

Saturday, November 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

WINGATE v. THE MONKLAND IRON
COMPANY.

Master and Servant—Reparation—Collaborator—Coal Mines Regulation Act (35 and 36 Vict. c. 76).

An apprentice to a firm of mining engineers who were employed and paid jointly by the landlord and the lessees of a mine to make a periodical survey under the Coal Mines Regulation Act and for other purposes, was, while engaged in making a survey, injured by an explosion of fire-damp caused by a naked lamp in the hands of a workman of the lessees who accompanied him through the workings. He raised an action for reparation against the lessees as responsible for the negligence of this workman. The Court *assoluted* the defenders, holding that the case was ruled by *Woodhead v. Gartness Mineral Company*, February 10, 1877, 4 R. 469, the pursuer having become a member of the organisation of the mine, and having thereby undertaken the risk of injury through the fault of other members thereof.

This was an action of reparation for personal injuries against the Monkland Iron Company. The following findings of the Sheriff-Substitute explain the circumstances in which the action was brought, viz:—“(1) That the pursuer was an assistant or an apprentice to Messrs M'Creath & Stevenson, mining engineers, Glasgow; (2) that on 26th April last he was sent by them to make a survey of workings in No. 5 pit, Thankerton Colliery, leased by the defenders; (3) that said survey was made periodically by Messrs M'Creath & Stevenson for the purpose of the plans of the workings of said colliery, and to check the output; that Messrs M'Creath & Stevenson were, in terms of the lease, named by the landlord, approved of by the defenders, and paid one-half by each; that the surveys were used by the defenders for purposes beyond the obligations of the lease.”

The pursuer when making a survey on 26th April was injured by an explosion of fire-damp or other gas. The averments made by him as to its cause and the defenders' answer thereto were—“(Cond 6) The said explosion was caused by the fault of the defenders in failing to provide, as they were bound by law to have done, an adequate amount of ventilation in said mine to dilute and render harmless noxious gases to such an extent that the working-places of the shafts, levels, stables, and workings of such mine, and the travelling roads to and from such working-places, should be in a fit state for working and passing therein. (Ans. 6) Denied. (Cond. 7) Or otherwise, the said explosion was caused by the culpable neglect and reckless conduct of the oversman or fireman employed by the defenders in said mine, or of the other servants in their employment, and for all whom they are responsible, in allowing a naked light to be taken into and used at or near a working-place therein which

had been disused or standing idle for some days, and which then contained fire-damp or inflammable gas, and that without taking steps to ascertain the existence of such fire-damp or gas, or taking any means whatever to expel the same. (Ans. 7) Denied.”

The pursuer pleaded—“(1) The pursuer having been injured through the fault of the defenders, or of their fireman or oversman, or other servants for whom they are responsible, the defenders are liable to the pursuer in reparation.”

The defenders pleaded—“(1) The pursuer's statements are irrelevant and insufficient to support his pleas. (2) The accident in question not having been caused by the fault of the defenders, or those for whom they are responsible, the defenders are entitled to *absolvitor* with expenses. (3) *Separatim*. The said accident having been caused through the fault of a fellow-servant of the pursuer, the defenders are entitled to *absolvitor*.”

The pursuer's own account of the occurrence of the accident, which was corroborated by other evidence, and was not disputed by the defenders, was as follows:—“I was sent to Thankerton Colliery by my masters on 26th April to make a survey underground. I was accompanied by another apprentice named John Stoaks. I think there are five pits going at Thankerton. We went down No. 5 pit about ten o'clock. We were accompanied by the oversman, Gilchrist, and the fireman, Waddell. Nothing was said about gas before we went down the pit. Stoaks and I had an open lamp each. The fireman and oversman had a safety lamp, but also two open lamps. We first went to the dook workings, and we went round all the faces there, and found men working at every face. After that we came to the pit bottom. When there the oversman said he had never seen gas in the pit. That was all I remember about gas. They then left the safety-lamp at the pit bottom, and we all proceeded towards the rise workings. When Stoaks and I were at B on the plan I was sitting at the other side of the road from where the explosion took place. I was marking some distances and bearings on my book; Stoaks was paying out the chain. The oversman went up towards the hitch to show me a light so as to give me the bearing of the road in order that I might take it down in my book. Waddell went a little after him. They had both open lamps lighted. Stoaks had the chain about ninety-five links paid out when the accident took place. I was marking some distances at the time, and turning round I got the explosion in my face. Stoaks, just before the explosion, called on me to lie down. He had evidently seen the explosion take place, but the flame was upon me before I could do so. After that I felt the flame round me for about a quarter of a minute. In a few minutes I and Stoaks got out of the road altogether.”

