gations at their own risk. It is not averred that the oversman desired the deceased to go further along the pit than the place averred to have been brushed for his squad. Then the averment that the deceased met his death by an accident in a disused working, which under the Mines Regulation Act the defenders should have fenced off, is contradictory of the other averments of the pursuers. It was only if that portion of the mine was likely to be wrought that the pursuers have any pretence that the deceased had any business to be there, and if so the pursuers were not bound to fence it off.

"Considering the whole averments of the pursuers the Sheriff-Substitute has come to the opinion that there are no facts averred relevant to infer a claim of damages against the defenders."

The pursuers appealed to Court of Session, and argued—There was a relevant averment of fault against the defenders in not having the opening to this unused working face fenced in terms of the Act of Parliament. Hogg was entitled to see if there was a place more fitted for his work than where he had been, and finding this opening unfenced he was entitled to assume that it was safe for him to enter to see if it was good for his work. He had gone into this dangerous place "inadvertently." The word "inadvertently" meant innocently.

Argued for the defenders—The pursuer's husband and the squad with which he worked had been given a particular place to work at, and he had no right to leave that place and wander about the mine looking for another face to work at. He ought to have inquired as to the safety of the place before he entered it. As he must have gone knowingly into this opening, he could not be said to have gone in "inadvertently," and therefore the Coal Mines Regulation Act did not apply to this case.

At advising—

Lord Justice-Clerk—I do not think that the Sheriff-Substitute has taken the right view of this case in dismissing it on the ground of want of relevancy. It may turn out that the Coal Mines Regulation Act does not apply to the circumstances of this case, but the pursuer makes a relevant averment in support of his contention that it does apply. I think that on the face of the summons there is a relevant statement of fault on the part of the defenders. It is said that the Act only applies to cases of "inadvertence," but the statement in this record is of an accident happening through inadvertence—that is, if this place had been fenced as provided for in the statute, then this man Hogg would not have gone into it, because he would have seen it to be dangerous. I do not see how the owners of the mine can protect themselves better than by complying with the regulations of the statute. I think the action is relevant.

Lord Young concurred.

Lord Craighill—I am of the same opinion. The interpretation of the statute which the defenders seek to put upon it here would exclude miners from the protection which it was intended to give them. The place where the accident happened was a disused working—that is, it was not in "actual course of working,"—and it was not fenced as provided for in the Act. I concur in thinking with your Lordship that the action is relevant.

Lord Rutherfurd Clark—I concur.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute appealed against, and on the pursuers' motion ordered issues to be lodged for the trial of the cause.

The following issue was afterwards adjusted, and the case remitted to Lord Fraser for trial:—"Whether, on or about the 30th day of December 1885, and within the Kingslaw Mine, No. 1, near Tranent, leased by the defenders, the deceased William Hogg, while in their employment, lost his life through the fault of the defenders, to the loss, injury, and damage of the pursuers? Damages claimed—1. Mrs Margaret Porteous or Hogg, the widow, £500; 2. Margaret Hogg, a child, £250; William John Hogg, a child, £250."

Counsel for Pursuers—Rhind—Gunn. Agent—Charles B. Hogg, L.A.

Counsel for Defenders—Strachan. Agent—T. F. Weir, S.S.C.

Wednesday, October 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'INALLY *v.* KING AND OTHERS.

Reparation—Master and Servant—Fault—Contributory Negligence.

Labourers were engaged in undermining a bank of clay in a quarry when the clay slipped down and killed one of them. The Court *held* on a proof that it was the duty of the employer, according to the practice of the work, to have a watchman to warn the workmen of signs of a fall; that none had been set, and in consequence the accident had happened; that the deceased was not guilty of negligence contributing to it in having trusted that a watch would be set, and worked on without examining for himself as to the risk of a fall, and *therefore* that the employers were responsible for his death.

On the 26th November 1885 certain labourers employed at a freestone quarry, Langloan, Coatbridge, were employed in stripping the soil off the face of a portion of the said quarry, which was of a soft clayey nature, to enable them to work the freestone. The operation was not finished that day, and on the next day, the 27th, the men began to the work again by the order of the gaffer or foreman. The "fall" which they were "holing" or undermining was about ten feet high, and while they were so engaged the earth above gave way and fell upon one of them called John M'Inally, and killed him.

His father John M'Inally raised an action in the Sheriff Court of Lanarkshire, against the owners and lessees of the quarry, Archibald King, John Scott, and Thomas Gilchrist, trustees of the late James King, Coatbridge. He averred that the accident was caused by the fault of the

defenders, and Robert Miller their foreman, in not having a man above to give warning of any sign of the ground giving way while the dangerous work was going on.

