Saturday, February 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

PRINGLE *v.* GROSVENOR.

Factory — Fencing of Machinery — Mill Gearing—Master and Servant—Factory and Workshop Act 1878 (41 *Vict. cap.* 16), *sec.* 5, *sub-sec.* 3, *and sec.* 96.

A "jolly machine" in a pottery manufactory was moved by its drum being brought in contact with a revolving plate round which a strap was placed connected with the machinery of the work. *Held* that the revolving plate was part of the mill gearing as defined by section 96 of the Factory and Workshop Act 1878, and required to be securely fenced in terms of section 5, sub-section (3).

Observations by the Lord Justice-Clerk upon the kind of danger which the Legislature intended to provide against by requiring the fencing of machinery.

By section 5 of the Factory and Workshop Act 1878 (41 Vict. cap. 16), it is enacted—"With respect to the fencing of machinery in a factory, the following provisions shall have effect: . . . (3) Every part of the mill gearing shall either be securely fenced, or be in such a position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced."

By section 6 of the Factory and Workshop Act 1891 (54 and 55 Vict. cap. 75), it is provided that in sub-section 3, of section 5, of the Act of 1878, before the words "every part" shall be inserted the words "all dangerous parts of the machinery and."

Section 96 of the Act of 1878 defines mill-gearing as comprehending "every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley, by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process."

Mrs Sarah Jane Brough or Pringle, wife of George Pringle, harness clipper, Glasgow, and George Pringle, as curator and administrator-in-law for his said wife, raised an action in the Sheriff Court at Glasgow against F. Grosvenor, pottery manufacturer, Eagle Pottery, Glasgow, for £200 as damages and *solatium* for the personal injuries sustained by the female pursuer as after-mentioned in the event of liability being fixed and determined at common law, or otherwise to pay her the like sum of £200 in the event of liability being fixed and determined under the Factory and Workshop Acts 1878 to 1891, or otherwise the sum of £93, 12s. sterling in the event of liability being fixed and determined under the Employers Liability Act 1880.

The defender pleaded, *inter alia*—"(2) The injuries to the female pursuer not having been caused by the fault or negligence of the defender, or anyone for whom he is responsible, the defender is entitled to absolvitor. (3) The injuries sustained by the female pursuer being caused by her own negligence or carelessness, or at least such negligence having materially contributed thereto, she is barred from suing the present action."

The Sheriff-Substitute (SPENS) allowed proof which showed that the circumstances under which the action arose were as follows—Mrs Pringle was employed in the defender's pottery as a "jolly woman"—that is, a woman in charge of a "jolly machine," a machine for moulding jelly cans, tea-pots, &c. The frame of the jolly machine was made of cast iron, and stood about three feet from the ground. It was covered by a flat wooden working-bench or table about four feet square. The machine consisted of a drum underneath the bench, and leading from the drum up through the bench was a spindle, upon which the jolly-woman placed a cup for containing the mould. Beside the drum, under the bench, was a circular plate or disc which revolved perpendicularly from left to right by means of a belt placed round it, driven by the steam power of the factory engine. The jolly-woman's duties were to set, remove, and replace the moulds in the cup on the top of the spindle. When she had the mould ready to firm, she placed her foot on a lever placed about 4 inches from the ground, by this movement the drum was pressed against the revolving plate, and by friction revolved itself horizontally from right to left. This action put the spindle and cup in motion and so the mould was formed. When one mould was cast the jolly-woman replaced it by another and thus the work proceeded. When the foot of the worker was taken off the lever, the drum of the machine should have ceased to press the revolving plate and should thus have stopped moving, but the machine at which the pursuer worked was out of order, so that even although the pressure on the lever was taken off, the drum and plate remained so close together that the drum never stopped. During work it was necessary to oil the top of the spindle in order to keep the machine in a proper condition, and it frequently happened that the oil trickled down the spindle to the drum and reduced the friction between the drum and the revolving plate, thus causing the work to proceed more slowly. It was the usual custom in other potteries to have the drum and plate boxed in so that the jolly-woman could not get at them, and a man went through the works and removed the oil from the plate when the women reported that their work was retarded thereby. In the pottery of the defender, however, the revolving plate and the drum of the machine were not fenced on all sides. The machine was placed against the wall, one of the ends was entirely open, the other was only partially fenced, and in front of the working table there was only a board about eighteen inches broad. It was also the recognised procedure in the defenders' pottery for the jolly-women

themselves to clean the plate and the drum when they became clogged by the oil.