Waddell (the fireman) in his evidence stated:—“About two o'clock in the afternoon, having nearly finished the survey, they [pursuer and Stoaks] were at the foot of the road leading to the hitch. The chain was there and the instrument. Gilchrist [the oversman] and I then went along this road towards the hitch. It was to give them the distance. We

took naked lights with us. It was in my hand. I cannot say how far I was up when the explosion happened. I was within a short distance of the hitch. The miners had stopped that place. It was not long before. It was some days, and it had not been worked in for some days. It was not fenced off. . . . I cannot say if that was a place that ought to have been examined by me in the morning. I did not examine it that morning. It was five o'clock in the morning when I was going up that road. I had examined it at half-past two o'clock the day before. . . . If I had taken a safety-lamp on this occasion the explosion would not have happened. I am satisfied now I was a little to blame in not taking a safety-lamp up with me."

The Sheriff-Substitute (BIRNIE) found (after the findings already quoted):—“(4) That while engaged in making said survey the pursuer was burned on the face, neck, and hands by an explosion of fire-damp caused by the fault of the oversman or fireman in the employment of the defenders; (5) that said oversman and fireman were competent, and supplied with sufficient material; (6) that the pursuer suffered damage to the amount of £60: Finds in law that the defenders are not liable in said damage: Assoili-zies them from the conclusions of the action, &c.

“*Note.*—The pursuer was an assistant or apprentice to Messrs M'Creath & Stevenson, mining engineers, Glasgow, and on 26th April last was sent to survey the workings in No. 5 pit, Thankerton colliery, leased by the defenders. He was accompanied by the oversman and fireman, and burned by an explosion of fire-damp, caused by the fireman taking a naked light into a part of the pit which had been wrought out some little time before. It is admitted that the spot was neither examined nor fenced, that it ought to have been either the one or the other, and that the neglect was the fault of either the fireman or oversman. The surveys were made periodically about every six months. Their object was to mark the progress of the workings on the working plans, and to check the output, and they were paid by the landlord and the defenders mutually.

“In these circumstances the pursuer brings this action of damages against the defenders.

“The action is brought at common law, and keeping in view the limited class entitled to sue under the Employers Liability Act 1880, probably could not have been brought under that Act.

“The liability of masters to servants has been the subject of frequent decision in the Courts, both of this country and of England; but for the purposes of this case it is only necessary to refer to the four leading Scotch authorities, *The Bartonshill Coal Company v. Reid*, June 17, 1858, 3 Macq. 266; *Wright v. Roaburgh & Morris*, February 26, 1864, 2 Macph. 748; *Wilson v. Merry & Cuninghame*, May 29, 1868, 6 Macph. (H. L.) 84; and *Woodhead v. Gartness Mineral Company*, February 10, 1877, 4 R. 469. The circumstances of these cases were different. The injured party was in each case a miner, but in the *Bartonshill* case he was injured by the fault of the engine-driver at the pithead; in *Wright v. Roaburgh*, by the fault of the underground manager; in *Wilson v. Merry & Cuninghame*, by the fault of the underground manager, com-

mitted before the miner was in the employment of the defenders; and in *Woodhead v. The Gartness Company*, by the fault of the underground manager, the miner being in the employment of an independent contractor; but in all the cases the rule was affirmed which is known by the name of *collaborateur*, or fellow-servant, that a master is not liable to a servant for the fault of a fellow-servant engaged in the common employment.

“This rule is different from that which regulates the responsibility of a master to third parties, and does not interfere with a master's responsibility for personal fault.

