Thursday, January 29.

SECOND DIVISION.

[Lord Ormidale and a Jury.

TOUGH *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation — Negligence — Railway — Master and Servant — Liability of Railway Company to Licensee on Premises for Negligence of Servants.

Held that a railway company was liable in damages for injury caused by the negligence of its servants to a passenger's friend, who, by permission of the company's servants, had been permitted to come on the platform.

Mrs Mary Tough, residing at Calton Road, Edinburgh, as an individual, and as tutrix and administrator-at-law for her pupil son Alexander Edward Tough, *pursuer*, brought an action against the North British Railway Company, *defenders*, in which she claimed damages for the death of her husband.

The Lord Ordinary (ORMIDALE) allowed an issue, and on 30th October 1913 the case was tried before his Lordship and a jury, when a verdict was returned for the pursuer.

At the trial evidence was led for the pursuer to the effect that on the evening of 22nd March 1913 the pursuer's husband went, along with two friends, to the Waverley Station in order to see them off by the 9·5 p.m. train to Dunfermline. The tickets of deceased's two friends were checked at the barrier, and deceased was allowed to accompany them inside to see them off at the train. The deceased's friends entered a compartment near the front of the second last coach, and the deceased stood at the carriage talking to them till the train started. As the train began to move out from the platform, which was crowded, deceased walked a few steps along the platform, and in endeavouring to avoid a woman in his path he moved to the side nearest the train and was struck on the back by a carriage door which was swinging open. Deceased was knocked over and fell on to the line, the wheels of the train passing over the upper part of his legs, and inflicting injuries from which he subsequently died.

In the course of the Lord Ordinary's charge to the jury counsel for the defenders asked his Lordship to direct them as follows, viz. —"That the deceased William Hall Tough was a licensee at the Waverley Station on the night in question, and the defenders are not responsible to him or his representatives for the consequences of the alleged negligence on the part of the defenders." His Lordship having refused to give this direction, counsel for the defenders excepted, and his Lordship subsequently signed a bill of exceptions in the above terms.

The defenders having obtained a rule, the bill of exceptions was heard along with the hearing on the rule.

Argued for the pursuer—The exception was incompetent, in respect that it did not ask a direction in law, but only on a question of fact. In any event, although the pursuer's husband was a licensee on the occasion in question, the defenders were liable to the pursuer for the consequences of their servants' negligence. The only exception was that the licensee took the risk of patent dangers. If the defenders were aware that people in the position of the pursuer went on their premises, and did nothing to restrain them, they were liable—*Thatcher* v. *Great Western Railway Company*, 1894, 10 T.L.R. 13; *Watkins* v. *Great Western Railway Company*, 1877, 46 L.J. (Q.B.) 817; *Tebbutt* v. *Bristol and Exeter Railway Company*, 1870, L.R., 6 Q.B. 73; *Messer* v. *Cranston & Company*, October 15, 1897, 25 R. 7, 35 S.L.R. 42; Beven on Negligence (3rd ed.), pp. 443 and 952. *Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92; *Cummings* v. *Darngavil Coal Company, Limited*, February 24, 1903, 5 F. 513, 40 S.L.R. 389, were not in point, and were inconsistent with *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229. These cases were discussed in *Mackenzie* v. *Fairfield Shipbuilding Company, Limited*, 1913 S.C. 213, 50 S.L.R. 79. The present case was ruled by that of *Thatcher* v. *Great Western Railway Company* (*cit. sup.*), from which it was indistinguishable. It was later in date than the case of *Batchelor* v. *Fortescue*, 1883, 11 Q.B.D. 474, founded on by the defenders, and the dicta of the Master of the Rolls (p. 479) and Smith, J. (p. 476), in that case were *obiter* and inconsistent with the later case.

