qui facit per alium facit per se*,—that is on the ground of authority given to do the act which is dangerous to others, which is the proper case for the application of that rule. But if I have chosen an experienced and careful man, and directed him to drive carefully and so as to avoid danger to third parties, or have employed skilled and careful men as gamekeepers, or as workmen in the erection of my house, it appears to me that my use of the highway in the one case, or of my own property in the other case supposed, being one of the “ordinary acts of life,” not necessarily attended with danger to others, and [only dangerous when individual fault is committed, ought not to infer liability on my part should injury result entirely from the fault of my skilled coachman, or gamekeeper, or the builder working in my service. I see no good reason in principle for distinguishing between liability on the part of the master to fine or punishment for the consequences of reckless driving, or reckless firing, or careless building, in the cases I have put, and liability for the civil consequences arising from the same fault. The reckless or careless act of the coachman or gamekeeper or builder being unauthorised, ought not in principle to infer liability in one respect more than the other. There is as much—or I should rather say as little—principle, for holding the master liable for criminal as for civil consequences in the case supposed. In short, the exception to the rule *culpa tenet suos auctores* in the case of strangers, founded on the principle *qui facit per alium*, is, in my opinion, a misapplication of the latter principle, for I think that principle ought to receive effect only with reference to acts authorised expressly, or which are the proper result of implied authority given.

Taking it, however, as settled by the law as now administered that on grounds of “supposed convenience,” or of more than doubtful principle

liability exists to a stranger or third party on the part of a master (who is guilty of no fault) for injuries caused by the fault of a servant acting in his service, there is neither the same reason nor expediency in making a farther or wider class of exceptions to the rule which renders a person responsible for his own fault only. If the person injured be a stranger, it is said he must have a remedy because he has not a ready means of knowing whether the injury occurred through the fault of the master or the servant, and because he has been subjected to risks without his consent. These observations, however, do not apply in the case of persons who are not strangers, but who are placed or voluntarily place themselves in circumstances and relations which necessarily subject them to certain known risks—to persons who enter a common employment, permanently or for a time however short,—who are or become members for the time of the circle of service, or the family or organisation or establishment,—and by so doing undergo risks of a kind naturally incident to their position, in consequence of which they suffer injuries. There is no good reason for extending the exception to the ordinary rule to such cases to the case of proper fellow servants or persons volunteering to take part in the servants' duties—to friends who may visit them,—to the members of a family, or their guests or visitors,—or to any of the members, permanent or temporary, of any organization or establishment in which all, however variously occupied, are working towards one common end or purpose,—should any of these persons receive injury by the fault of one, it may be of a large circle, with whom he is naturally brought into contact.

The question in each case appears to me to resolve into this:—Is the person who complains of the injury a stranger or third party as regards the person who is sought to be made liable for the fault of his servant or agent? Is he one of whom it can be said that no relation subsisted between him and the person whom he seeks to hold responsible for the fault of another, which made the risk he underwent and the consequent injury a natural incident of his position? Unless it can be shown that he is in this position,—that he was, in the language of the Lord Chancellor in the *Bartonshill* case, in a position “external to the master and his servants,”—the ordinary and reasonable rule of *culpa tenet suos auctores*, and not the exception to that rule, applies.

As regards the question, who is to be considered a stranger and so to be entitled to hold the master responsible for the consequences of the fault of a servant, I am humbly of opinion that the decisions have gone as far as the law should allow—some of them indeed too far; and when the cases are carefully considered I think it is not difficult to perceive the reason of this. The truth appears to be that the cases in which strangers claimed and obtained a remedy against the master of a servant in fault were so common that they came to be regarded as examples of a broad and general rule, imposing liability for the fault of others, rather than examples of an exceptional and limited class of circumstances in which an exception to the general rule of *culpa tenet suos auctores* was admitted. It is remarkable that in the case of *Priestly v. Fowler*, which occurred in the Court of Exchequer so recently as 1837, and which is now generally referred to as the earliest authority

