being bound to "make provision for lighting" under the statute § 130, this was sufficient to justify the course taken, and the conviction which followed thereon.

At advising—

The Lord Justice-General—My Lords, in this appeal I am of opinion that the duties and obligations of owners in regard to the lighting of common stairs must be regulated generally by the spirit of the provisions running through the Act. When these are looked at, not separately, but in a body, so as to employ one section as the interpreter of another, it appears clearly to have been the purpose of the Legislature that the owner was to supply such permanent materials as were necessary for the domestic use of the subjects owned by him—that is to say, the lamps where oil was to be the lighting material, or the gas-burners and gas-pipes where gas was to be used. The occupiers of the stair or court, on the other hand, were to supply the lighting medium, and to keep the lamps or burners clean and regularly lighted.

The other Judges concurred.

The Court sustained the appeal.

Counsel for Appellant—Brand.
Counsel for Respondent—Balfour.

COURT OF SESSION.

Tuesday, December 9.

SECOND DIVISION.

ADAMS *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation—Culpa—*Collaborateur*—*Railway.*

A single line of railway was worked by what is known as the train-staff system. In consequence of a violation of the rules of that system, an accident happened by which the stoker of a train belonging to a company having running powers over the line was killed. The parties to blame for this accident were the engine-driver and guard of the train, and one of the stationmasters on the line. In an action raised by the widow of the stoker against the company to whom the line belonged, *held* (1) That the deceased and the stationmaster being in the employment of different masters were not fellow-servants, and that, as far as the fault of the latter was concerned, the doctrine of *collaborateur* could not apply; (2) that although the engine-driver and guard of the train were unquestionably fellow-servants of the deceased, and had contributed to the accident by their violation of the rules, the pursuer was nevertheless entitled to recover damages from the defenders as the company whose servant the stationmaster was.

Observations upon the case of *Thorogood* v. *Bryan*, June 20, 1849, 18 L. J. C. P. 336.

This was an action raised by Agnes Hobbs or Adams, widow of the late James Adams, residing in Stranraer, against the Glasgow and South-Western Railway Company, in which she sought to recover £500 in name of damages in consequence, as she alleged, of her husband having been killed by the fault of the defenders.

The deceased's husband was a stoker in the employment of the Caledonian Railway Company. On the 20th June 1874 he was acting as goods train fireman on the single line of railway between Dumfries and Castle-Douglas. That line is the property of the Glasgow and South-Western Company, but is worked jointly by them and the Caledonian Company under the provisions of certain Acts. On the day abovementioned Adam's train arrived at the Dalbeattie Station, which is on this line, shortly after twelve o'clock. It proceeded through the station at a slackened speed, and soon afterwards encountered a ballast train belonging to the Glasgow and South-Western Company returning towards Dalbeattie. The two trains came into collision, and Adams was instantaneously killed.

The defenders, while not disputing to any material extent the facts as set forth by the pursuer, nor imputing any blame to the deceased himself, denied liability, on the ground that the collision complained of had been caused, or at least materially contributed to, by the fault of his fellow-workmen.

The case was tried before Lord Young and a jury, when the following facts were brought out in evidence:—

The single line on which the collision took place was worked by what is known as the train-staff system. For regulating the working of this system the following rules, *inter alia*, have been made:—"1st, No engine or train shall be permitted to leave any train-staff station unless the train-staff for the portion of the line over which it is to travel is then at the station. 3d, If other engines or trains are intended to follow before the staff can be returned, a train ticket stating 'staff following' shall be given to the engine-driver, the staff being exhibited along with the ticket to both engine-driver and guard. This shall be done with all other trains till the last, when the staff itself shall be given to the engine-driver of the last train. After the staff has been sent away, no other engine or train can leave the station or junction, under any circumstances whatever, until its return. 4th, The train tickets shall be kept in a box fastened by an inside spring, and the key to open the box is the train staff, so that a ticket cannot be obtained without the train staff. 9th, No engineman is to start with a train or engine from any train staff station until he has received the train staff or ticket. 11th, When a ballast train has to work on any portion of the line, the train staff will be given to the engine-driver. This will close that portion of the line whilst the ballast train is at work. The ballast train must proceed afterwards to one of the terminal stations of the staff to open the line before the ordinary traffic can be resumed." These rules were binding not only upon the servants of the Glasgow and South-Western Company, but also upon those of

the Caledonian, when working over the lines belonging to the former company. An additional regulation, said to be in force on this line of railway at the time of the accident, was as follows:—"It shall also be the stationmaster's duty to have the '*staff or ticket*' in readiness, and exhibit it to the guard, who shall not start the train until he sees the staff. The stationmaster will then hand it to the engine-driver."

