the alterations the character of a structural alteration which they might otherwise not have. Apart from the fact that it has already been decided in the case of *Colville* v. *Carrick* that the Dean of Guild has no jurisdiction to deal with the use to which a building is to be put apart from the fitness of the structure as regards strength, &c., for the use intended, I am unable to understand this reasoning. How the question whether an alteration on a house is an alteration of the structure can depend upon the use to be made of the house in its altered state I am quite unable to see. What the appellant is doing to his house is either a structural alteration or not according to the way in which it affects the building as a structure, and so reading the statute, I must hold that the judgment of the Dean of Guild Court must be altered.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court sustained the appeal, recalled the interlocutor of 28th June 1889 and all succeeding interlocutors, and found the appellant entitled to expenses.

Counsel for the Appellant—Gloag—Goudy. Agents—M. MacGregor & Co., W.S.

Counsel for the Respondent—J. C. Thomson—Shaw. Agent—Party.

Tuesday, November 12.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* BOYLE.

Reparation—Known Danger—Carter Injured by Unmanageable Horse—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)*—Process—Bill of Exceptions.*

A carter who was ordered by his employer to take a horse and cart to a particular destination, objected on the ground that the route would bring the horse into the immediate neighbourhood of steam-engines, at sight of which he became unmanageable. The employer promised him assistance, and sent a man along with him, but in spite of his help the horse, on meeting a steam-engine, became unmanageable, and inflicted severe injuries on the carter. The latter raised an action, alleging that his employer was in fault in using the horse for carting in the neighbourhood of steam-engines, and for sending to the help of the pursuer an inexperienced and incompetent man. The defender alleged that the pursuer had accepted the known risk of the service.

At the trial the presiding Judge directed the jury to consider "(1) Whether, having regard to the condition of and character of the horse in question, the defender was to blame for its being used in carting as it was in the place and at the time of the accident? (2) Whether the defender was to blame for sending Patrick Laden to assist the pursuer in managing the horse, in respect he (Laden) was an inexperienced and incompetent carter, and so unfit for the duty? (3) Whether the pursuer knew the condition and character of the horse, and did, with that knowledge, and of the danger to which he was exposed, undertake the charge of it? He requested the jury, in the event of their being of opinion that there was fault, to specify in what respect." The jury stated in answer "that they found, by a majority of nine to three, that the defender was blameworthy in having the horse in his possession, for use by his carters, not being broke to steam-engines; and found unanimously that the pursuer knew of the horse's condition and character, and the risk he ran in taking charge of it." The Judge told the jury that these findings amounted to a verdict for the defender, and directed them to return that verdict accordingly."

Held that although the jury had not in terms returned a finding on the second question, their answer to the first question implied an answer to the second, and a bill of exceptions *disallowed.*

This was an action of damages for personal injury by Andrew Wilson, carter, against his employer Adam H. Boyle, contractor, Glasgow.

The pursuer sued under the Employers Liability Act 1880 and at common law. He alleged that on 31st October 1888 he was ordered by James Duncan, the defender's superintendent, to take a horse, of which the pursuer was in charge, to the docks at Cessnock. The route lay along Govan Road, which was used by steam tramcars. The pursuer objected to go as ordered, because the horse was afraid of steam-engines, and was incapable of control when in sight of them. Duncan promised the pursuer the assistance of another man, and finally sent him to his destination with the horse and cart, accompanied by Patrick Laden, who was in charge of another horse and cart.

The pursuer alleged that Laden was a labourer and not an experienced carter. On the way they encountered a steam tramcar. The pursuer's horse became unmanageable, and knocked down the pursuer, who sustained severe injuries. He averred—"The said horse had previously bolted in Rutherglen when frightened by steam, and was known to the defender or his superintendents to be afraid of steam. It was not a safe horse to employ in the town, where it would be liable to meet steam-engines, and the defender was guilty of gross and culpable negligence in permitting the said horse to be employed in town, where it was liable to be frightened and bolt at the sight of steam. The defender's superintendent, the said James Duncan, was guilty of gross and culpable negligence in sending the said Patrick Laden, an inexperienced carter, and not providing the pursuer with competent assistance in the

management of the said horse."

The pursuer pleaded—"(1) The said horse was part of the defender's plant, and the accident which caused the injuries to the pursuer being the natural result of a defect in the said horse, the defender is liable to him in damages as craved. (3) The defender's superintendent having ordered the pursuer to work the said horse in a place where its defect made it dangerous, and the pursuer's injuries having resulted from so working the said horse, the defender is liable in damages as craved. (4) The defender's superintendent having failed to provide the pursuer with competent assistance to make the working of the said horse safe, and the pursuer having been injured through his failure to provide such assistance, the defender is liable in damages as craved."