in the law applicable to claims of damages for injuries caused by fellow servants or *collaborateurs*, Lord Abinger, in delivering the judgment of the Court, said:—“It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other;” and in that case, on general principles, it was held the servant could not recover. But in most of the cases in this country and in England, indeed in almost all of them which have occurred since that time, it has been assumed in the argument that the ordinary rule or principle was in favour of liability against a master not in fault for the consequences of fault on the part of his servant. The question has been discussed from this as the starting point, and has been usually put:—Is there a good reason why the master should not be responsible in this case? If it be said this is merely a form of stating the question which has not affected the result, I do not agree in the observation. On the contrary, this form of the question having assumed a general rule or principle against the master and imposing liability on him, and so having laid the *onus* on him of responsibility for the fault of his servants unless there were special reasons to exempt him, has I think materially affected the result to the prejudice of the law. The true position of the parties where fault is the ground of action is thus stated by Lord Cranworth in the *Bartonshill* case:—“Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to shew that the circumstances were such as to make some other person responsible”—and if the question had been always so presented, and it had been fully recognised that the person injured must always shew that he was in the position of a stranger to the master sought to be held responsible, I greatly doubt if the liability of the master would have been carried so far as the cases have gone.

In the present case I think it has not been shown that there are grounds for holding the defenders to be responsible to the deceased workman Woodhead, or his representatives, for the consequences of the fault of Beveridge; for I think it cannot be said with truth or propriety that Woodhead in the work in which he was engaged was in the position of a stranger or third party in a question with the defenders. His relation towards the defenders and Beveridge was such that (applying the tests stated by Lord Cranworth in the *Bartonshill* case and already noticed) (1) he or his representatives could have no difficulty in distinguishing whether an injury sustained was the result of fault on the part of the defenders or on the part of their servant, and (2) the ordinary risks or perils necessarily incident to the work in which he engaged were obvious, and such as often lead to serious injury or even to loss of life, either from unavoidable accident or from the fault of others engaged in the pursuit of the same common object. The deceased and Beveridge were admittedly engaged in a common employment, in the sense of common work, although it is said they had not the same master. They were working

in the same pit, and with one common purpose in view, viz., the raising of minerals to the surface. As appears from the rules by which all workers in the pit were regulated, and which have been referred to in detail by some of your Lordships, they had in many respects important duties to each other, Beveridge having had not only the care of the ventilation and roads, but the duty of inspecting the working place at which Woodhead was engaged, as well as the work done by him, and Woodhead being subject to directions and even liable to dismissal by Beveridge. In such circumstances, and where the parties were not only working towards one common object, but were each members of the same community or establishment, standing in a relation which implied important duties to each other and to the defenders, the deceased cannot, I think, be regarded in the light of a stranger, to whom the defenders would be responsible for the fault of their servant. The words of Chief-Baron Pollock in the case of *Abraham v. Reynolds* appear to me to apply forcibly to the present case:—"The rule applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. A friend of the servant—a son or a relation living in the same house, not in the character of a servant, but as a member of the same family—is probably in the same position, and such persons cannot maintain actions any more than a servant could. But that is where they form one family or one establishment for one common purpose." If it be supposed that another miner directly employed by the defenders had fallen to the bottom of the pit from the same cause, and at the same time as Woodhead, I think it is not possible to find a satisfactory principle which will distinguish the two cases so as to make the defenders responsible for the death of Woodhead, though they would certainly not have been responsible for the death of the other workman. Both were engaged in the same pit, as members of the same establishment, working for a common object, and neither therefore was a stranger to the defenders, by whom the pit was being worked. The single circumstance founded on is that the direct employers of the deceased were the Gardners and not the defenders, but that cannot, I think, overcome the effect of the other circumstances already referred to, which place the deceased in a common relation with all the other persons working in the pit.

