have contemplated such circumstances as are present in this case. There must be hundreds and thousands of widows who have married again, and if the Act intended to exclude such from guardianship that would have been done by its provisions.

LORD SHAND was absent on Circuit.

LORD PRESIDENT—I think it desirable that the question which we answer in the affirmative should have this addition, that the second party shall be guardian of the pupil children along with the first party.

Counsel for the First Party—D.-F. Mackintosh —Graham Murray. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for the Second Party—Jameson—Patten. Agent—F. J. Martin, W.S.

Wednesday, June 27.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

MULLIGAN *v.* M'ALPINE.

Reparation—Personal Injuries—Fault—Relevancy:

In an action of damages at the instance of a labourer against his employer in respect of injuries sustained through the explosion of a barrel of gunpowder, the pursuer averred that it was his duty to bore holes in rock for blasting purposes, to fill the holes with powder, and to fire the charge; that on the occasion of the accident a portion of the fuse he was using had been carried by the wind to a small barrel of gunpowder which had been brought from the magazine to the working place; that the system under which the work was carried on was unnecessarily dangerous, as the powder was kept in a magazine at a distance from the work, and was carried in barrels, whereas usually powder-flasks were supplied; and that before the accident complaints had been made by the workmen of the system. *Held* that there was no relevant averment of fault on the part of the defender, and action *dismissed.*

This was an action of damages at the instance of Patrick Mulligan, labourer, against Robert M'Alpine, contractor, Glasgow, concluding for £500 at common law, or otherwise £150 under the Employers Liability Act, 1880. The pursuer averred that he had been for some time in the employment of the defender, his duty being to bore holes in rock for blasting purposes, to fill these holes with gunpowder, and to fire the charge.

In answer to this the defender stated that the pursuer had been in his service for several years, and that he had very long experience in blasting operations.

The pursuer further averred—(Cond. 3) "On or about 22nd November 1887 the pursuer was engaged in these duties at a cutting in or near Rae Street, Saltcoats. He was engaged in firing the charge when a gust of wind carried a portion of the fuse or fire to a keg or small barrel of gunpowder, which had been brought from the magazine or store to the working place, and caused it to explode. The statement in answer is denied." (Ans. 3) "Admitted that the pursuer was about the date mentioned engaged as stated, and that while he was so engaged a barrel of gunpowder exploded. *Quoad ultra* not known and not admitted. The pursuer himself brought the barrel of gunpowder to the place where the accident happened, and he is called on to admit or deny this statement." (Cond. 5) "The said accident, and the pursuer's injuries, were due to the fault of the defender, and of those for whom he is responsible. In particular, the system under which the defender carried on his work was a bad and unnecessarily dangerous one. The powder was kept in a magazine or store, about five minutes' distance from the work, and was carried therefrom to the work in small barrels, holding about twenty-five pounds of powder, and averaging in height 14 inches, and in diameter 10 inches. The practice was to remove the cover or top of the barrel with a pick to get the powder out. The said system is unnecessarily dangerous, and is not the usual system. Usually powder-flasks, with narrow orifices, are supplied, the use of which practically obviates all risk. The defender could have, and ought to have, supplied flasks, and ought not to have allowed the use of barrels. It was the explosion of the powder in one of these barrels that caused the said accident, which was thus a direct consequence of the defender's fault. The statements in answer, so far as inconsistent herewith, are denied. In particular, it is denied that the pursuer kept the key of said store or box, or that it was his duty to take the barrel from the store, and to replace it after the shot had been fired, or to remove it to a distance before firing the shot." (Ans. 5) "Admitted that a barrel of powder exploded, and that the powder used for blasting purposes in the cutting at which the pursuer was working at the time of the accident was (enclosed in a bag) kept in a barrel, which was placed for safe custody in a store or box. Explained that only one barrel of powder was kept at a time in this store or box, and that the barrel was there opened; and explained further, that the said powder was under the sole charge of the pursuer, who kept the key of the said store or box. Explained also that it was the duty of the pursuer to take the barrel of powder from the store or box each time a shot was to be fired, and to place it again in the store or box after the shot had been fired, taking care to remove the barrel to a safe distance from the neighbourhood of the shot before firing the shot. On the occasion of the accident, the pursuer, instead of removing the barrel to a safe distance before firing the shot, kept it within a yard of the hole wherein the powder had been placed. The pursuer is called upon to admit or deny these statements. *Quoad ultra* the averments in this article are denied. Explained that in all parts of the defender's contract barrels were employed for the keeping of the gunpowder used for blasting, and that no inconvenience or accident resulted from this method, which was well known to the pursuer." (Cond. 6) "Before the said accident complaints had been made by some of the defender's work-

men of this system, and requests for flasks made to their superiors in the defender's employment, and his foremen and managers were well aware of the danger of his system, and of the condition of his works, machinery, and plant, which, as above stated, were defective and unsuitable for their purpose. It is believed and averred that these complaints and requests, as well as the said system of working, and the condition of the said works, machinery, and plant, were well known to the defender personally. At all events, Keegan, the gaffer, and William M'Alpine, the manager of the defender over the said works, were aware of all this, and when complained to, as above stated, promised from time to time to have the system altered, and suitable flasks supplied. This, however, was never done till the day after the accident, when flasks were at length furnished. The defender was thus at fault, and is liable at common law to the pursuer, or at all events he is liable under the Employers Liability Act, 1880, to the pursuer for the consequences of the fault of his said gaffer and manager in not providing for a supply of suitable flasks, and allowing the pursuer and the other workmen to work as above set forth." (Ans. 6) "Denied."