Argued for the defenders—A person who went on private property as a mere licensee with the acquiescence of the owner took all risks to which he might be exposed, with the exception of concealed risks or risks due to allurement, or the malicious acts of the owner or his servants—*Latham* v. *R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398. The negligence of servants was one of the risks taken by a licensee—*Batchelor* v. *Fortescue* (*cit. sup.*), *per* Smith, J., at p. 476, and Brett, M.R., at p. 479; *Bolch* v. *Smith*, 1862, 7 H. & N. 736; *Holmes* v. *North-Eastern Railway Company*, 1869, L.R., 4 Ex. 254, *affd.* L.R., 6 Ex. 123. The case of *Cooke* v. *Midland Great Western Railway Company* (*cit. sup.*) was one of allurement to a trap, and was in a different class from the present. There was here no concealed source of danger, and there was no absolute wrong done by the company. The law of Scotland recognised the distinction between invitees and mere licensees, which was clearly established in the law of England—*Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, *per* Lord Kinnear at p. 1042, 45 S.L.R. 860. The case of *Thatcher* v. *Great Western Railway Company* (*cit. sup.*) was wrongly decided, and had never been followed or properly discussed. In that case the rights of railway companies in their stations as against licensees coming there had not been considered, and were not to be found clearly defined till the case of *Perth General Station Committee* v. *Ross*, July 27, 1897, 24 R. (H.L.) 44, 34 S.L.R. 871. The case of *Watkins* v. *Great Western Railway Company* (*cit. sup.*), referred to in *Thatcher* v. *Great Western*

Railway Company (*cit. sup.*), was not a case of licensees pure and simple.

At advising—

LORD SALVESEN—[*After dealing with the rule for a new trial*]—There remains the bill of exceptions which was taken to the refusal of the presiding Judge to direct the jury in the following terms:—"That the deceased William Hill Tough was a licensee at the Waverley Station on the night in question, and the defenders are not responsible to him or his representatives for the consequence of the alleged negligence on the part of the defenders." That direction was perhaps not expressed as it ought to have been, but as there was no question of the character in which the pursuer's husband was upon the platform, I think we are entitled to consider the question of law which the defenders undoubtedly sought to raise in this way. Their case, as I understand it, is that a person who is neither a passenger by train nor has a legal invitation from the Railway Company, expressed or implied, to be upon the platform next to a train that is going to start, is a mere licensee, and must take all the risks that may arise from his being on the private premises on which he is permitted to be, except those that arise from malicious or deliberate wrongdoing on the part of the owner of the premises or those for whom he is responsible. It will be observed that in this broad statement of what the defenders maintain they include casual acts of negligence committed by the owner of the premises or his servants for whom he is responsible to the injury of the licensee. We had a very forcible argument from Mr Cooper upon this point, which he regards — and I think rightly regards — as one of great general importance to railway companies, and I am disposed to accept at least one of the propositions which he laid down. I think the licensee does take the risk of the condition in which the premises are, subject again to the qualification that the peril from which he suffers was not a concealed peril of which the owner was aware but of which the licensee was ignorant.

There are many illustrations of this proposition. I need not refer to any of the special cases, because they are all examined in two very learned judgments by English judges in the case of *Latham* v. *R. Johnson & Nephew, Limited* ([1913] 1 K.B. 398), which was decided only last year. The doctrine laid down in that case seems to me to be exactly that which has been recognised in various Scottish cases, some of which were referred to by Lord Justice Hamilton in the elaborate opinion which he delivered. But the case of *Latham* was not a case which raised any question of negligence on the part of the servants of the owner of the premises. It was a case where a child had been injured by playing amongst a heap of stones on a piece of waste ground which the owners permitted members of the general public to use for their own purposes. It did not therefore raise the question with which we are here concerned, that question being—Does the licensee take the risk of negligence, whether of omission or commission, by the servants of the owners of the premises on which he is permitted to go?