“The question in this case is if the pursuer is within the rule or the principle on which it is founded, and the case of *Woodhead* is the most recent and direct authority. That case was decided by Seven Judges. One of these, the present Lord Justice-Clerk, dissented from the judgment. Another, Lord Deas, placed his opinion on the ground that the pursuer must be held to have been a servant of the defenders; but the remaining five affirmed the principle of which the doctrine of *collaborateur* is only one of many examples, that when one contracts to do, or voluntarily does work, he knows or ought to know to what risks he is exposing himself, and takes on himself these risks. The Lord President says:—‘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. . . . 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 insuring 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; . . . and to hold that a master's 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 the legal principle, would also, I think, introduce great confusion.’ Lord Ormisdale says—‘It is not because 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.’ The principle is, ‘that the injured party, by engaging with others in the same work, . . . must be held to have undertaken all the risks and dangers incident to the position in which he has so voluntarily placed himself.’ Lord Mure says—‘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 em-

ployment is known to be attended with considerable risk, arising in many, if not most, instances from the negligence of fellow-workmen, each workman engaged in that employment is held to have had that risk in view when he undertook the employment; . . . and after a review of the *Bartonskill* case and of English and American authorities, '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.' Lord Gifford says—'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, the master himself being blameless, when the injury is so occasioned to third parties or strangers. I think such claim is only competent to members of the public, with whom the master has no contract, and who are not placed in special relation to the master in reference to the employment of the servant in the fault. . . . 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 and mistakes of all the officials. . . . 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.'

Lord Shand says—'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 has been 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 third or wider class of exceptions to the rule which renders a person responsible for his own fault only. . . . There is no good reason for extending the exception . . . to the case of proper fellow-servants or persons volunteering to take part in the servant's duties, to friends who visit them, to the members of a family, or their guests or visitors, or to any of the members, permanent or temporary, of an organisation or establishment, in which all, however variously occupied, are working towards one common end or purpose; and the Lord Justice-Clerk, in summing up the purport of the decision, says—'It is now conclusively settled that, however independent a contract may be, if the work is a common one, such as the working of a pit or the building of a house, the master or owner cannot be made liable for injury, unless his subordinates be proved to have been incompetent, or the material supplied by him insufficient.' It only remains to be observed that this principle is as old as the *Bartonskill* case, and that although the injured party had in the case of *Woodhead* signed the rules, that, as the Lord President expresses it, only systematised the organisation, and did not create it.

'The pursuer admits that at the time of the accident, if he was a member of the organisation of the pit, the fault of the fireman or oversman

was a risk he was bound to take, but says he was not, because (1) he was not a servant, nor Messrs M'Creath & Stevenson, contractors, within the meaning of the decisions; (2) he was not under the control of the defenders within the meaning of the decisions; (3) Messrs M'Creath & Stevenson were not appointed by the defenders, but the landlord, or at all events by him and the defenders; (4) the surveys being at distant intervals, Messrs M'Creath & Stevenson, or their assistants, had not the means of acquainting themselves with the risks incurred; and (5) when injured he was not engaged in the common work of the pit, that being the output of coal, and he not being engaged in the output of coal.

'It seems to me that none of these considerations exclude him—1st, The principle is not limited to the case of servants, properly so called, and Messrs M'Creath & Stevenson contracted—that is, were employed, and accepted the employment—to make the surveys; 2d, neither can I doubt that they and the pursuer, in matters connected with their own safety and that of the pit, were under the control of the defenders, although in some matters beyond that control, as the oversman, fireman, or strangers were in some matters beyond it; 3d, although Messrs M'Creath & Stevenson were named by the landlord in terms of the lease, they required to be, and were, approved of by the defenders, and were paid by the landlord and the defenders jointly. It seems to me that they thus contracted with the defenders although they also contracted with the landlord, and it is further in evidence that the surveys were utilised by the defenders for purposes beyond the obligations of the lease; 4th, it cannot be said that Messrs M'Creath & Stevenson, or the pursuer, had less opportunity of discovering risks than an ordinary miner on the first day of his employment, or than a miner employed in one part of a pit has of discovering a risk in another part which he has no right to visit, while their superior intelligence enabled them to calculate more accurately the risks incident to all pits, and to make more particular inquiries; and 5th, I think the object of the survey was connected with the work of the pit. See as to this the opinion of Chief-Justice Erle in *Morgan v. The Vale of Neath Railway Company*, L.R., 1 Q.B. 149. It is also to be observed that the fireman, in so far as he took a naked light to a spot which he knew ought to have been examined or fenced, was in fault while engaged in the work of the survey.