The case of *Gregory v. Hill*, decided in 1869, was relied on by the pursuer; but I think the grounds of decision in that case are not satisfactory. It seems to me to conflict with the principle of the cases of the *Bartonshill Company*, *Wright v. Morris*, and *Wilson v. Merry & Cuninghame*, and to be directly opposed to the case of *Wigget v. Fox*, in the Court of Exchequer in England in 1856, which has been often referred to in subsequent cases and recognised as authoritative. It appears to me that where a number of persons are engaged, though in different capacities and departments, in the common work of building a house, or a ship, or in any similar undertaking, where from the very nature of the work they have duties to each other, and although the employment is only indirectly from the same

source—the particular classes of workmen having their direct and immediate employment from their own master—there is yet such a bond of union amongst all of them as makes them one family or establishment, and precludes one of them if injured from imposing responsibility on the master of another workmen, as a stranger if injured might do. The cases of *Abraham v. Reynolds* and *Wylie v. The Caledonian Railway Company* are distinguishable from the cases of *Gregory v. Hill* and *Wigget v. Fox*, in this respect, that the persons injured were not members of the same establishment or permanently engaged in an undertaking having, strictly speaking, one common object in view. In the former the person injured was taking delivery of bales from a warehouse, and was injured through the fault of the warehouseman's servant. In the latter, a servant delivering cattle at a railway station, and who assisted in putting them into trucks, was injured by the fault of a servant of the company which was taking delivery. In these cases the injured persons were regarded as strangers, and not as engaged in an employment having a common object, because they were severally acting independently and for separate interests from the persons with whom they were temporarily brought into contact—in the one case in taking delivery from others, and in the other in giving delivery to others whose separate duty it was to take delivery. It may be questioned, I think, whether these cases have not extended the class of strangers too far, and whether, where persons are engaged in such an act as taking and giving delivery of goods or mooring a vessel at a pier, all who are engaged in such work, with duties to each other and having in a reasonable sense, a common object in view, ought not to be regarded as members of one body, none of whom can hold the master of the other responsible except for personal fault; but these cases have, I think, fixed the law which must be applied in similar circumstances, so long at least as their authority is not questioned in the Court of last resort. The cases of *Calder v. Caledonian Company* in 1871, and *Adams v. The Glasgow and South-Western Railway Company* in 1875, relied on by the pursuers, do not conflict with the decision to be now given in this case, for in both the persons injured were using railways as public highways, and were thus in the view of the Court strangers in a question with the companies who were employers of the persons who caused the injuries.

I have only to add, with reference to the argument that the deceased in this case ought to be regarded as a stranger to the defenders in the present question because he was a workman for whose fault the defenders would not be responsible to third parties, I agree in opinion with Lord Gifford, that this does not follow. The immediate employers of Woodhead, the Gardners, would have been responsible for injuries caused by him to third parties—strangers in the course of his work—if such a case occurred; and it may be the defenders would not have been responsible. But I think the question of the defenders' responsibility for injuries sustained by Woodhead through their servant's fault depends upon general considerations entirely different from those which would have determined the defenders' liability to strangers for the fault of Woodhead. This last

question must be solved by the consideration whether Woodhead was properly the servant of the defenders,—whether he was in their service, and acting for them in performing the act complained of,—while it is a sufficient answer to any claim by him or his representatives, based on the fault of a servant of the defenders in the mine, that he was not a stranger—that though his relation to the defenders was not that of a servant hired and paid by them, he was yet one of the general community or organisation, none of whom were strangers to the defenders or to each other.

After the opinions had been delivered some conversation took place among the seven Judges on the question whether the verdict must be entered for the defenders or whether there must be a new trial. Reference was made to the 36th section of the Court of Session Act 1868, which provides for a verdict being taken subject to the opinion of the Court, on a point reserved, and enables either party to move to have the verdict entered for such party although returned against him, if the Court shall be of opinion that the direction was erroneous. The section also empowers the Court if necessary to set aside the verdict and order a new trial. It was said that the object of the section was to avoid the necessity of a new trial, but some doubt was expressed whether it applied where there was a bill of exceptions in common form. It was also asked what in such a case would be the time within which an appeal was competent?—interlocutors granting or refusing new trials not being appealable (55 Geo. III, c. 42, sec. 6) while interlocutors on bills of exceptions are appealable within fourteen days after the date of the interlocutor, or eight days after the beginning of the next session of Parliament [*Ibid.* sec. 7; 7 Will. IV. cap. 14]. This matter being left to the Second Division, the verdict was entered for defenders.