John Robb, the Caledonian Railway driver of the train upon which Adams was fireman, stated that upon 20th June he got a ticket from Douglas, the clerk at Dalbeattie, while passing slowly through the station, but that he did not see the train staff, and that he had been in the habit of passing stations without seeing it. He admitted that he knew the rules with the exception of the last one. William Robertson, the guard, corroborated this evidence as to the practice of passing without seeing the train staff, and also stated that he was ignorant of the last rule, and did not think that he was entitled to refuse to pass until he had seen the train staff. Carmichael, the stationmaster, stated that previous to 20th June he had never given the ticket without showing the staff, but on this occasion he had left the station leaving the clerk or porter in charge. The clerk, William Douglas, admitted that he knew the rule about showing the staff, but that being in a hurry he gave the ticket to Robb without looking for the staff, and in ignorance of the fact that the ballast train was on the road. The tickets were not locked up. It further appeared that the staff was at this time in the possession of the driver of the ballast train, who had received it when passing through the station about eleven o'clock.

After the evidence had been led, a minute to the following effect was adjusted and signed by counsel:—"The parties agree that the jury shall assess damages on the assumption of the defenders' liability, and that the Court shall enter a verdict for the pursuer for the damages which shall be so assessed, or for the defenders, according as they shall be of opinion on the record and notes of evidence that the defenders are or are not legally liable." Then, at the request of the pursuer's counsel, assented to by counsel for defenders, Lord Young asked the jury their opinion on the question—Whether or not the engine-driver and guard (or either of them) of the goods train, were in fault in passing the Dalbeattie station without seeing the train staff?

The jury retired, and on their return stated that they assessed the damages at £300, and, on the question put as above, noted that by a majority of ten to two they were of opinion that neither the engine-driver nor the guard of the goods train was in fault.

In consequence of this minute the case came to be heard before the Second Division upon questions of law raised by the evidence.

Argued for the Glasgow and South-Western Railway Company — The only point settled by the jury was the amount of damage, and their mere opinion upon the question of liability cannot prejudice the defenders. The defenders are not liable, for the following reasons:—(1) Even assuming that the fault lay only with the officials at the Dalbeattie station, they were at the time of the accident collaborateurs of the deceased, all being, although the servants of different masters, engaged upon the same common employment. The deceased had undertaken the risk incidental to being associated with fellow-workmen belonging to other companies. (2) The proximate cause of the accident was the violation of a well-known rule by the driver and guard of the deceased's train, who were undoubtedly his fellow-workmen. They were bound to insist upon seeing the staff before leaving the station, and had they done so the accident could not have happened. The deceased was so identified with them as to bar the present claim for damages (cases of *Thorogood* and *Armstrong*).

Argued for pursuer—The deceased was not a fellow-workman of the officials at Dalbeattie station. They were in the employment of different masters, and the doctrine of collaborateur could not apply. It had been so decided in the case of *Calder*, which was conclusive upon this point. The guard and driver of the train, who were fellow-servants of the deceased, did not contribute to the accident. There was no positive obligation upon them to see the staff before starting. They had not been made aware of the rule which rendered this imperative. This was the opinion of the jury. Even assuming that they were to blame, this did not deprive the pursuer of a claim for damages against the defenders, whose servants unquestionably contributed to the accident by their carelessness. The case of *Thorogood* was a doubtful authority even in England.

Authorities—*Degg* v. *Midland Railway Company*, Feb. 21, 1857, 26 L. J. Exch. 171; *Walker* v. *South-Eastern Railway Company*, 32 L. J. Exch. 205; *Wigget* v. *Fox and Henderson*, Feb. 23, 1856, 11 Hurlstone and Gordon, 832; *Thorogood* v. *Bryan*, June 20, 1849, 18 L. J. C. P. 336; *Waite* v. *North-Eastern Railway Company*, Feb. 4, 1839, 28 L. J. 239; *Bridge* v. *Grand Junction Railway Company*, 1838, 3 Meeson and Welby, 244; *Armstrong* v. *Lancashire and Yorkshire Railway Company*, Jan. 23, 1875, 10 L. R. Excheq. Cases, 47; *Warburton* v. *The Great Western Railway Company*, Nov. 17, 1866, 2 L. R. Exch. 30; *Wyllie* v. *Caledonian Railway Company*, Jan. 27, 1871, 9 Macph. 463; *Calder* v. *Caledonian Railway Company*, June 16, 1871, 9 Macph. 833, Smith's Leading Cases, i. 266; *Rigby* v. *Hewitt*, May 8, 1850, 5 Exch. Rep. 240; *The Milan*, Nov. 28, 1861, 31 L. J., P. M. and A. Cases, 105; Addison on Torts, 4th ed. 389.

At advising—

Lord Justice-Clerk — This case has come before us upon the Judge's notes of evidence taken at the trial. Apparently the parties did not think it necessary to take a verdict from the Jury at all, but they entered into a minute to the effect that (quoted *supra*), and therefore we are now to judge both of the facts as proved by evidence and also of the law of the case.