The defenders stated that no watchman was in use to be sent to the top of the bank until the supports or "legs" left for upholding the bank were being removed, when it was the duty of the men engaged at the work to send one of their number up to watch for the ground giving way. In the circumstances the workmen ought to have been extra careful as there had lately been frost followed by rain. The accident was the result of a *damnum fatale.*

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault or negligence of the defenders, as trustees foresaid, or of those for whom they are responsible, the pursuer is entitled to decree, in terms of the first alternative conclusion of the petition."

The defenders pleaded—"(4) The death of the said John M'Inally having been caused by a *damnum fatale*, the defenders are not responsible therefor. (5) If the accident did arise from fault or negligence, it having been caused by the fault or negligence of the said deceased John M'Inally, or, at all events, he having, by his fault or negligence, materially contributed towards same, the pursuer is barred from insisting in this action, and the defenders are not liable in damages for said accident. (6) If the alleged negligence did exist, it was due to carelessness on the part of the said deceased John M'Inally's fellow-workmen, or of those engaged in a common employment with him, and the defenders are not therefore liable in compensation for damage sustained in consequence thereof."

It was proved that there was a newly appointed foreman in charge of the work that morning, and that he did not send any man up to the top to watch, while the men who were engaged "holing" could not see if a watchman had been placed or not. The evidence was conflicting as to whether it had been the practice of a former foreman to send a man to the top to watch while the work was going on. The parties were agreed that the average wages of a man in the same position as the deceased were £46, 16s. per annum.

The Sheriff-Substitute (BIRNIE) issued an interlocutor finding that the deceased John M'Inally had been killed while in the employment of the defenders, and that his father had suffered damage thereby to the extent of £50, but that the deceased had been guilty of contributory negligence. He therefore assoilzied the defenders from the conclusions of the action with expenses.

"*Note.*—The deceased was engaged bringing down earth in a field near Langloan Quarry, to put out a fire which had broken out in a heap of cinders in the quarry. A fall of earth is brought down by digging two chambers, and undermining to a depth of about 3 feet between the two. The present fall was about 10 feet long and 10 feet high, and had two 'legs' or supports. The chambers and the undermining were, as I read the evidence, finished, and the deceased was taking out one of the 'legs' when the earth fell upon him and killed him. It is admitted that there ought to have been a watch on the top at all events when the 'legs' began to be taken out. The pursuer says that it was the duty of the foreman to set that watch—the defenders that it was the duty of the men themselves. The evidence leaves this in doubt, and it is a point in which there ought to have been no doubt. Had there, therefore, been nothing else in the case I would have been inclined to think the defenders were liable on account of their defective system of working. But it seems to me impossible not to hold that the deceased was guilty of contributory negligence, in commencing to take out a 'leg' without seeing that there was a watch. No doubt, in certain cases a workman is entitled to trust to his superior taking the requisite steps for his safety, but it is not proved in the present instance that the foreman always set the watch, and still less that the deceased was entitled to trust to him doing it. It was easy for the deceased to see if there was a watch or not. The foolhardiness of taking out a 'leg' without making sure of this was manifest, and it would, in my view, be of bad example, and likely to lead to much danger, were workmen to be encouraged in such foolhardiness." . . .

The pursuers appealed to the Court of Session, and argued—It was the fault of the defenders' foreman that there was not a man placed upon the top of the bank to watch for signs of danger. There was a peculiar obligation on the part of employers to take special care of ordinary labourers as these were—*Pollock* v. *Cassidy*, Feb. 26, 1870, 8 Macph. 615. Fault had been proved on the part of the defenders; they must therefore prove the contributory negligence of the deceased just as clearly. In not coming out of the excavation to see if a watchman was on the top, the deceased was not guilty of contributory negligence, as the gaffer was bound to send a watchman, and the deceased was entitled to rely on his doing so.

The defenders argued—The men who were engaged in the operation of "holing" knew that they were engaged in a particularly dangerous work, and ought to have sent a man up to watch for themselves. If there was a duty on the foreman to send a man up to the top to watch for the signs of danger, that duty must be fairly construed. There were several operations of the same kind going on at once in this quarry, and the workmen ought to have told the foreman that there should be a man on the top of the bank as they were coming to a dangerous part of the operation. The men were guilty of contributory negligence in not coming out of the excavation to see if a watchman was on the top.