The defender explained that the horse in question had been in Glasgow for nearly a month, during which the pursuer had worked with it at jobs in various parts of the city.

The defender pleaded—"(4) The pursuer's injuries having been caused, or at least materially contributed to, by his own negligence, or by that of one of his fellow-servants, he is not entitled to recover damages from the defender."

On allowance of proof the pursuer appealed to the Second Division of the Court for jury trial, and the following issue was adjusted—"Whether on or about 31st October 1888, in or near the Govan Road, Glasgow, . . . the pursuer was injured in his person through the fault of the defender, to his loss, injury, and damage?"

The trial accordingly took place upon 24th July 1889 before Lord Young—and the counsel for the parties having addressed the jury, his Lordship charged the jury, and directed them to consider (1) Whether, having regard to the condition and character of the horse in question, the defender was to blame for its being used in carting, as it was in the place and at the time of the accident? (2) Whether the defender was to blame for sending Patrick Laden to assist the pursuer in managing the horse, in respect he (Laden) was an inexperienced and incompetent carter, and so unfit for the duty? (3) Whether the pursuer knew the condition and character of the horse, and did, with that knowledge, and of the danger to which he was exposed, undertake the charge of it? He requested the jury, in the event of their being of opinion that there was fault, to specify in what respect. The jury, after retiring, stated in answer, by their foreman, that they found, by a majority of nine to three, that the defender was blameworthy in having the horse in his possession for use by his carters, not being broke to steam-engines; and found unanimously that the pursuer knew of the horse's condition and character, and the risk he ran in taking charge of it. Lord Young told the jury that these findings amounted to a verdict for the defender, and directed them to return that verdict accordingly. The counsel for the pursuer excepted to this direction, and required Lord Young to direct the jury that the master was responsible for injuries caused by defective plant connected with the employment, and that a horse was 'plant,' and that notwithstanding the pursuer's knowledge of the dangerous character of the horse they were bound to return a verdict for the pursuer. Lord Young refused so to direct the jury, and the counsel for the pursuer excepted. The jury returned a verdict for the defender as directed.

On the bill of exceptions the pursuer argued—The doctrine of *volenti non fit injuria* did not apply in the circumstances. The pursuer sufficiently objected to the dangerous task imposed on him by the defender's superintendent. He was led to believe that Laden's presence would avert the danger. The master would have been liable if the horse had killed a stranger. The result of the Act was to put the servants of an employer in the position of strangers, therefore the master was liable in damages to the pursuer. The cases of *Membery* and *Fraser*, upon which the defender relied, had both been decided upon the principles of common law, and did not apply in this case, which was laid upon the Employers Liability Act 1880 as well as at common law—*Hasten* v. *The Edinburgh Street Tramway Company*, March 11, 1887, 14 R. 621; *Weblin* v. *Ballard*, March 22, 1888, L.R., 17 Q.B.D. 122; *Yarmouth* v. *France*, August 11, 1887, L.R., 19 Q.B.D. 647; *M'Monagle* v. *Baird & Co.*, December 17, 1881, 9 R. 364. The procedure at the trial was such that a new trial ought to be granted. If a Judge put such questions to a jury as to split up their verdict into parts the pursuer was entitled to have an answer to each of the questions. Here the jury had not answered the second question. If, when they were told that the verdict was for the defender, they had been allowed to consider the verdict as a whole they might have found that the defender had been in fault in sending Laden, an inexperienced man, and that would have been a verdict for the pursuer.

The respondents argued—The maxim *volenti non fit injuria* applied. This defence was not over ruled by the Act of 1880, which only provided that if there was a defect in the plant, which had been made known to the master, that would render him liable. It was another defence given to the master in exchange for the extension of his liability. The jury had found unanimously that the pursuer here was aware of the character of the horse and of the risk he ran. There was nothing more necessary or possible to show that he voluntarily undertook the risk than to prove that he tried to do the work—*Membery* v. *Great Western Railway Company*, May 14, 1889, L.R., 14 App. Cas. 179. The case of *Weblin* had been overruled both by the case of *Yarmouth* v. *France*, and by *Thomas* v. *Quartermaine*, March 21, 1887, L.R., 18 Q.B.D. 685. As regarded the evidence, there was none to show that Laden was incompetent, and the jury had impliedly negatived that ground of fault. As regarded the alleged inaccuracies of procedure, the presiding