The nature of the case is this,—It is an action brought by the widow of a man named Adams, who acted as a fireman on a goods train belonging to the Caledonian Railway Company, and running between Dumfries and Stranraer. The Caledonian Railway has running powers over the Glasgow and South-Western line, and in the course of going along that line on the evening of 2d June 1874 that train passed the Dalbeattie

Station about 12 o'clock. It seems that the train-staff, as it is called, ought to have been exhibited as the train was passing through that station by the station-master of the South-Western line, and that the station-master was not entitled to allow the train to go on, or to give a ticket for that purpose, until he exhibited that train-staff. He did not exhibit it, but he gave a ticket; the train went on, and a ballast train which started in front of it, and was then returning, ran into the train. There was a collision in which Adams was killed, and the present action is at the instance of his widow for reparation.

Now, in regard to the facts which I have stated, there is no doubt at all that the train staff was not exhibited; that it ought to have been exhibited; that the ticket was given without that exhibition; that in point of fact it could not have been exhibited, because it had gone with the ballast train, and therefore that fault on the part of the Glasgow and South-Western station-master is certain.

On the notes of the evidence three questions arise for consideration:

(1) Was the deceased a fellow workman with the servants of the South-Western Company?

(2) Did the servants of the Caledonian Company contribute to the injury of the deceased?

(3) If they did, does their contributory fault limit or exclude the action?

On the first head it is unnecessary to resume the questions which have been so frequently discussed as to the law of reparation for injuries cause by the fault of fellow workmen. I had occasion to state my views fully in the case of *Gregory* v. *Hill*, and I adhere to the views I then expressed. The ordinary rule of reparation may be stated in the words of the brocard "*Culpa tenet suos auctores.*" In cases, however, in which the person who actually does the wrong is at the time engaged in work in the employment or under the orders of another, the law has given a wide interpretation to the term "author," and has held it to embrace the employer, on the corresponding maxim "*qui facit per alium, facit per se.*"

The Courts in England, chiefly since the passing of what is called Lord Campbell's Act, have introduced a practical limitation of the application of this last-mentioned maxim in cases arising out of injuries inflicted by one fellow servant on another; not by way of limiting the scope of the principle of liability, but by inferring an implied condition in the contract of service. It is held that the master, on the one hand, stipulates to be free of responsibility for injuries arising from the acts of his other servants in any question with him, and the servant undertakes the risk of such acts occurring in the course of the common employment in consideration of the stipulated wages.

If the question were open, it might perhaps be doubted whether any such condition can be legitimately deduced from the contract of service, and whether the supposed obligation does not partake more of the nature of a legal fiction than of that of a sound and just inference. The duty of a man to protect those whom he induces to enter his service is to the full as great as any he owes to the public. If it were thought that in the present condition of society, and the greater risks incurred in manufacture, the old doctrine of "*qui facit per alium, facit per se*" has too wide a scope, it would have been a more convenient rule to have limited its operation to cases, whether with servants or the public, in which the master had been wanting in due and reasonable precaution. But it is too late to raise any such question. The fiction, if it be one, is found firmly fixed in the law, and it is settled that a servant cannot make his master responsible for injury arising from the wrong of a fellow servant, because, by his own contract with the master he has barred himself from doing so. From this it follows that no one but the employer can plead the benefit of the contract, and the only question remaining on this head is, whether the deceased was employed by the Glasgow and South-Western Company?

I am of opinion that the deceased was employed solely by the Caledonian Company; and that the fact that the latter 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 a private road, would convert the persons using it into servants of the proprietor. It would be a hardship on railway companies to impose on them liability for the servants of all the companies or traders who use their line. But the case of *Calder*, in which the running powers were precisely the same as in the present case, is conclusive on this point.

On the second point I am of opinion that the engine-driver and the guard of the Caledonian train were guilty of negligence which contributed to the death of the deceased. Understanding from Lord Young that the opinion of the jury was not intended to operate as a verdict, I have no hesitation in coming to an opposite conclusion. The engineman and the guard were both aware that it was the duty of the stationmaster to exhibit the train staff to them before giving them a ticket to proceed, and that he was not entitled to allow the train to proceed without doing so. The rules, which are admitted to have been in their hands, make that clear; and although the injunction on them to see the train staff before proceeding might have been more directly expressed, there could have been no reasonable doubt on their minds as to what their duty was. To hold otherwise would be to remove all security for the safety of the public.

On the third ground, two separate views are submitted. It was maintained, in the first place, that the contributory negligence of the fellow-servant is equivalent to the contributory negligence of the deceased himself; and secondly, that this would have been the case even if the deceased had been a passenger.

On the first view I am of opinion that it is entirely untenable. It proceeds on the idea that on some unexplained ground a servant is liable for the wrongful acts of his fellow-servant. But the doctrine I have been considering implies the reverse. The fact that a fellow-servant did or contributed to do the wrong liberates the master; but it does not liberate the fellow-servant, who remains liable for his wrongful

act; and still less can it liberate a stranger who participated in the wrong. In no view which can be plausibly stated can the injured man be responsible for the acts of a fellow-servant with whom he has no contract, nor can these free from responsibility a third party with whom he had not only no contract, but no relations. *Culpa tenet suos auctores*, and if this action had been directed against the stationmaster, he never could have been heard to maintain that he was not liable for his own wrong because a fellow-servant of the deceased was also liable.