I pause here to say that there is no doubt that the pursuer's husband was a licensee in the sense in which that word is used in the English authorities. On this particular occasion there was a barrier erected at the entrance of the platform where the tickets of passengers were checked, and no one could go upon the platform at all without the consent of the clerk who was checking the tickets. The object of that checking was to avoid the necessity in a crowded train on a Saturday night of the third class passengers' tickets being checked inside the carriages. What happened was that when Tough went down with his two friends their tickets were checked, and he then asked the clerk if he might be allowed to pass on to the platform along with them to see them off; the clerk nodded, and he thereupon went on to the platform. That is a typical case of a man being expressly permitted to go on to premises from which he could have been excluded if the owner had desired so to exclude him; so that there is no doubt that the law in regard to licensees, whatever it may be, applies to the case of this man Tough, because in no sense can it be said that he was on the platform by invitation, nor had he any contract with the Railway Company which entitled him to special consideration at their hands. The point of real interest and importance in the case is then —Does such a licensee take the risk of the negligence of the servants of the owner of the premises? In my opinion he does not do so, and I think there is no authority in which the contrary proposition has been laid down. I take by way of illustration the case of a man who is permitted to go upon the avenue to a gentleman's country house. Undoubtedly he takes the risk of there being defects in the road—whether they are at the side of the road or in the condition of the roadway. What is good enough for the owner is good enough for the licensee, and if the owner is content to take those risks for himself, the licensee cannot exact any special care or protection on the part of the owner. I make these observations, of course, subject to what I have already said that there must be nothing of the nature of a trap or concealed risk known to the owner but unknown to the licensee, and of which it was the duty of the owner to warn the licensee. But then does the licensee take the risk, for instance, of the coachman of the owner of the avenue negligently driving him down? I think the state of the law would be very extraordinary if that were so. Take a case which is more analogous to the present. Suppose one of the porters in a railway station in driving his barrow of luggage along the platform negligently ran it against a person standing on the platform; it was admitted, as I understand, by Mr Cooper that if he were a person who was about to travel by train he would have a good action against the railway company for such negligence on the part of their servant; but his contention was that the licensee had no claim at all,

but must take, as a condition of the permission that is granted to him of being on the premises at all, all the risks that may arise from the negligence, however crass, on the part of those whom the owner has put in charge of the premises.

I am quite unable so to hold. I do not think that there are any of the cases cited which really create any difficulty except perhaps the cases of *Batchelor* v. *Fortescue* (11 Q.B.D. 474) and *Ivay* v. *Hedges* (9 Q.B.D. 80), there referred to. In *Ivay* v. *Hedges* the plaintiff was permitted to use the roof of a house for drying linen. There was a defect in a rail on this roof, of which the owner of the roof was aware but the plaintiff was ignorant. The plaintiff slipped upon the roof when he was on the point of carrying linen to hang over the rail, and owing to the defect in the rail he slipped through it and fell to the ground and was severely injured. It was held that the owner of the roof was not liable to the plaintiff in damages. Now I quite understand that decision, and I think it was a perfectly sound decision if the defect in the rail was a patent defect. If, for instance, one of the posts of the rail was missing, then undoubtedly the licensee had the same knowledge as the owner and could not complain of his meeting with an accident which resulted from a patent defect, of which he took the risk when he went upon the roof to hang up the clothes. But if, on the other hand, it was a concealed risk, then I rather think that the other class of case might possibly apply, of which *Indermaur* v. *Dames* (1866, L.R. 1 C.P. 274, L.R. 2 C.P. 311) is a good example. But the case does not disclose, so far as I can see, whether the risk was open or concealed; if it were an open risk arising from a patent defect the decision is in accordance with the other authorities.