'It was observed by Lord Gifford in the case of *Woodhead* that although one in the position of the pursuer was a *collaborateur* in regard to the question of the master's liability, it did not follow that he was so in all questions, so that the present pursuer, although a member of the organisation of this pit in regard to the present question, may not be so in regard to other questions; while if not a member of this organisation he must have been a stranger, and if a stranger, the startling result follows that Messrs M'Creath & Stevenson are liable for his fault to every miner in every pit he is sent to survey.

'Had I arrived at an opposite conclusion I would have thought the fair damages were £60. The pursuer was two months absent from the office. He or his family incurred some expense in visits to the country, and he has doctors' fees

and medicines to pay other than Dr M'Gown, who was sent and is to be paid by the defenders. I allow £10 for the extra expense, £15 for the doctors' fees and medicines, and the balance for pain, risk, and loss of time. The pursuer was paid his salary by Messrs M'Creath & Stevenson when absent from the office."

The pursuer appealed to the Sheriff (CLARK), who pronounced the following interlocutor—
" . . . "Finds that the pursuer was not a *collaborateur* or fellow-workman with the defenders' employees, or engaged with them in a common undertaking, but was a stranger visiting the works in the discharge of his professional duties, and as such entitled to be protected by the defenders against all dangers arising from causes that by the exercise of due skill and precautions on their part could be obviated: Finds that the defenders, by themselves or by those for whom they are responsible, failed to exercise the said due skill and precautions, and that they are accordingly liable to him for the consequences of their neglect: Therefore recalls the interlocutor appealed against, and decerns against defenders in pursuer's favour for the sum of £60 sterling: Finds defenders liable in expenses," &c.

"Note.—I have had considerable difficulty in dealing with this case; but the result at which I have ultimately arrived appears to me to be the only one reconcilable with legal principle and the true meaning of the decided cases.

"I do not differ with the Sheriff-Substitute in his findings of fact—to that extent both sides seem to be willing to accept his views as accurate. The real question seems to me to resolve into this, Can the doctrine of *collaborateur* be successfully maintained by the defenders as applicable to a case of this kind? Or to put it otherwise, as stated by the Sheriff-Substitute, seeing the pursuer was accompanied by the defenders' oversman and fireman, and was burned by an explosion of fire-damp caused by the fireman taking a naked lamp into a part of the pit which had been wrought out for some time before, and seeing it is admitted that the spot was neither examined nor fenced, and that it ought to have been one or the other, and that this arose from the fault of either the oversman or fireman, are the defenders not liable unless it can be made out that the pursuer was a *collaborateur* with their workmen, or engaged with these in a common undertaking? Now, for reasons I am about to give, it seems to me that the Sheriff-Substitute is in error in holding that the pursuer can in any proper sense be considered as a *collaborateur*, or engaged in a common undertaking with the defenders' workmen. I think, on the contrary, that he must be regarded as a stranger present in the pit in the discharge of a duty for which he was answerable, not to the defenders, but to their lessors.

"In the first place, it must be considered that in dealing with him, it is the same thing as if we were dealing with his employers, the mining engineers, Messrs M'Creath & Stevenson, so that if these gentlemen had been themselves engaged in making the survey, and had received injuries as did their assistant, the exact same question would have arisen as to liability. Now, the said engineers were not the servants of the defenders in any proper sense. They were employed by the lessors, and, as is plain from the lease, were so employed for the lessors' special purposes, namely, to ascer-