Judge was entitled either to put the questions to the jury, to which he desired answers, or, if the jury should return a general verdict, to ask their reasons. Here the Judge had put proper questions, and the jury had answered them all. If they had not in terms answered the second, it was only because the answer to the first was sufficient for both, as that specified the only fault of which they found the defender guilty. The theory that a jury ought to be allowed to reconsider their verdict after they had given an honest opinion upon the matters of fact in the case, and found that that opinion led to a different result perhaps from that which they anticipated, was quite erroneous — *Milne-Home* v. *Police Commissioners of Duns*, June 10, 1882, 9 R. 924.

At advising—

LORD JUSTICE-CLERK—I think that in this case it is unnecessary to our decision that we should come to any opinion upon the abstract question which has been argued as to whether a servant who knowingly does a piece of work in circumstances of danger must always be held to do so voluntarily, so to expose him to the application of the maxim "*volenti non fit injuria.*" No such question in my judgment arises here. At the trial his Lordship who presided asked the jury to consider three questions. He did not call on them to give specific answers to these questions. But after having asked them to consider them, his Lordship requested them, if they were of opinion that there was fault on the defender's part, to specify the particulars in which that fault consisted. Now, their answer to the questions does not in terms give a finding on the second question. But in my opinion the jury gave an answer to the first question which answered the second also, and which also met the special request made to them by Lord Young to specify the fault if any. The jury found by 9 to 3 "that the defender was blameworthy in having the horse in his possession for use by his carters, not being broke to steam-engines; and found unanimously that the pursuer knew of the horse's condition and character, and the risk he ran in taking charge of it." Now, there we have the alleged specific fault found in answer to the request of the Judge. The implication, too, is, I think, clear that the jury did not think it necessary to answer specifically the question as to Laden's competency—the second question—for they do not find any other fault against the defender than that of "having the horse in his possession for use by his carters, not being broke to steam-engines."

I must say also that even had the jury given an answer to the second question according to its terms, I do not think that the pursuer could have obtained any benefit from it, for the notes of the learned Judge make it clear that there was nothing in the proof to justify an answer in the affirmative to the question whether the defender was in fault in sending Laden to assist the pursuer, "in respect Laden was an inexperienced and incompetent carter." That confirms me in thinking that the jury have here stated the only fault which they found established.

Then the finding of the jury that "the pursuer knew of the horse's condition and character, and the risk he ran in taking charge of it," seems to me to express this, that they find that he, knowing quite well the character of the horse, willingly went to drive it along with Laden as his assistant—that he went voluntarily, and undertook the risk. Now, so reading the verdict, I think that Lord Young was right in holding it to be a verdict for the defender, and in directing a verdict for the defender to be returned.

It is unnecessary to go further, holding as I do that the direction of the Judge at the trial was right, and that the verdict is one for the defender.

I wish also, however, to say that I disapprove altogether of the suggestion that if a jury have been asked by the presiding Judge to give their opinion on specific questions, and do return their answer to these questions, and are then told by the Judge that their verdict is equivalent to a verdict for one of the parties, they may then be asked at the suggestion of the other party to retire once more in order to consider whether they cannot give a verdict for him on the general issue. I think the best result of the services of a jury is obtained when they give their verdict on specific questions of fact apart from the consideration to which party these answers are favourable in point of law.

On these grounds I am for disallowing the bill of exceptions, and for discharging the rule.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD LEE—I concur in thinking that the meaning of the jury was as your Lordship has stated. I think that they intended in the first place to specify the fault they thought proved; that, in the second place, they intended to negative any fault on the part of the defenders in sending Laden to assist the pursuer; and that, in the third place, they intended to affirm that the pursuer knew the risk and undertook it.

I give no opinion to the effect that the statute has made no difference with respect to a plea of "known danger," when urged in defence. I am not satisfied that, in an action to which the statute applied, the pursuer's case would be dismissed on relevancy if the averments were similar to those in the well-known case of *Crichton* v. *Kerr*, February 14, 1863, 1 Macph. 407. I go on this, that the findings of the jury implied that the pursuer accepted the assistance of Laden as sufficient, and with that assistance undertook the work.

The Court refused the bill of exceptions.

Counsel for Pursuer—M'Kechnie—Deas. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for Defender — Jameson — Younger. Agents—Mitchell & Baxter, W.S.