The other case which I think raises some difficulty is the case of *Batchelor*, to which Mr Cooper attached great importance. I am free to confess that some of the observations of the learned judges who decided that case seem to me to go beyond anything that had been previously laid down, and to run counter to subsequent decisions, and I notice that Mr Beven in his book on "Negligence" takes the same view and comments adversely upon certain observations of the judges in that case. I am bound to say here again that one does not get sufficiently detailed facts to know whether the decision itself was not precisely in accordance with the law as it has been laid down in other cases, although some of the observations in the opinions undoubtedly went beyond anything that had been previously laid down. If the watchman who was injured in that case by what the Court of Appeal thought might be negligence of the defenders' servants, was unseen by them in the position from which he was watching their operations, then the case is quite in accordance with precedents. But if, on the other hand, he was observed by them and they negligently caused him injury in the course of their operations, then I should respectfully doubt whether that decision is in accordance with the law which has been administered in this Court and also I think in England.

But we are relieved entirely from considering the observations in *Batchelor's* case because of the case of *Thatcher* v. *Great Western Railway Company* (10 T.L.R. 13), in the decision of which Lord Justice Lopes, who was the judge who directed the jury in *Batchelor's* case, took part. That case was precisely on all-fours with the present, because not merely was the cause of the accident the same, but the man who was injured was a licensee of the same character as the pursuer's husband in this case. He was a person who had accompanied some friends down to the station, was not intending to travel by the train, had no express invitation, but had gone on to the platform just to see his friends off, and was injured in precisely the same way as that in which the pursuer's husband met his death. In those circumstances I think the case of *Thatcher* is conclusive. It has never been commented upon, far less overruled. I notice it was not even cited in the case of *Toal* v. *North British Railway Company* (1908 S.C. (H.L.) 29), and one may conjecture that if *Thatcher's* case had been cited to the First Division their judgment might not have been the same; they might have been disposed to have allowed inquiry, as the House of Lords eventually did. For my own part I think *Thatcher's* case was well decided. It is of course not binding upon us, but I think it is in accordance with law and the common sense of the matter. We do not recognise that a licensee takes every risk to which he may be exposed on the premises through overt acts of negligence or through negligent omissions which may result in injury to him, such negligence being the negligence of persons for whom the owner of the premises assumes responsibility.

I have therefore no difficulty in coming to the conclusion that we must refuse the bill of exceptions, and that on the other part of the case we must discharge the rule.

LORD GUTHRIE—[*After dealing with the rule for a new trial*]—The question of the defenders' liability for fault of their servants resulting in injury to licensees on their property would, if decided in the defenders' favour, have far-reaching consequences for the travelling public. According to the defenders, railway companies are liable for such injury at stations where persons seeing friends away at a platform are bound to take a penny ticket, but at stations where there are no such regulations railway companies, if liable at all beyond the obligation not to treat the licensee as a trespasser, are liable only for injury maliciously inflicted by their servants in so far as these are inflicted by the servants in the course of their duty. The only direct authority where the circumstances were fairly comparable with those in the present case is *Thatcher* v. *Great Western Railway Company* (10 T.L.R. 13), and it is admitted that if that case, which has not been adversely criticised, was well decided the defenders must fail. I am of opinion that the case was well decided, and