The proposition maintained by the defenders on this head, as I understand it, is the following:—That if in the execution of a contract of carriage between a public carrier and a passenger, the passenger be injured through the joint fault of the carrier and a third party, the passenger has no right of action against the third party, who is to escape altogether, because the carrier and the passenger are in law identical, and are responsible for the acts of each other; and the passenger thus caused or contributed to his own injury.

On any principles or analogies with which we are familiar, the mere enunciation of such a proposition would be sufficient to refute it; but we have been referred by the defenders to the case of *Thorogood* v. *Bryant*, in the English Common Law Courts (18 L. J. 336), and the recent case of *Armstrong* v. *Lancashire and Yorkshire Railway Co.* (10 L. R. Exc. 47) as giving its sanction. The case of *Thorogood* was this—It was an action by a passenger in an omnibus against the proprietors of another omnibus in order to obtain reparation for a collision which took place between them in the course of transit. It was pleaded for the proprietors of the omnibus—and the plea was sustained by the Common Law Court—that in respect that the driver of the omnibus in which the plaintiff was had been in fault also, and as the plaintiff, being a passenger, was identified with the driver of the omnibus, he was guilty of contributory negligence, and therefore could not obtain reparation. Now, that is the proposition which is given effect to in *Thorogood's* case and is pleaded here; and I am far from saying that if we were to follow that precedent and hold it sound it is not directly applicable. I have read these cases attentively, and certainly the opinions in the case of *Thorogood* affirm the proposition I have stated to its full extent. But before we can be expected to follow the opinions of English judges, entitled and certain to receive at our hands deserved respect, we must have something more than mere judicial asseveration for our guidance—some intelligible principle—some foundation in law and reason in support of the rule. After carefully examining this case of *Thorogood*, I entirely sympathise with the surprise expressed by Dr Lushington (in the case of the *Milan*) at the judgment itself, and the inability which that great lawyer felt to comprehend the grounds on which it proceeded. It has not been received with favor by the profession in England, as the significant passage in Smith's Leading Cases (1, p. 66), sufficiently shows, but as the Judges in the recent case of *Armstrong* certainly expressed approval of it (although their remarks were *obiter*), and the scope of the principle or rule is very wide, it may be right to examine the matter closely, and ascertain to what amount of authority the decision is entitled.

The ground, such as it is, on which the judgment in *Thorogood's* case is defended by the Judges who pronounced it, as far as I can understand it, is the supposed identity in law between the carrier and the passenger, and I presume that identity holds in every contract of carriage, and makes the passenger or the customer liable for the wrongful acts of the carrier. No stronger expression could be used to imply mutual responsibility than identity. The persons, that is to say, are one and the same, and the acts of one are the acts of the other, as if they had been master and servant or principal and agent. But this is merely the rule of "*qui facit per alium, facit per se*" in a very questionable, and indeed as with deference I think it, extravagant application of it. The very maxim which it taxed the ingenuity of Courts to abridge, when the effect was to shelter the master from responsibility for the acts of his servant, is now revealed in this shape with the effect of protecting the actual wrong-doer from the legitimate consequences of his own wrong.

If it be true that the wrongful act of the carrier is constructively and by imputation the wrongful act of the passenger, it necessarily follows that whenever a third party is injured in the course of the execution of the carrier's contract by rail, every passenger in the train is liable to make reparation to the person so injured, *propter quod fecerunt per alium*, because being identical with the carrier, and responsible for his wrongful acts, they did, or contributed to, the injury.

I am quite aware that the Judges in *Thorogood's* case had no intention of giving any countenance to such a demand. But I see not how it is to be avoided excepting on the assumption which is manifestly true, that the passenger is not identified with the carrier, and is not responsible for what he does. I can only infer that the identity spoken of is not to be understood as a complete legal identity, but that the term is used in a popular sense, sufficient to exclude the action, but not capable of being, nor intended to be, carried out to all its other legitimate and logical results.

The question whether the passenger contributed to the injury is a matter of fact which cannot be partially true and partially false. But is there any ground for holding it to be true in any sense? It seems clear to me that the element which is essential to the application of the maxim *qui facit per alium facit per se* is entirely absent in the relation of carrier and passenger, namely, the element of authority and control. No man can be responsible for the acts of another who has no authority over him. The contract of carriage is a branch of the contract *locatio operis*, and has well-known incidents and obligations. The carrier is bound to carry the passenger safely, and if he fails so to do he is guilty of a breach of contract. The passenger is bound to pay the fare contracted for, and there the legal relation ends. There is beyond this no more identity between them than exists between a Liverpool trader who commissions and the Clyde shipbuilder who builds a ship, or between an English railway company which orders and the manufacturer at Carron who constructs a boiler. They are independent parties to a contract, and neither has control or authority over the other.

