I think it is necessary in order to make the libel relevant to set forth that the pamphlet or thing delivered was of an indecent or obscene nature. That is not averred. I therefore think that the libel is not relevant.

The Court quashed the conviction.

Counsel for the Appellant — Rhind. Agent—John Veitch, Solicitor.

Counsel for the Respondent—Sol.-Gen. Asher, Q.C.—Taylor Innes. Agent—Crown Agent.

COURT OF SESSION.

Saturday, October 29.

SECOND DIVISION.

[Sheriff of Dumbartonshire.

JACKSON *v.* M'ALPINE.

Reparation—Master and Servant—Process—Issue—Relevancy at Common Law and under Employers Liability Act 1880 (42 *and* 43 *Vict. c.* 42).

An action for damages (£1500 at common law and £200 under the Employers Liability Act 1880) was raised by a workman against his employer on account of the pursuer having been injured and rendered blind by the explosion of a dynamite cartridge embedded in the soil, which he struck with his pick while engaged at work. The pursuer averred that the accident happened by reason of the foreman at the work and a person under him, but not a fellow-servant of the pursuer, having neglected to draw or explode the cartridge when it missed fire, and further averred that "the said accident occurred through the fault and negligence of the defender, who frequently visited the excavations, in permitting and sanctioning arrangements in connection with the ways, plant, and explosives used at the works which he knew to be defective and extremely dangerous." The pursuer proposed an issue in general terms, with a schedule claiming as damages £1500. The defender moved that the action should be dismissed so far as laid at common law, and the damages in the schedule reduced to £200.

The Court (*diss.* Lord Trayner), without deciding the relevancy of the action at common law, *refused* the motion, and allowed the issue proposed by the pursuer.

William Jackson raised an action in the Sheriff Court at Dumbarton against Robert M'Alpine, railway contractor, Glasgow, and residing at Bearsden, Dumbartonshire, for damages for injuries received by the pursuer on 26th December 1891 while in the defender's employment. The action concluded for £1500 as damages at common law, and alternatively for £200 as damages under the Employers Liability Act 1880.

The pursuer averred—"(Cond. 1) . . . . The defender had the contract for the excavations connected with the erection of a gasometer at Temple gasworks, near Maryhill, for the Corporation of Glasgow. . . . . (Cond. 3) For the placing of the said gasometer a very large pit or hole had to be excavated at the said gasworks. The soil at said pit was partly blue clay, and it was removed by defender's workmen in terraces, and gangs of labourers were employed at different parts loosening the strata with picks and shovelling the material into boxes, which were hoisted when full from the pit by means of cranes. The surface of each of the foresaid terraces was a way on which the labourers stood and worked when picking and shovelling, and it was the defender's duty to have these ways safe for the workmen employed upon them. The said gangs or squads of workmen wrought under the superintendence of the defender and of Robert Moseley, his foreman. (Cond. 4) In order to facilitate the removal of the strata from the said pit, the defender brought large quantities of dynamite on to the ground, which he stored in a wooden shed there, and the defender instructed his superintendent or foreman, Robert Moseley, who did no manual work and in whose charge he left the conduct of the said work and control of squads of men thereat when he was not at the work himself (inclusive of the squad in which pursuer wrought), to use the dynamite, which was made up in cartridges. These cartridges were placed in the foresaid terraces at intervals of a few yards at a depth from the surface of from four to seven feet, the bore going downwards and slightly slanting towards the next lower terrace or working face. The use of dynamite to which the defender resorted was at the time and under the circumstances condescended on unnecessary, as the ordinary means of pick and shovel were practicable and available for the excavation of the earth or clay at which pursuer wrought, and the resort to dynamite was a culpable and reckless proceeding on defender's part. At anyrate, the placing and exploding of the said cartridges was delicate and dangerous work, requiring skill and the utmost care and caution on the part of the defender and his manager or foreman for the safety of the workmen, and was under the immediate direction, control, and superintendence of the said Robert Moseley, and an assistant named Patrick Lawler, who inserted the dynamite in the bores, and exploded it by lighting the fuse attached, (Cond. 5) On Wednesday, December 23rd 1891, the said foreman, who was a person to whom superintendence was entrusted in the sense of the Employers Liability Act, ordered a number of cartridges which had been placed by his directions and at his sight and at the sight of Patrick Lawler, a person who under the said foreman was entrusted with the superintendence of the explosives used at the said works, at intervals as aforesaid along one of the terraces to be fired. They