On the defenders' motion for expenses, the pursuer asked a modification, on the ground that on the only issue of fact on record, viz. the fault of Beveridge, the defender had admittedly failed. The plea on which the case was decided, viz. that by the operation of the statutory rules Woodhead was a servant of the defenders, was nowhere stated on record: if stated, it would have been disposed of on the adjustment of issues. The defenders replied that a general denial of fault was a sufficient answer to an action of damages laid on fault; and that the plea of *collaborateur* had in no previous case been decided before enquiry.

The Lord Justice-Clerk observed that in the future wherever in such actions there appeared from the record to be a general work or organisation of labour, as in a house or a mine, no issue could be allowed except on the selection of incompetent servants or on the work not being well found.

The Court pronounced the following interlocutor:—

“The Lords of the Second Division having, along with the four Judges of the First Division, heard counsel on the motion to apply the verdict for the defenders, and on the Bill of Exceptions, in conformity with the opinion of a majority of the seven Judges, enter-up a verdict for the defenders, and assilzie them from the conclusions of the summons: Find the defenders entitled to ex-

penses (including the expenses of the trial), subject to modification, and before answer as to the amount of modification, appoint the defenders to lodge in process their account of expenses, and remit the same for taxation to the Auditor of Court, and decern.”

Counsel for Pursuer—Solicitor-General (Macdonald)—Moncrieff. Agents—Wright & Johnston, Solicitors.

Counsel for Defender—Asher—Mackintosh. Agents—Russell & Nicolson, C.S.

Saturday, February 10.

FIRST DIVISION.

[Sheriff of Midlothian.]

THE PORTOBELLO PIER COMPANY v. CLIFT.

Contract—Assignment—Certificate and Licence.

By contract of service A agreed with a pier company, his employers, to apply for a certificate and licence for the sale of liquors, which he was taken bound to assign to any one whom the directors of the company should require. It was further provided in the contract that either party should be at liberty to put an end to the agreement on giving notice of one month. A was dismissed summarily, and the pier company presented a petition to the Sheriff praying that he should be ordained to assign the certificate and licence to a person named by them.—*Held* (1) that A could not be called upon by the company to assign the certificate to their nominee, but that they were entitled to have the certificate and licence delivered to them without an assignment; and (2), [*dub.* Lord Shand] that the company having mistaken their remedy were liable in expenses.

On 2d May 1876 a contract was entered into between the Portobello Pier Company and Henry Clift, whereby the latter agreed to act as pier-master and manager of the refreshment rooms at the end of Portobello Pier, the property of the former. The engagement was to date from 17th May 1876, on which date Clift began his duties. In terms of the contract he applied for a certificate and licence for the sale of liquors, which was granted, the cost being paid by the Pier Company. He remained in their service until the 27th June following, when he was summarily dismissed.

This was a petition to the Sheriff of Midlothian by the Pier Company against Clift, setting forth the terms of the contract, and particularly that under it Clift was taken bound to assign to such person or persons as the petitioners, through their directors should require, the certificate and licence which he held. He had refused to do so, whereby the petitioners averred that they had sustained, and were daily sustaining, damage through their inability to carry on the business of restaurateurs at the refreshment-rooms. The petitioners prayed that the respondent should be ordained to assign and deliver the said certificate and licence to and in name of Donald S. Fraser, No. 5 South St Andrew Street, Edinburgh, who has been appointed restaurateur in room of the respondent.

The respondent lodged a minute of defence denying the averments made, and pleading—“(1)