I do not think that any of the opinions quoted by Mr Cooper from other cases prior and subsequent are inconsistent with the result arrived at in *Thatcher's* case. I assume four elements in this case, and I give no opinion as to the result if any of these were absent — first, that there was a failure in duty on the part of the defenders' servants, namely, their failure fully to shut the compartment door or to see that it was fully shut, which resulted, through the subsequent opening of the door, in injury to the deceased; second, that neither this original failure in duty nor the consequent opening of the door were patent to the deceased; third, that this act was not an ordinary incident in the conduct of the defenders' business of which the deceased took the risk; and fourth, that the original act, or at least the consequent opening of the door, occurred after the deceased obtained his licence from the collector to go on the platform. Mr Cooper relied on the opinions expressed in the case of *Latham* ([1913] 1 K.B. 398), where Lord Justice Farwell and Lord Justice Hamilton deal with the case of a licensee as distinguished, on the one hand, from a trespasser, and, on the other hand, from a person who has been invited to the premises and a person under contract. The circumstances of that case were entirely different from those with which we are here concerned, and I do not think that the general principles of law enunciated by these learned Judges support Mr Cooper's contention when applied to the facts of the present case. I refer particularly to the following passage in Lord Justice Farwell's opinion at p. 405—"There are, however, the following exceptions to the freedom from liability, namely . . . (2) 'concealed trap,' that is something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous and without giving notice to the licensee. 'A person coming on lands by licence has a right to suppose that the person who gives the licence . . . will not do anything which will cause him an injury'—*per* Willes, J., *Corby* v. *Hill*" (1858, 27 L.J. (C.P.) 318). It appears to me that this case does not come under the general rule as to the liability of licensees by contrast with persons under contract, but under the exception noted by Lord Justice Farwell, namely, "something added to the condition of the ground as it was when the license was given in a way likely to be dangerous and without giving notice to the licensee."

On the whole matter I think the verdict must stand.

LORD ORMIDALE—[*After dealing with the rule for a new trial*]—In regard to the question of law raised by the bill of exceptions, Mr Cooper admitted that the case of *Thatcher* v. *The Great Western Railway Company* (10 T.L.R. 13) was an authority absolutely against the proposition for which he contended. It seems to me that he has furnished us with no reason for supposing that the law laid down in 1893 in *Thatcher* is not good law, or that it conflicts with any decision of more recent date. The law laid down by the House of Lords in the *Perth Station* case (*Perth General Station Committee* v. *Ross*, 24 R. (H.L.) 44) in 1897 was, Lord Macnaghten said, not new law, but had been the law of England for forty years. It is said that *Thatcher* cannot stand along with cases like *Batchelor* v. *Fortescue* (11 Q.B.D. 474), which has been approved in more recent cases. It seems to me that so far as I could gather them the circumstances in *Batchelor* were somewhat special, and at any rate that the accident occurred in the ordinary and normal course of the operations which were being conducted by the defenders' servants, and further, that the accident was not due to any negligence on the part of these workmen. No doubt the expressions used by the Master of the Rolls are very general, but as the Master of the Rolls as well as Mr Justice Lopes, before whom with a jury the case had been tried, were both members of the Court of Appeal which decided *Thatcher's* case only ten years later, it must be assumed that in the opinion of these eminent judges the law laid down in *Thatcher* did not in the least conflict with the decision in *Batchelor*.

In *Latham's* case ([1913] 1 K.B. 398) *Batchelor* is cited along with other cases as establishing this proposition that the rule as to licensees is that they must take the premises as they find them apart from concealed sources of danger—where dangers are obvious they run the risk of them. Lord Justice Farwell in the same case defines concealed trap, which is one of the exceptions to freedom from liability in the case of a licensee, as follows—"something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous and without giving notice to the licensee"; and he quotes with approval the following dictum of Mr Justice Willes in *Corby* v. *Hill* (27 L.J. (C.P.) 18)—"A person coming on lands by licence has a right to suppose that the person who gives the licence will not do anything which will cause him an injury."

Now it seems to me that the present case and *Thatcher's* case fall within the principle underlying the exceptions to the freedom from liability to which the dicta I have quoted refer. The pursuer met with his injuries, not from any seen or existing danger or risk existing on the premises which he was bound to take as he found them, but because of something which the defenders did of an extraordinary or abnormal nature. Mr Cooper would not admit that the starting of a passenger train with an open door was a normal occurrence at the Waverley Station, and there is no proof that it is. Assuming, therefore, that the pursuer on getting permission to enter the section of the defenders' premises from which the 9·5 train to Stirling was to start, was bound to take the risk of all obvious dangers, that he had to face all the accustomed perils of seeing friends off by a train, that he had to take care of himself, and that he had no right to look to the defenders for protection from the risks attendant on the normal execution of such an operation,

still he was also entitled to rely on the defenders and their servants refraining from negligently doing anything novel or unusual which was calculated to injure him, as the starting a train with an open door was. To that extent they were bound to take reasonable care of him. I think, therefore, that the bill of exceptions should be refused.