It was suggested in one of these cases that

the carrier might be considered as the agent of the passenger. I do not think he might be so considered unless in law he is the agent of the passenger; and he is not the agent of the passenger. There is contract of principal and agent between the parties, and no such relation is implied in the contract of carriage. The carrier does not act on the passenger's authority, but on his own. He runs his public vehicle at his own pleasure, at such time, in such places, and in such manner as he thinks fit. If these things form part of his contract, he must fulfil them; but he is in no respect subject to the passenger's orders or direction. It follows therefore that the carrier is not the agent of the passenger.

No doubt, although the contract of carriage does not imply any mutual responsibility for the acts of those who are parties to it, either may so act as to be participant in the wrongful acts of the other. The passenger may trust himself to a driver whom he knows to be intoxicated or incapable; he may sit beside the driver and take the reins; he may bribe the driver to drive at a dangerous pace; and in many other ways may contribute to his own injury or that of another. But his liability for such acts will be direct, and will depend on his own delict. As long as he himself acts under his contract, he has no responsibility for those who are employed to convey him.

It was suggested in the case of *Thorogood* that the passenger selected the vehicle in which he chose to travel, and therefore became responsible for the wrongful act of the driver. I do not know what virtue there may be in the term "selected," but I suppose the same thing may be said of every man who uses a public conveyance. Selecting the vehicle only means that he used it; and how the use of a public conveyance by a passenger should be a wrongful act, I am quite unable to understand.

I am therefore of opinion that our judgment must be for the pursuer, with the sum of £300 of damages, as found by the jury.

Lord Ormidale — Accidents on railways and consequent actions of damages are unfortunately so frequent—perhaps unavoidably so—that it is right I should in the present case fully explain the grounds upon which I have formed my opinion.

The issue in this case, which raised the question whether the pursuer's deceased husband, who was in the service of the Caledonian Railway Company as fireman of a goods train, was killed through the fault of the defenders, in place of being left to be disposed of by the jury in the ordinary way, was withdrawn from them in terms of a joint minute, by which the parties agreed that "The jury shall assess damages on the assumption of the defenders' liability, and that the Court shall enter a verdict for the pursuer for the damages which shall be so assessed, or for the defenders, according as they shall be of opinion on the record and notes of evidence that the defenders are or are not legally liable."

The damages were assessed by the jury at £300; and the Judges' notes bear that, "At the request of the pursuer's counsel, assented to by counsel for the defenders, I asked the jury their opinion on the question whether or not the engine-driver and guard (or either of them) of the goods train were in fault in passing the Dalbeattie Station without seeing the train-staff; and that in answer to this question the jury stated, by a majority of ten to two, they were of opinion that neither the engine-driver or guard of the goods train was in fault."

Each of the parties claimed the verdict, and moved the Court accordingly.

The defenders maintained they were not liable in respect (1) That the pursuer's husband, and their servant who committed the fault, were at the time of the occurrence fellow servants engaged in the same common work; and (2) That, at anyrate, the pursuer's husband was the fellow servant of the driver and guard of the goods train of which he was fireman, and that the driver and guard were in fault in passing the Dalbeattie Station without having the train-staff exhibited, which, on the doctrine of contributory fault, disentitled the pursuer to recover, it being clear that without this fault on their part the collision, which resulted in the death of the pursuer's husband, could not have taken place.

1. In regard to the first of these propositions, it cannot be disputed, and as I understand was not disputed, that the defenders' servant in charge of the Dalbeattie Station was in fault in directing or allowing the goods train of the engine of which the pursuer's husband was fireman to pass at a time when the train-staff neither was nor could have been exhibited, that the collision and fatal occurrence took place. The defenders' argument proceeded upon this assumption. The only point, indeed, attempted to be made on the part of the defenders under this branch of the case, was founded on the further assumption that their faulty servant and the deceased were fellow servants engaged, as stated on page 6 of the notes, "in the same common work." The basis of the defenders' argument, as thus stated by themselves, is somewhat peculiar, and at once suggests the question, whether on their own showing their contention can be sustained, for I take it to be clear that in order to constitute the relation of fellow servants, not only must they be engaged on the same work, but also under the same employment. Waving, however, this and any other criticism on the language used by the defenders, their case, in this branch of it, appears to me to be fatally defective, for the reason that their faulty servant, and the pursuer's deceased husband, cannot, in any reasonable or correct sense, be held on the evidence to have been on the occasion in question within the doctrine established and settled by the House of Lords in a series of consecutive judgments (*Bartonshill Co.*, 3 Macqueen's House of Lords Cases, pp. 266 and 300, and *Wilson* v. *Merry & Cunninghame*, Scotch App., vol. 1, p. 326), to the effect that where the injury caused by the negligence or unskilfulness of a servant is sustained, not by the public but by another servant acting in the same employment, under the same master or employer the master or employer is not liable unless there be proof of general incompetency on the part of the servant causing the injury, or insufficiency or defectiveness in the machinery or other appliances furnished by the masters, the reason of this being, that although a servant may be taken to have engaged to encounter all risks which are incident to the service