counted the shots as they went off and found that two cartridges had missed fire. They neglected, as it was their duty or the duty of one or other of them to do, to order the said unexploded cartridges to be drawn and to see that they were drawn or exploded; and in the knowledge of the said foreman and of the said superintendent of explosives, the said cartridges were left in the ground unexploded. The said Patrick Lawler was in no sense a fellow-servant of the pursuer except that he was in the pay of the same master. (Cond. 6) On the afternoon of Friday, 25th December 1891, the said foreman, who had taken pursuer into defender's employment, and whose orders the pursuer was bound to obey, removed the pursuer from the working face at which he had been employed up to that time, and stationed him at the working face where he knew there were unexploded cartridges. While the pursuer was working at said face or terrace as it was his duty, and as he had been ordered by the said foreman to do, his pick struck one of the cartridges embedded in the ground as aforesaid, which the said foreman and the said Patrick Lawler knew had missed fire, and it exploded and knocked the pursuer against a barricade some yards off. (Cond. 7) By the said explosion the pursuer was rendered . . . hopelessly blind and permanently disabled from earning a livelihood. (Cond. 8) The said accident occurred through the fault and negligence of the defender, who frequently visited the excavations, in permitting and sanctioning arrangements in connection with the ways, plant, and explosives used at the works which he knew to be defective and extremely dangerous. The material was an unusual one and highly dangerous, and known by the defender to be so, and it was still more highly dangerous and known by defender to be so to insert more than one cartridge in any one bore, and also to explode more than one at or about the same time. Besides, neglecting to ensure that the said unexploded shots were drawn or exploded before the pursuer was put to work at the said face thereby rendered the ways connected with the work unsafe and defective, and the defender or Moseley or Lawler ought to have warned the pursuer of the danger which they knew attended his working at that face while unexploded shots of dynamite remained in it. It was the duty of the said Robert Moseley, the foreman, and of the said Patrick Lawler, both being persons to whom superintendence was entrusted, to warn the workmen when the cartridges were to be fired, and count the shots as they were fired, and see that none of them hung fire, and if they hung fire to warn the workmen of the fact, and prevent them working beside the hung shots until they should be drawn or exploded. They failed in every part of their duty. The pursuer has ascertained since the accident that cartridges had often failed to fire, but he was never informed or warned of this fact, and in particular, knew of no danger existing at the face where the said foreman placed him and saw him working when he was knocked down as aforesaid by the said explosion. The pursuer believes and avers that the cartridges used by the defender, and which formed part of the plant or machinery used by him were of bad quality, or they would not have failed as pursuer has learned they did, and it is possible and usual and proper in all well-conducted works where dynamite is used to provide for the safety of workmen by firing each shot by itself and drawing it if it fail. No rule, system, or care was observed at the said excavations for making use of dynamite or for detecting when particular cartridges failed to explode. Their detection was left to chance or accident."

The pursuer pleaded—"(1) The pursuer, having suffered loss, injury, and damage through the fault or negligence of the defender, is entitled to reparation as sued for, with expenses. (2) The pursuer having been injured while in the employment of the defender, through the fault and negligence of the defender, or of those for whom he is responsible under the Employers Liability Act 1880, he is entitled to decree as second concluded for."

The defender pleaded, *inter alia*—"(1) There being no case stated at common law, the defender should be assoilzied from the first alternative craving."

On 28th June 1892 the Sheriff-Substitute (GEBBIE) allowed a proof before answer.

The defender appealed to the Sheriff, but the Sheriff (LEES) adhered.

The pursuer appealed to the Court of Session for jury trial, and proposed the following issue for the trial of the cause—"Whether, on or about the 26th December 1891, within a pit or excavation then in course of being made at or near Temple Gas Works, Maryhill, the pursuer, the said William Jackson, while in the employment of the defender, was injured through the fault of the defender, to the loss, injury, and damage of the pursuer? Damages laid at £1500."

The defender objected to the issue in so far as the sum claimed as damages in the schedule was stated at £1500, and maintained that it ought to be limited to £200, the amount sued for under the Employers Liability Act.