tain in their interest whether the defenders were or were not conducting the works in accordance with their undertaking. The defenders had no power to dismiss them. They were under no obligations to obey the defenders—indeed, it is highly probable in many cases, if they, the engineers, were to make a proper survey in the interest of the lessors, it would become their duty to disregard directions or suggestions made by the defenders, and which might tend to defeat or embarrass the inquiries that had to be made. That the defenders paid part of the fees of these engineers is nothing to the purpose; that took place in virtue of an arrangement, not with the engineers, but between the lessors and defenders. It is of equally little importance that the defenders might for their purpose utilise the survey made by the engineers and obtain the benefit of their plans and sketches. For the fact still remains that the engineers were employed for the purpose of the lessors. Furthermore, to say that the engineers employed to inspect a mine are fellow-workman with the miners engaged therein in hewing and delivering coal, or that they and such miners are jointly engaged in a common undertaking, appears to me to be altogether unwarrantable. At that rate M'Creath & Stevenson, who as mining engineers are no doubt employed as inspectors and surveyors in perhaps fifty different mines throughout the kingdom, would be *collaborateurs* with the miners in each of these mines respectively, and engaged in all such mines in a common undertaking with the workmen therein—a proposition which on the face of it seems to carry absurdity. It may be said that the mine could not be carried on to advantage without the occasional aid of mining engineers. This may be so; but this is of little avail to the defenders' case. For with equal truth it might be argued that the surgeon employed to attend the miners in case of accident, a firm of artisans employed to supply the miners with tools for excavation, and many other tradesmen without whose aid the works could not be carried on, were to be held as *collaborateurs*, or engaged with the miners in a common employment.

"Again, to extend the doctrine of *collaborateur* to a case like the present would seem to be straining it beyond any decision or *dictum* with which I am acquainted. The general case has been that where a common miner, a carpenter, or other operative was the pursuer. In some cases he was a platelayer, in others an engineman, or something of a similar kind. In all these cases he was obviously fitly enough described as a fellow-servant with the other workman, or as a workman engaged with them in a common employment. To apply this to a mining engineer called in on special occasions and for a special duty, at intervals of half-a-year, to make a survey of the mine, and who could know nothing of the workmen employed or of the way in which they had been in the habit of conducting their operations until he made such discoveries in the course of the special operations which he was called in to carry out, would, it humbly appears to me, be nothing else than an abuse of language. It has no doubt been held that contractors or subcontractors and their servants—in short, all that class of persons who become parties to the general rules of a mine—must be held to be

fellow-workmen. But it seems very obvious that the pursuer comes under no such category. He is neither a contractor, a sub-contractor, or a servant of such persons; he never became a party to the general rules or organisation of the mine. He was not working to a common end or purpose even with the defenders, much less with their servants. In some senses his duties were opposed to their interests—at all events, his duties towards the lessors might seriously conflict with the interest of the defenders. There is a provision in the lease under which in certain circumstances arbiters may be appointed. It seems to me that there are as good or even better grounds for calling such arbiters fellow-workmen, or persons engaged in a common concern with the defenders, as there are to include the pursuer in such a category.

“For these reasons it seems to me that the real position held by the pursuer, as representing and indeed identified with the mining engineers M’Creath & Stevenson, is that of a visitor present in the mine on a special occasion, in the interest, not of the defenders, but of their lessors, and entitled as such to all protection which due skill and precaution on the part of the defenders would secure him.

“If I am right in these views, I do not think it can be maintained that the defenders discharged these duties, and that it must be held that the injuries sustained by the pursuer were the direct consequences of fault on the defenders’ part, or that of others for whom they are responsible.

“The only other question remaining is the amount of damages to be assessed. Probably if I had been dealing with the case as primary Judge, I should have assessed damages at a higher amount than those stated by the Sheriff-Substitute; for it seems indisputable that the pursuer has undergone great suffering, no little risk of life, and that the injuries he received may affect for years to come his chance of effecting an insurance on his life on ordinary terms. I am not, however, disposed to differ from the Sheriff-Substitute in a matter in which he enjoyed better opportunities than I can pretend to for assessing the amount of damage.”

The defenders appealed to the Court of Session, and argued—They were bound by the Coal Mines Regulation Act to make the inspection. M’Creath & Stevenson having undertaken it, in doing it themselves, and anyone in their employment whom they might send to do it, undertook at the same time all risk attending it. The pursuer became for the time part of the organisation of the mine, and had thus taken the risk of injury from the act of the defenders’ servants without redress against any but the author of the injury. Therefore the defenders, to whom no fault was attributable or attributed, were not responsible for the explosion. It was not a case of *respondet superior*, but of *culpa tenet suos auctores*. It was not necessary to the application of this rule that the injured workman should be permanently employed in the organisation to take him out of the category of stranger there on lawful business.