he undertakes, he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Applying the doctrine thus established to the present case, I think it is impossible to hold that the defenders, the Glasgow and South Western Railway Company, were the masters or employers of the pursuer's deceased husband. There was no contract of service between them; he was not in their employment at all, but in a different service and under different masters or employers altogether. The defenders' servant, therefore, by whose negligence or unskilfulness the fatal injury was caused to the pursuer's husband, and the latter, were not fellow servants engaged in the same service, or under the same master or employment. And if it be so, there is no room for the assumption that the pursuer's deceased husband, when he entered the service of the Caledonian Railway Company, must have engaged to encounter, not only all the risks incident to that service, but also all the risks incident to the service of the defenders' company, in which he never was. Not only does it appear that the rule, but also the reason of the rule, established by the cases referred to is inapplicable to the present case.

Accordingly, in circumstances in all essential respects similar to those which occur here, it was, in *Calder* v. *The Caledonian Railway Company* (9 Macph. 833), held unanimously by the Court that a railway company was liable in damages for injuries caused by the fault of a pointsman in their employment to the guard of a train belonging to another company, while passing over a portion of the line of the former company; and this judgment is entitled to all the more weight that it followed on the case of *Gregory* v. *Hill* (14th Dec. 1869, 8 Macph. p. 282), decided not two years before, on the same grounds, and to the same effect.

It is true that the Acts of Parliament regulating the running powers of the Caledonian Company, in whose employment the deceased was on the occasion in question a servant, were nominally different from these in the case of *Calder* v. *The Caledonian Railway Company*, but on the clauses in both, so far as relating to the matters in dispute being examined in the course of the discussion in the present case, it was found that there was no substantial difference in their terms.

In the words, therefore, of the Lord President, who delivered the judgment of the Court in *Calder's* case, it appears to me that the Caledonian Company and the deceased, one of their servants, are to be considered as strangers to the defenders' company and their servant who committed the fault. And if I am right in this, the first ground on which the defenders maintain their case entirely fails.

2. The other, and only other, ground on which the defenders rely, is to this effect—that the pursuer's husband was, if not the fellow servant of the individual in the employment of the defenders who committed the fault, the fellow servant of the driver and guard of the goods train of which he was fireman, and that as the guard and driver were in fault in passing the Dalbeattie Station without having the train-staff exhibited to them, the pursuers are, on the principle of contributory negligence, debarred from recovering damages. This proposition involves different considerations from those which have been already noticed, and may, in consequence of the English decisions which were cited in the course of the argument, be held to be attended with some difficulty.

Clear, however, it is, that if the Court is to be guided by the opinion of the jury, as stated in the notes, neither the engine-driver nor the guard of the goods train, the only fellow servants of the deceased who are said to be implicated, was in fault, and if so, all room for the defenders' contention under this branch of their case is excluded. But it was strenuously urged that although both parties are stated in the notes to have assented to the opinion of the jury being taken on the question of fault, it was not intended that they should be bound by it. Now, I must own my reluctance to accede to this view, which necessarily assumes that the parties meant nothing by consenting to the opinion of the jury being taken, and that neither was to be bound by it. I cannot understand how this could be, and, for myself, I cannot help thinking that the correct course would be for the Court now to hold both parties bound by the opinion of the jury, obtained as it was of mutual consent.

If this course, however, is not to be adopted, and assuming that the Court is entitled to determine for itself, on a consideration of the evidence, whether the deceased's fellow-servants, the engine-driver and guard of the goods train of which he was fireman, were on the occasion in question in fault, as well as the defenders' servant, I would be disposed to hold that they were. Without entering into details, it appears to me that it was the duty, as enjoined by the rules of the service, of the engine-driver and guard not to have passed on the occasion in question Dalbeattie Station without seeing the train-staff, and that they were in fault in doing so. The question of law is thus raised—Whether the fault of the deceased's fellow-servant—for it is not said the deceased was in fault himself—excludes the pursuer's right to recover damages, on the ground that their fault must be held to have been contributory fault on the part of the deceased.

So far as I am aware, this question has not been the subject of direct decision in Scotland; and I cannot help thinking that a decision now in the affirmative of it would be inconsistent alike with sound principle and the reasoning on which the House of Lords proceeded in the cases which have been referred to, viz., that in order to support the defence of an employer to an action at the instance of a servant for injury sustained in the course of his employment, it is necessary for the master to show that it was not he who was in fault, but a fellow-workman of the sufferer engaged in the same employment; and this because it must be presumed that the sufferer in entering the service undertook all the risks of that service arising from the fault of his fellow-workman engaged in the same employment. This doctrine may perhaps be thought, and I believe has been thought by many, to go far enough adversely to workmen, but to extend it still further, and to say that not only a workman who has sustained injury in the course of his service cannot maintain action for reparation against not his own employer, but against another party altogether, for an injury sustained through the fault, not of a fellow-workman in