At advising—

LORD JUSTICE-CLERK—In this case the Sheriff-Substitute is of opinion that there was a breach of duty on the part of the employer, on the ground that the system of work in this quarry was defective, and that it was the duty of the employer, or of those for whom he is responsible, to place a watchman on the top of the bank where the quarrying operations were being carried on. But he holds that the deceased was guilty of contributory negligence in commencing his work on that morning without seeing that a watchman had been sent to the top. I am unable to come to that conclusion, assuming that the Sheriff-Substitute's premises are correct. If it was the duty of the employer to send a watchman to the top when the operation of holing was going on, I should have imagined that the workmen were entitled to trust that that duty was properly fulfilled. As to the plea of contributory negligence, it is no

doubt true that while employers are bound to take reasonable precautions for the safety of their men, they are not obliged to make provision for their workmen's safety when they rush into dangers of their own making. But in this case I think it was the duty of the foreman or gaffer to have had a watchman sent to the top, and that it was all the more his duty in the circumstances here, viz., a frost followed by rain, which rendered it more probable that the roof might give way. Unfortunately the roof did give way, and killed this man M'Inally. In these circumstances I do not think that there is room for the plea of contributory negligence, and I think that the Sheriff-Substitute's interlocutor must be altered.

Lord Young—On the whole, I am of the same opinion as your Lordship, although I have not come without hesitation and consideration to the opinion that the Sheriff-Substitute's judgment, the reasons for which have been obviously carefully thought out, should be altered. In supplement to what your Lordship has said I would like to express my views shortly.

In the first place, the operation in which these men were engaged was a dangerous operation. They were taking away the earth from under a bank, and leaving a mass of earth above only partially supported, because they had dug away the greater part of its support. It is admitted that there ought to have been a watchman upon the top of the bank to observe what effect the "holing" operations would have upon this mass of earth above, the effects being usually shown by cracks in the surface. Now, it is admitted that the mining below this mass of earth had been going on the previous day. Two "legs," *i.e.*, natural supports, had been left, but a great deal of the support had been dug out, so that notwithstanding the partial support of these "legs" the mass of earth was in danger of coming down. Well, the men were sent to continue their work in the morning, and no one was sent to see if the operations of the day before had produced any effect upon the earth above. It has been conceded that there was a duty on the part of the employers or their foreman either to go or to send some-one to watch for the danger of the roof falling in. There therefore was fault to begin with. If the employers had done their duty in sending some-one to the top to watch for the signs of danger, that would have been a precaution which was only their duty. Now, in our law if a precaution which ought to have been taken has been omitted to be taken, and if that precaution would have made an accident less likely, that is enough to found liability.

In regard to the question of contributory negligence on the part of the deceased, the men who were working here were labourers, and the alleged contributory negligence comes to this, either that they ought to have enough intelligence to see for themselves when they came to a dangerous part of the operation and set a watch for themselves, or else that they should take care not to go on too long without seeing that the foreman did his duty. The usual case of contributory negligence is one of a man rushing into danger and risking his life against all the laws of ordinary prudence, but that is not the case here. I rather think that the deceased was entitled to assume that the foreman Miller had done his duty and sent up a man to watch. Miller was not in ignorance of the state of matters at this face, and I think it accords with the evidence that Miller's duty from the first was to have had some-one on the top to watch for signs of danger. I do not think that the deceased was reckless of his own safety in that he went to work without seeing that there was a man on the top watching.

I think the system of working pursued at this quarry was not a safe one. If there can be any doubt—as the Sheriff states in his note there was —as to what is the rule, whether the workmen ought to work at this holing only so long as they can safely do so, and then place a watchman for themselves, or whether it is the duty of the foreman to put a watchman on the top from the beginning of the operation, that is the fault of the system. There ought to be no doubt as to the rule of the works. I think we ought to negative the allegation as to contributory negligence.

Lord Rutherfurd Clark—I have found this to be a difficult case, but I do not differ.

Lord Craighill was absent on circuit.

The Court pronounced this interlocutor:—

"Find, 1st, that on the morning of 27th November 1885 John M'Inally, son of the pursuer, along with other workmen in the employment of the defenders, by order of Robert Miller, the foreman, resumed work in making excavations in the face of a bank of earth in order to bring down the superincumbent soil, on which work M'Inally had been engaged on the preceding day, and that while in obedience to said order he was so occupied the earth fell upon and killed him; 2d, That it was the duty of the defenders to have placed a man on the summit of the bank to watch and give notice to the workmen engaged below whenever the surface gave inclination of being affected by the excavations, but that they failed to do so, and that the death of the said John M'Inally is attributable to their failure; 3d, That he did not by any fault or negligence on his own part contribute to his death: Find in law that the defenders are bound to compensate the pursuer for the loss and damage sustained by him through the death of his son: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Assess the compensation due to the pursuer at £100 sterling: Ordain the defenders to make payment of that sum to the pursuer with legal interest thereon from the date hereof till paid: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer—Rhind—A. S. D Thomson. Agent—William Officer, S.S.C.

Counsel for Defenders — Low — Craigie. Agent—R. J. Gibson, S.S.C.