Authorities—*Woodhead v. Gartness Coal Company*, February 16, 1877, 4 R. 469; *Turner v. Great Eastern Railway Company*, 38 Law Times (N.S.) 431; *Charles v. Taylor, Walker, & Company*, 38 Law Times (N.S.) 773; *Lovell v. Howell*, L.R., 1 C.P. 556.

The pursuer replied—The limits of the doctrine of *collaborateur* were reached in *Woodhead’s* case, and the present one lay beyond them. The pursuer was in the position of a stranger, between whom and the mine-owner no contract existed. He was not under the control of the mine-owner, or engaged in a common work with his employees. He was not engaged in the business of the company at all, but in an office imposed by statute upon the mine-owner, and was under no voluntary contract with him to take the risks of his service.

Authorities—*Indermaur v. Danes*, L.R., 1 C.P. 274, and 2 C.P. 311; *Stephen v. Police Commissioners of Thurso*, March 3, 1876, 3 R. 535; *Abraham v. Reynolds*, and *Smith v. Steele*, L.R., 10 Q.B. 125.

At advising—

LORD YOUNG—Four men were engaged in the work of making the survey when the explosion occurred, viz., the two assistant-engineers, of whom the pursuer was one, the pit oversman, and a fireman, and each of the four carried a naked lamp. The explosion was immediately caused by the naked lamp in the fireman’s (Waddell’s) hand. All four were more or less severely burned by the explosion—the pit oversman the most severely of all. Both Sheriffs are of opinion that it was dangerous, and therefore wrong, to use naked lamps, and both attribute the explosion to their use, the lamp that immediately caused it, as it happened, being in the fireman’s hand. In condescendence 6 fault is imputed to the defenders, viz., inadequate pit ventilation, but this was not proved according to the judgment of the Sheriffs, and was not insisted in before us. The question on which the Sheriffs differ in opinion, and which alone was argued to us, is, whether or not the defenders, to whom no fault is imputable, are responsible to the pursuer (the assistant of M’Creath & Stevenson) for the misconduct of the fireman (the defenders’ servant) in lighting him and his fellow-assistant with a naked lamp while making the survey. On this question I agree with the Sheriff-Substitute and differ from the Sheriff. I do not of course doubt for a moment that the defenders are responsible to the pursuer, and indeed all others, for the consequences of any fault or failure of duty on their own part. Nor, equally of course, do I doubt that the defenders are responsible to the outside world, i.e., to strangers who have no concern with their business for all the risks incident to it, including the fault and negligence of people in their employment causing them damage. But if two mining engineers, whether masters or assistants, undertake the duty of surveying a pit, and proceed to discharge it by the light of four naked lamps, two of which they carry themselves, the other two being carried for them by two of the pit workmen, I am not of opinion that the lessee of the pit warrants the safety of the proceeding, and is responsible to any of those engaged for the consequences of an explosion of fire-damp. Assuming, as I do, that the fireman who carried that one of the four naked lamps which in fact caused the explosion was to blame, I doubt whether in the circumstances the others who were engaged in the same work and were also carrying naked lamps could have recovered from him. But assuming that they could, I am of opinion that the defenders, as his employers, are not responsible

to them or any of them for his conduct in this matter. They were all four engaged in contract work connected with the business of the pit, and I think it was no part or term of the contract of any of them that the safety of each should be guaranteed by the defenders against the carelessness or rashness of the others.