The pursuer pleaded—"(1) The pursuer having received injuries in his person through the defender's fault (1) in conducting his work under a defective and dangerous system; (2) in exposing his workmen, including the pursuer, to unnecessary risks; (3) in employing defective and unsuitable works, machinery, and plant, is entitled to compensation and to decree in terms of the prayer of the petition."

The defender pleaded—"(1) There being no relevant case stated by the pursuer, the defender should be assoilzied from the action as laid. (4) The injury sustained by the pursuer being the result of a pure accident, or being caused, or materially contributed to by the pursuer's own carelessness, the defender is not bound to compensate the pursuer as craved. (5) The pursuer, being in the knowledge of any risks incident to his employment, or the method of working adopted by the defender, and having worked in the face of any such risks, must be held to have accepted the same, and is barred from insisting in the present action."

Upon 12th April 1883 the Sheriff-Substitute (GUTHRIE) sustained the first plea-in-law for the defender, dismissed the action as irrelevant, and decerned, and found the pursuer liable in expenses.

"*Note.*—The defender's contention that the pursuer has not alleged a defect in the condition of his plant in the sense of the first section of the Act of 1880, is not in my opinion sound, and the question seems to be settled by the cases of *Heske* v. *Samuelson*, 12 Q.B.D. 30, and *Cripps* v. *Judge*, 13 Q.B.D. 583, and as Mr Spens (Employers and Employed, p. 201) points out by *Welsh* v. *Moir*, in Scotland.

"It is a more important point, and one which goes to the bottom of the action, whether the pursuer has not disclosed enough of the facts to preclude him from recovering damages on the principle *volenti non fit injuria*. I have been almost inclined to hold, in considering this question, that it might be better dealt with after a proof. The question whether or not a pursuer in an accident case agreed to incur a particular danger, or voluntarily exposed himself to it, being a jury question or question of fact, that is not to be determined by the mere fact that he was cognisant of a certain degree of risk, and did not desist from the work in which he was engaged. This view is that of the English judges in *Yarmouth* v. *France*, 19 Q.B.D. 647, following on and qualifying the leading case of *Thomas* v. *Quartermaine*, as it also was the view of Lord Kinnear and Lord Deas in *M'Gee* v. *Eglinton Iron Company*, 10 R. 955. But I find myself precluded from taking that view, and allowing a proof before answer by the Scotch authorities, which enable us to escape, in such cases at least as the present one, from some of the difficult inquiries suggested as resulting from the principles laid down in *Thomas* v. *Quartermaine*. The case of *M'Gee* above referred to, and the later and still more apposite case of *Fraser* v. *Hood*, December 16, 1887, were decided, as I think, on this general and salutary principle, that a pursuer who shows in his condescendence that he was aware of a danger incident to his employment, and that, notwithstanding his knowledge, he deliberately continued in his employment taking the risk, is not entitled to make his employer pay in damages for what was no injury, but the result of a hazard voluntarily incurred. It is impossible, as I regard it, to follow the opinions in *Yarmouth* v. *France*, which was a judgment after a trial, without denying the authority of these Scotch decisions on relevancy, which I am bound to respect, and which recommend themselves to my judgment. *Fraser* v. *Hood* is in all respects identical with this case, the only difference being that the pursuer there set forth that he had been five years in the defender's service, while here we get that information from the defender's statements, which are according to correct rules of pleading admitted. The defender says the pursuer has been in his service for several years, and has had a very long experience in blasting operations, and neither of these matters is denied by the pursuer, who at adjustment has carefully inserted answers to certain of the averments of the defender. If he had made no answers at adjustment he might have been taken as denying all the defender's statements; but he has answered, and his general answer is limited to a denial of the defender's statements 'so far as inconsistent herewith.' I therefore hold him as not denying, *i.e.*, as admitting the defender's statements *quoad ultra*, and among these the two to which I have just adverted."

The pursuer appealed, and argued—There was here a relevant averment of fault on the part of the defender. The pursuer averred that the system was in fault, and that repeated complaints had been made about it. There was a failure in not providing the proper plant for the work. The barrel might have been a good enough barrel, but it was not suitable for blasting operations. The employer was in fault in not providing his workmen with the ordinary and proper apparatus for their work, viz., a flask for carrying gunpowder—*Heske* v. *Samuelson & Company*, Nov. 20, 1883, 12 L.R., Q.B.D. 30. The question whether the pursuer knew of the danger he incurred in working as he did, and was accordingly barred from claiming damages, was one to

be decided after a proof, and not upon relevancy. He had averred that the system was bad, that the workmen had complained of it, and that they went on working in the expectation that it would be changed—*Yarmouth* v. *France*, August 11, 1887, 19 L.R., Q.B.D. 647; *Grant* v. *Drysdale*, July 12, 1883, 10 R. 1159; *Murdoch* v. *Mackinnon*, March 7, 1885, 12 R. 810.