the same employment or at the same work with himself, but in the employment and at the work of that other party, between whom and the sufferer there was no contract of service whatever, would, I think, be altogether inconsistent with sound principle and good sense. To take the present case as an illustration of what I mean, let me ask, how is it possible to suppose that the deceased, when he entered into the employment of the Caledonian Company, can be presumed to have undertaken all the risks of that employment, including the risk of injury caused by his fellow-workmen engaged in the same service, but also all the risks of service with the defenders into which he never entered, and of whose workmen he knew nothing, and between whom and himself there never was, in any correct sense, any community of work or interests whatever. It is surely more consistent with reason and with established law to hold in such a case that the defenders must, on the principles involved in the maxims *qui facit per alium* and *respondet superior*, be answerable for the consequences of the death of the pursuer's husband, caused by the fault of one of their servants who was not a fellow-servant of the deceased.

But the defender maintained, in reference to various English cases—none of them, however, decided in the House of Lords—that the question is no longer open, but must be held to be conclusively settled against the pursuers. The decisions of the English courts, and the opinions of the English judges, are always received in this Court with the greatest respect. It so happens, however, that the English decisions bearing on the present question were shown at the discussion not to be uniform; and as none of them appear as yet to have been under the consideration, or to have received the approval of the House of Lords, they cannot be held as conclusive. It is necessary, therefore, to examine the English cases, or at least such of them as the defenders seemed chiefly to rely upon, viz., the cases of *Thorogood* v. *Bryan* (18 Law Journal, Com. Pleas, p. 336) and *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (10 Law Reports, Exch. p. 47). In the former, the action for reparation was at the instance of a passenger by one omnibus, who, after he had got out and was standing on the road, was knocked over and injured by the pole of another omnibus, and the Court of Exchequer appear to have held that, if the accident was caused by the fault not only of the passenger himself, but of the driver of the omnibus on which he had been a passenger, he would be disentitled to recover. The precise principle, however, on which this was held is not easily discoverable from the report of the case. Mr Justice Celtman, who gave the leading opinion, seems to have held that a passenger in a public omnibus is so identified with the driver of it as to make the fault of the former the fault of the latter; and in the case of *Armstrong* v. *The Lancashire and Yorkshire Railway Company*, where a passenger by one of two railway trains was injured in consequence of the fault of both, the Judges of the Court of Exchequer seem to have expressed an approval, or perhaps I should rather say, stated that they did not dissent from the decision in *Thorogood's* case. But only two Judges—Barons Bramwell and Pollock—composed the Court in deciding *Armstrong's* case, and they do not appear to have been agreed either in their understanding of the principle upon which *Thorogood's* case was decided, or of the principle on which they proceeded themselves in deciding *Armstrong's* case. While it is not very easy to see what was the understanding of Baron Bramwell as to the principle of decision in *Thorogood's* case, Baron Pollock expressly says that he felt a difficulty in consequence of the use of the word "identified" in that judgment; and he goes on to add—"But what I understand it to mean is, that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." So, according to this explanation, it would seem to follow that every passenger in a public omnibus, or other vehicle, must be held, in regard at least to any action for reparation in respect of injury sustained through the fault of another omnibus or vehicle, to be in the same situation as the driver or owner of the vehicle in which he was himself a passenger.

Now, I must say that I cannot assent to a doctrine so very startling in itself, and so serious as regards its consequences. On the contrary, I can see no reason why, in the present case, the defenders, who are admittedly wrong-doers, through the fault of one of their servants, should not be held liable to the pursuers as representatives of a person who was himself free from fault, and not answerable for the fault of the defenders, or any one in their employment. Nor can I think that the opposite doctrine, which seems to have been given effect to by the learned Judges in the cases of *Thorogood* and *Armstrong*, has been as yet so established that it ought to be followed or adopted without a more thorough discussion, and a more authoritative judgment than it has yet received. Not only has it been adversely criticised by the profession in England, as in Smith's Leading Cases (vol. 1, p. 266 of 6th edn.) and Mr Addison's Book on Torts (p. 388), but that it has not been hitherto accepted in the courts in England as settled law is clear from the case cited in the report of *Armstrong* v. *The Lancashire and Yorkshire Railway Company* — *The Milan* — where Dr Lushington expressly said that he declined to be bound by *Thorogood* v. *Bryan*.

I am therefore, for the reasons now stated, of opinion that the defenders have failed in both branches of their argument, and that the verdict in this case should be entered for the pursuer for the damages assessed by the jury.