I have read with care the evidence, and the carefully prepared opinions of both Sheriffs, and I cannot speak otherwise than in commendation of the exposition of the law, and more particularly the reference to the authorities on the question by the Sheriff-Substitute, in which I concur. This case belongs to a branch of the law in which there has been a great variety of opinion, but one on which I think there should not be any misunderstanding, and I should myself be far from attempting to dogmatise upon it. I think the Sheriff-Substitute has stated the result of the authorities very accurately. They come to this, that a man is responsible for his own fault—and that of course includes that of those whom he employs in the course of his business—for injury to all to whom he is under contract. Again, he is responsible for the fault of anyone in his employment whereby damage is caused to outside people, and that extends not only to a man's business but to other matters, such as keeping a carriage. Any man carrying on a business attended with more or less risk is liable. He shall not say—"Mine is a risky business, and the accident was no fault of mine, but my servants, and I am not liable." The answer is—"No, you for whom the business is carried on must bear the risk incident to it, and if injury is caused to anyone from it you must bear the responsibility for it." I have said that principle would apply equally to other cases than that of a man carrying on business, and I used the familiar instance of the case of keeping a carriage. If, owing to the risks arising from keeping it, a stranger on the street should suffer injury, he who has the glory of keeping the carriage shall be liable for the injury caused in the course of his use of it. He cannot say he is not responsible, because that was a risk incident to the conduct of his establishment. And one of the earliest instances put in this view of the law was that he would not be responsible for injury to the footman behind the carriage, for he is not a stranger, but a party to the contract. The case was put in this way—There is a contract between the footman and the master, and the question is, who, on the contract, is to suffer? and the conclusion was, that it should be as the parties to the contract might have expressed it, but if they had not expressed it, the master should not be responsible. That rule is not limited to the case of *collaborateur*, for the result is the same in the case of the master of a family in relation to those living in his house, showing that the rule depends on a principle of which *collaborateur* is only an instance, and that it is not confined to it. It extends, as I have said, to a man's own family, to visitors and servants in his house. In these cases, also, as well as in that of *collaborateur*, the injured person is not a stranger to the conduct of the establishment, and the risk remains where it falls—the man being himself guilty of no wrong, for of course if he is so, then he is responsible.

I have made these few remarks to show how I must concur in the view of the Sheriff-Substitute as truly expressing the result of the authorities

on this matter, and not in that of the Sheriff, who seems to have been under the impression that this is a stern rule of law applicable to the case of *collaborateur* only. I think the cases show that this is not so, and on the whole matter, I agree with the Sheriff-Substitute that there was no fault here on the part of the defenders, and that they are not responsible for the fault of their fireman in carrying a naked lamp on this occasion. I therefore propose that we should alter the interlocutor, agreeing substantially with the Sheriff-Substitute, but I would suggest that we should distinctly negative the fault of the defenders in point of fact and in point of law, and their responsibility for the accident.

LORD CRAIGHILL.—The appellants are tenants of part of a mineral field in the county of Lanark, and one of the conditions in the lease for this landlord is that the appellants should keep "regular plans and surveys of the workings of the said seams of coal, ironstone, and fireclay, to be drawn out by a person of skill to be named by the said lessors or their forefords and approved of by said lessees, and at the mutual expense of the parties." Messrs M'Creath & Stevenson, mining engineers, were appointed to do what was thus prescribed, and accordingly from time to time the workings were examined and the results recorded on plans which these engineers prepared. These things were not done on all occasions by Mr M'Creath or by Mr Stevenson himself. The services of some one in their employment were thought sufficient for doing what was required; and the pursuer of the present action, who was an apprentice in their office, was one of the persons from time to time put to this work. He was so employed along with an assistant on 26th April 1883, when there occurred an explosion by which he was severely injured when making his examination of the mines. In consequence of this accident the present action was raised against the appellants, concluding for damages on the ground of their liability for the fault to which the explosion was to be attributed. Personal fault originally was imputed to the appellants, but that was not proved; and the ground on which the pursuer's claim has ultimately been maintained is their liability for the fault of their servant, whose negligence was the cause of the accident. The Sheriff-Substitute assoiled the appellants; but the Sheriff recalled this judgment, sustained the pursuer's plea, and decreed for damages. Hence the appeal by which the case has been submitted to our judgment.

Upon consideration I have come to the conclusion that the Sheriff-Substitute was right, and that we ought to revert to his judgment. I so think, because in the first place the present case seems to me to be covered by the case of *Woodhead* and the earlier cases recognising the same principle of decision. What was decided in the case of *Woodhead* as explained in the rubric of the report (4 R. 469) is that the rule of law which imposes upon a master responsibility for injury caused by the fault of his servant while employed in his service applies only in cases where the person injured is a stranger not connected with the work in which he is engaged, the master in other cases being responsible only for personal fault. Taking this decision to be a correct statement of the law, the question for our determination, so far as