The LORD JUSTICE-CLERK concurred with Lord Salvesen.

LORD DUNDAS was sitting in the Extra Division.

The Court disallowed the exceptions.

Counsel for the Pursuer—George Watt, K.C.—Macquisten. Agent—J. D. Rutherford, W.S.

Counsel for the Defenders—Cooper, K.C. —E. O. Inglis. Agent—James Watson, S.S.C.

Tuesday, February 3.

FIRST DIVISION.

(SINGLE BILLS.)

FERRIS *v.* GLASGOW CORPORATION.

Process — Compromise — Joint Minute of Settlement — Minute Signed by Party — No Appearance for Party Signing Minute —Intimation.

When the Court is asked to interpone authority to a joint minute, and neither the opposite party nor his counsel appears, evidence must be produced of timeous intimation of the motion to the other party by registered letter.

Joseph Ferris, miner, 25 Garngad Avenue, Glasgow, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, in which he claimed £750 damages for personal injury sustained, as he alleged, through the fault of the defenders' servants in suddenly starting a tram car while he (the pursuer) was boarding it. The cause having been remitted to the First Division for jury trial, the Court on 18th December 1913 ordered issues.

On 21st January 1914, the action having been extrajudicially settled, counsel for the defenders moved the Court to interpone authority to a joint minute in the following terms:—"The pursuer on his own behalf, and Russell for the defenders, concurred in stating to the Court that this action had been settled extrajudicially, and craved the Court to interpone authority to this minute, to assoilzie the defenders from the conclusions of the action, and to find no expenses due to or by either party. In respect whereof, &c. (Signed) JOSEPH FERRIS, ALBERT RUSSELL."

There was no appearance for the pursuer.

The attention of the Court having been called by the Principal Clerk of Session to the provisions of the Codifying Act of Sederunt of 1913, Book A, cap. iii, sec. 14, requiring such minutes to be signed by counsel, the LORD PRESIDENT stated that the Court would consult the Judges of the Second Division before disposing of the matter.

On 28th January 1914 the judgment of the Court (LORD PRESIDENT, LORD JOHNSTON, and LORD SKERRINGTON) was delivered by

LORD PRESIDENT—We have considered this matter with the Judges of the Second Division, and we are of opinion that when the Court is asked to interpone authority to a joint minute, and neither the opposite party nor his counsel appears, evidence must be produced of intimation of the motion to the other party by registered letter. That intimation will be accepted as sufficient notification to the absent party after such interval as the Court shall deem proper.

Thereafter on 3rd February 1914, evidence having been produced of intimation to the pursuer by registered letter, the Court interponed authority to the joint minute, and in respect thereof assoilzied the defenders.

Counsel for the Defenders — Russell. Agents — St Clair Swanson & Manson, W.S.

HOUSE OF LORDS.

Friday, February 6.

(Before Earl of Halsbury, Lord Kinnear, Lord Atkinson, and Lord Shaw.)

BANK OF SCOTLAND *v.* LIQUIDATORS OF HUTCHISON, MAIN, & COMPANY, LIMITED.

(In the Court of Session, November 29, 1912, 50 S.L.R. 151, and 1913 S.C. 255.)

Bankruptcy — Company — Winding-up — Vesting of Assets in Liquidators—Obligation to Grant a Security—Latent Trust.

The solicitors of a limited liability company wrote to a bank—"We further write to say that we are authorised by the directors, and our London correspondents have our instructions, forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in name of this company for the amount required to secure the debt due by Mr Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood in respect of the arrangements made that the bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence."

Correspondence followed as to whether an assignation or a mortgage should be given to the bank, but though the debenture in favour of the company was