The respondent argued—The pursuer's averments were irrelevant. As regarded the alleged defects of the system he maintained it was quite good if worked in a proper manner. All that the pursuer had to do in order to make the system quite safe was to carry the barrel back to the store after the charge of gunpowder had been taken out of it, and he did not allege that it was part of the system that the barrel should be left at the working place. The pursuer had not only contributed to the accident, but the accident arose wholly from his own rashness, and that being the case, he could not recover—*Daly* v. *Arrol Brothers*, Dec. 2, 1886, 14 R. 154; *M'Ghie* v. *North British Railway Company*, Feb. 26, 1887, 14 R. 499; *Fraser* v. *Hood*, Dec. 16, 1887, 15 R. 178; *M'Gee* v. *Eglinton Iron Company*, June 9, 1883, 10 R. 955.

At advising—

Lord Justice-Clerk—In this case I have come to be of opinion, although not without some difficulty, that we should affirm the judgment of the Sheriff-Substitute appealed against, but on this ground only, that there are no grounds disclosed in the statements of the pursuer for imputing fault to his employer. The kind of fault which it was desired to make out against him was this, that this squad of men had received instructions from him as to the method of carrying on their operations, that these instructions were incompatible with their safety, but that they must nevertheless be carried out. The mere statement of such a kind of fault shows its insecurity as a ground of action.

The general conditions under which the men worked were these. The powder was kept in a store in barrels at a little distance away, and when it was necessary to fire a charge one of these barrels was brought to the place of working, and the charge taken from it. It was, I think, conceded that there was nothing to prevent the men, when the charge had been taken out, from taking the barrel back to the store, and if they had done that there would have been no danger in the operation. I rather gather that the men usually saw no reason why they should take the barrel back to the store when they had taken out the charge, and on this occasion they certainly did not do so, and thus this unfortunate accident occured. But it does not follow from that that the arrangements made by the contractor for the safety of his men while carrying on their work were insufficient or defective, and I think that this case comes under the head of injuries arising from misadventure or accident. I do not think it necessary to go into the cases which have been quoted to us, as I think that is a sufficient ground of judgment.

Lord Young—That is my opinion also, and I only wish to explain that where accidents are alleged to have occurred through bad arrangements, or defective machinery supplied by the employer to his workmen, I would usually be very slow to decide the case without making an inquiry into the facts, but here, I think, the whole matter is an ordinary intelligible affair.

The pursuer was engaged by a contractor to conduct certain blasting operations, and he was given tools to bore holes in the rock which had to be blasted. He was also provided with gunpowder for blasting, and I suppose with matches as well. The gunpowder was kept in a store a short distance away from the working place in small barrels, very portable, as they were only ten inches in diameter, and carried to where the men were working. Well, I should think it clear that a man who bores holes in rocks for blasting operations would have an intelligent enough regard for his own safety to know that if he struck a match near an open barrel of gunpowder he would run a risk of being blown up. I should think he would see that the barrel was removed to a place of safety before striking a match. This barrel was taken near the spot where the operation was to take place, the powder taken out of it and poured into the hole, and then the man struck his match, so that a portion of the fuse was blown on the open barrel of gunpowder, and the accident occurred. Then he says that he had not intelligence enough to know his own danger, but I cannot take that off his hands. I should have thought that the simplest way would have been to put a slate on the top of the barrel so that the fire could not get at it. But this intelligent individual left it open, and then he says his master is to blame for that because he did not give him a flask to carry the gunpowder from his store to the work. I cannot here find any allegation of such fault on the part of the master towards his employee as to render him liable in damages, and I think if the pursuer failed to do his own duty he cannot put that failure on the master.

I do not think it necessary to go into the cases cited to us, as I think it quite a plain sailing matter—only that a man engaged in blasting operations did not carry a barrel of gunpowder away to a sufficient distance before he fired the charge.

Lord Rutherfurd Clark—I am disposed to think there should be inquiry in this matter; I should not like to say without inquiry that there is no relevant case.

The pursuer says that there was an improper system employed at this work, and that that system had been repeatedly complained of. I think the only safe course would be to inquire into that allegation.

On the other point in defence, that the defender knowingly exposed himself to danger, I do not think that there are sufficient facts in the record to sustain that plea.

Lord Craighill was absent from illness.

The Court refused the appeal.

Counsel for the Appellant—C. Thomson—A. S. D. Thomson. Agent—A. C. D. Vert, S.S.C.

Counsel for the Respondent—C. S. Dickson. Agent—Macpherson & Mackay, W.S.