Argued for the defender—The action was irrelevant at common law. In accordance with the usual practice, there were alternative conclusions in the summons, one at common law, the other under the Employers Liability Act. [LORD RUTHERFURD CLARK — Why is it the usual practice to have alternative conclusions? There is only one ground of action, although the damages may vary according to circumstances.] The action should be dismissed as regards the first conclusion. On pursuer's own showing, the accident happened because the cartridges were not taken out after they missed fire. If this was, as the pursuer averred, due to the neglect of the foreman, the employer was not liable at common law, and the action so far as laid at common law should be found irrelevant —*Robertson* v. *Linlithgow Oil Company, Limited*, July 18, 1891, 18 R. 1221.

Argued for the pursuer—There was enough on record to make the case relevant at common law—statements connecting the defender personally with the superintendence of the work. It might prejudice the pursuer if the whole circumstances were not gone into at the trial. The whole case should go before the jury—*Henderson* v. *John Watson, Limited*, July 2, 1892, 19 R. 954.

At advising—

LORD JUSTICE-CLERK—I think this is one of those cases in which it is not desirable to pronounce any finding on the question of relevancy at present. As the case has to go to trial at anyrate, it is better that the whole case should be presented to the jury.

LORD YOUNG—I am of the same opinion. The Employers Liability Act was not passed for the purpose of excluding an action otherwise competent. Actions of this sort are only allowed on the ground of fault, and unless fault on the part of the master is proved the action will fail. At common law it is open for the master to say, "There was blame, but the blame was on the part of an individual for whom I am not responsible—viz., a fellow-workman—and you must bring your action against him." The statute removed the ground of defence in certain cases, but it gave no new ground of action. The ground of the action is still blame. In this case a man was blown up and blinded for life by dynamite. It is averred—and we cannot enter into details at present—that "the said accident occurred through the fault and negligence of the defender, who frequently visited the excavations, in permitting and sanctioning arrangements in connection with the ways, plant, and explosives used at the works which he knew to be defective and extremely dangerous." I must say I think at first sight such arrangements were defective when the explosive went off and deprived of sight a workman who cannot be expected to know anything about them. I think that, as a general rule, when a case in which we have to decide whether there is liability exclusive of the statute and also under the statute goes to trial, we should not determine anything till after the facts are fully disclosed in the evidence. There may be cases so clear that the Court will determine beforehand that there is no liability at common law on the part of the employer, but this case is not of that kind.

LORD RUTHERFURD CLARK—I agree.

LORD TRAYNER—I am of a different opinion. I have always thought that the questions of the master's liability at common law and under the statute should be kept separate. In this case I think there is no ground whatever for an action at common law. The case can only succeed at common law if fault attaches to the defender. I look through the record in vain for an allegation of such fault. I see that a very relevant case of fault is alleged against the foreman, but as against the master himself I see no ground of action. I am therefore for following the case of *Robertson* and dismissing the action as far as laid at common law.

The Court approved of the issue, and found the defenders liable in £4, 4s. of expenses.

Counsel for Pursuer—Crabb Watt. Agents—Nisbet & Mathison, S.S.C.

Counsel for Defender—Sol.-Gen. Asher, Q.C.—Salvesen. Agents—Macpherson & Mackay, W.S.

Saturday, October 29.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CAIRNS *v.* LEE.

Process—Interdict—Correction of Statement of Facts after Note Passed.

A complainer, the proprietor of three houses, prayed to have the respondent interdicted from interfering with his north gable. In the statement of facts appended to the note he quoted *per incuriam* the title of the second of his houses, while it was the third one which alone had a free north gable. When the record upon the passed note came to be made up he added the two other titles. The respondent showed by his answers that he had noticed the mistake and had clearly understood what gable was referred to.

Held that the correction in the statement of facts was such as the complainer was quite entitled to make, the prayer of the note being unambiguous and unaltered and the respondent having been in no way misled.

John Cairns, blacksmith, Loanhead, brought a note of suspension and interdict against J. B. W. Lee, S.S.C., Edinburgh, praying the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondent and all others acting by his authority, from interfering with or building into or on the top of the wall forming the north gable of the tenement of houses belonging to the complainer, and situated in Clerk Street, Loanhead, and in the meantime to grant interim interdict; and further, to ordain the respondent to take down the buildings so far as erected into or upon the said north gable wall, and to restore the said gable wall to the state in which it was prior to the operations of the respondent thereon.

The complainer set forth in his statement of facts that he was proprietor of three subjects situated in Clerk Street, Loanhead, and that the respondent was proprietor of the two small houses situated to the north of the subjects belonging to the complainer. The complainer averred that the respondent had taken down these houses, that he was in the course of erecting a new tenement, and that in doing so he had interfered with