Lord Gifford—This case raises several questions of very general application. When the evidence had been concluded before the jury, the counsel for both parties concurred in a joint minute to the effect that the jury should assess damages on the footing of liability, leaving legal questions to the Court. Now, that minute was just a judicial bargain by which the parties are bound. The answer of the jury upon the assumption of liability was to assess the damage due to the pursuer at £300. At the same time the presiding Judge, upon the suggestion of the pursuer's counsel, and with the assent of the counsel for the defenders, asked the jury their opinion on the question whether or not the engine-driver and guard of the deceased's train

were in fault, and to that question the jury replied in the negative; and one of the first questions is, whether we are bound by this opinion of the jury? I do not think that we are. The bargain between the parties, expressed in the joint minute, must receive full effect, and by that minute the Court are entitled to look at the evidence and give an opinion on all the facts of the case. If this question put to the jury was intended to modify the minute, that minute should have been then and there altered. Even if their answer were to be regarded as a verdict, looking to the evidence, I should be disposed to come to a different opinion, and hold the verdict to be bad. But I prefer not to look upon it in the light of a verdict, but to take the ground that in this case the parties have made a bargain which is not to be easily departed from, whatever may have been the motive in putting this question to the jury. Be what it may, the effect of the bargain is to make the Court the sole judge of the facts of the case, and the jury merely the assessors of the damages.

Upon the facts of this case there can be no doubt whatever. The accident was due to the fault of three individuals. In the first place, there was that of the stationmaster at Dalbeattie Station. He violated a rule in allowing the train to go upon the single line without exhibiting the train-staff. There is an emphatic rule against doing this. It is permissible to give a ticket to the guard if the train-staff be there, but for obvious reasons this is not permitted to be done if that staff be away. He was further to blame in not having the tickets locked up in the box provided for them, which was intended to be opened only by means of the staff.

I think also that the driver and guard of the deceased's train were in fault, and contributed to this accident. They were bound not to have left the station without obtaining the staff or the ticket, and in the case of the ticket, without satisfying themselves that the train-staff was at the station. I think that the regulations, which were admittedly in their possession, sufficiently prove that. These rules provide that no engine is to be permitted to leave a train-staff station unless the train-staff is *then* at the station, and that the staff, in the case of a train ticket being given, is to be exhibited along with the ticket. I cannot read the word "exhibited" and hold that there was no duty upon the driver and guard to see the staff. The additional rule, which prohibits a guard from starting until he sees the staff, only renders the duty more explicit.

As to the question of law—in the first place, was the stoker, to whom no fault is attributed, the fellow servant of any of these individuals? He was of course the fellow servant of his own engine-driver and guard; and if the present action had been brought against the Caledonian Railway Company it would have been excluded by the well known doctrine by which a master is not liable for injuries caused to one servant by the act of his fellow servant. But was the deceased a fellow servant of the stationmaster? I am of opinion that he was not. The stationmaster was the servant of the Glasgow and South Western Railway Company alone. It would be absurd if the circumstance of one company having running power over the line of another were to make all the servants of the one company fellow servants of those belonging to the other. I think this question is quite settled by the judgment in the case of *Calder*. Douglas, the stationmaster, was not therefore a fellow servant of the deceased Adams.

The only remaining question is, whether the pursuer is disentitled to recover because of the fault of Robb and Robertson, who were the undoubted fellow servants of the deceased? Now, in the first place, I would observe that the principle by which a servant cannot receive damages from his master for injuries inflicted by his fellow servant does not prevent him from his direct action against that fellow servant himself. It is therefore clear that an action could have lain against Douglas, the stationmaster himself; and the question is, whether the pursuer has an action against Douglas' master? This, again, raises the question whether that action is barred by the fact that the fellow servants of the deceased were also in fault? It would be a strange thing to hold that it was. All wrongdoers are liable conjunctly and severally, and an action against Robb, Robertson, and Douglas would have been competent. There would be no difficulty in disposing of this question were it not for the cases of *Thorogood* and *Armstrong*.

Now, I am unable to find a principle upon which to support the judgment in these cases, and we have it proved to us that they have been received in England with disfavour. In particular, we have the judgment of Dr Lushington. Until, therefore, I have a better understanding of the ground upon which these decisions rest, I must proceed upon the general principle that a master is liable for the faults of his servants. We have here proved the undoubted fault of Douglas, who was the servant of the Glasgow and South Western Railway Company, the defenders, and I therefore think the answer which we are bound to give is that the Glasgow and South Western Railway Company are liable in damages to the pursuer.

LORD NEAVES was absent.

The Court accordingly entered a verdict for the pursuer for the damages as assessed by the jury, with expenses.

Counsel for Pursuer—Johnstone—D. Crichton. Agent—Robert Pringle, W.S.

Counsel for Defenders — Balfour — Jameson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, December 10.

FIRST DIVISION.

[Lord Gifford.

MILLER & CO. *v.* WALKER.

Joint Adventure—Fraud—Guarantee.

A firm entered into a contract of joint-adventure with the lessee of a certain mine, by which they were to grant to him their acceptance of two bills, each for £1000, at twelve months, as a bonus for a half share in the lease, he giving a guarantee that the profits upon the mine should amount in the first year, or at all events in the first two years, to £2000, and be first applied to payment of their acceptance. After more than two years, as