that is to be affected by judicial precedent, is whether the facts admit of its application to the present case. Was then the pursuer a stranger—that is to say, a person not connected with the work in which the servant through whose fault the accident occurred was employed. The contrary appears to me to be the fact. The two, no doubt, are of different classes; the work which the one did was of a higher sort than that which was done by the other; and more than that, the operations in the mine, so far as the raising of minerals was concerned, might have been carried on even if the work for which the pursuer was engaged had never been undertaken. Nevertheless, taking things as they were under the lease by which this mine was worked, the two were in my opinion members of one organisation. The examination of the workings at stated periods by an expert for the purpose specified was a condition of the lease under which all the operations in the mine were conducted; and it appears to me consequently that those engaged in the fulfilment of this part of the contract were persons by whom along with others the work of the mine as that behoved to be carried on was accomplished. “Fellow-workmen” or “*collaborateurs*” might—nay, would—be, if common use is to be taken as the text, an awkward or inapposite word by which to express such relationship as there was between these members of this organisation; but in the sense in which it has been used in the cases referred to it is applicable here, and may, nay I think must, be accepted as an accurate description. But in the second place, the fundamental question is not whether the pursuer is a servant and the defenders were fellow-labourers or *collaborateurs* or members of the same organisation, but what is the legal import or result of the contract between Messrs M’Creath & Stevenson, the pursuer’s masters, and the defenders? Is it to be held that the defenders were to answer to M’Creath & Stevenson not merely for their own personal fault but for the fault of their servants in the mineral field? There is nothing to this effect expressed in the contract. There might have been a provision covering either the one party or the other; and as there is not, the presumption is that they were content to leave this to legal implication. My opinion is that in the circumstances M’Creath & Stevenson must be held to have taken the employment which was the subject of their contract with the defenders with all risks attending its execution. Those in fault upon this view of the matter must answer for their fault; but there is no warrant for a vicarious responsibility. An explosion through fault of a worker in the mine is one, and indeed one of the most obvious, of these risks, and as they did not stipulate that the defenders should answer to them for the consequences as if the fault had been their own, the legal and reasonable conclusion is that this is not a responsibility under which, according to the true understanding of the parties, the defenders were to be laid by the contract. The matter appears to me to be one depending upon contract, and as it has not been provided that they should be answerable for their servant’s fault, there is nothing upon which the defenders’ liability can be sustained.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD JUSTICE-CLERK—I cannot resist the conclusion at which Lord Young has arrived. It is rather too late now to go back on the principle on which the previous decisions were pronounced. The idea of a contract by a workman to take all the risks of his master’s business has recently received a severe shock from the Employers Liability Act; but this case does not fall within the Act, and consequently the question here comes to be whether it is covered by the opinions in the case of *Woodhead*. I confess I cannot distinguish this case from that one, and therefore the decision in *Woodhead* leads to the liberation of the master in this case, which must be ruled by it.

The Court pronounced this interlocutor:—

“The Lords . . . Find that the injury sustained by the pursuer was caused by an explosion of fire-damp occasioned by the fault of the oversman or fireman in the employment of the defenders, who were competent and sufficiently equipped for the proper and efficient discharge of their duties: Find that the pursuer suffered damage to the amount of sixty pounds sterling: Find in law that the defenders are not responsible for said damage: Therefore sustain the appeal: Recall the interlocutor of the Sheriff . . . Affirm the interlocutor of the Sheriff-Substitute of 4th January last: Of new assolvie the defenders from the conclusions of the action,” &c.

Counsel for Pursuer (Respondent)—Mackintosh—Morison. Agent—Alexander Morison, S.S.C.

Counsel for Defenders (Appellants)—Hon. H. J. Moncreiff—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, November 12.

FIRST DIVISION.

[Bill Chamber.

DUMBARTON WATERWORKS COMMISSIONERS

v. LORD BLANTYRE.

Arbiter—Statutory Arbitration—Interdict—Ultra Vires—Competency—Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 19).

Statutory commissioners authorised to take certain land for the purposes of their works, served a notice on the proprietor that they intended to take certain portions of land belonging to him, and required particulars of his interest. He having served a claim, arbiters were appointed by both parties; but thereafter, on the ground that the claim made by the proprietor appeared to include claims for compensation which were excluded under their private Act, the commissioners sought interdict against the arbitration being proceeded with. The Court refused interdict on the ground that it was not desirable to interfere unless it was perfectly clear that under the Act the claims in question were excluded.