While the pursuer was cleaning the revolving plate and the drum of her machine with a piece of waste on 22nd September 1892, the waste was caught between the plate and the drum and her hand was drawn in and jammed and crushed. The pursuer gave evidence that she was cleaning at the left hand of the machine, at the part of the plate revolving from the drum, but it was clear from the evidence that she was cleaning at the right hand side of the machine when the accident occurred.

On 5th April 1893 the Sheriff-Substitute pronounced the following interlocutor:—"Finds that the pursuer was on the 22nd September 1892 engaged at a jolly machine in the defender's works, and while engaged in cleaning with a piece of waste a certain plate and drum her right hand was drawn in and serious injuries sustained thereto: Finds, under reference to note, that the system of defender was faulty: For reasons in note, repels the third plea-in-law stated for defender, and also the whole defences: Finds defender liable in damages, assesses these at the sum of thirty-five pounds.

"*Note.*— . . . The next question is as to whether there was a violation of the Factory and Workshop Act in respect the plate and drum in question were not fenced in such a way as to prevent the pursuer and the other jolly-women from attempting to clean while the machinery was in motion. Mr Oatts argued that the drum and plate were parts of the jolly machine, and were not 'mill-gearing' in the sense of the Act. I have no hesitation in holding that the revolving plate at all events was 'mill-gearing' in the sense of the statute. It does not seem to me open to dispute that the motion of the first moving power was communicated to the revolving plate, and by the revolving plate again to the drum. Now, if the interpretation clause as to mill-gearing be looked at, it comprehends, *inter alia*, 'every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process.' Let us suppose the drum to be part of the jolly machine, the revolving plate is, of course, a wheel, and in these circumstances it seems to me that the revolving plate necessarily falls under 'mill-gearing.'

"In my view, then, the system was wrong. The object of the Factory Acts was, *inter alia*, to protect employees against themselves. In the case of *Gibb* v. *Crombie*, 2 R. 886, Lord Ormidale said—'Although I assume that any person young or old, provided he is of sufficient intelligence to know what he is about, who wantonly and willingly thrusts his arm into machinery is not entitled to damages, such a defence would require to be well supported by the facts before it could be entertained against the plain policy of the Factory Acts, which were intended to afford a protection to young persons against the carelessness and inexperience incidental to their age.' I do not think that any distinction can be drawn in this matter between a lad of eighteen and a woman of twenty-seven. I take it, the policy of the Factory Acts was to minimise risk to all the employees. I have previously said (p. 114, Spens and Younger on Employers Liability), commenting on *Gibb* v. *Crombie* and other cases—'These cases, I think, fairly show that the neglect of statutory precautions whereby injury has resulted, and which statutory precautions were devised for protection of persons against themselves, will very seriously affect the defence of risk incident to the employment, and of working in the face of a known danger, if preferred by a master in an action by a servant injured by the neglect of such statutory precautions.' In this case there is no doubt pursuer had worked on for a considerable time knowing that she was expected to clean the machinery while in motion, but I am not prepared to accept the plea of risk incident to the employment or known danger. Indeed, apart from the question of neglect of statutory precautions in the recent case of *Smith* v. *Baker* (Law Reports, App. Cases, 1891, p. 325), it was held at common law—'The mere fact that a workman undertakes or continues in such employment with full knowledge and understanding of the danger, is not conclusive to show that he has undertaken the risk so as to make the maxim *volenti non fit injuria* applicable in cases of injury.'

"Again, as to contributory carelessness I pointed out at the beginning of the Note that the pursuer was injured while at the right-hand side of the machine, and at p. 15 of the proof the pursuer explains that she knew it was a dangerous thing to clean from the right-hand side, and she was always careful to clean from the left-hand side, knowing the risk, the reason being because the plate was revolving from the right-hand side and therefore liable to draw the hand in. I think it is clear from some inadvertence upon this occasion she cleaned from the right-hand side. Now, in the first place, as already indicated, I think the plea of contributory carelessness where statutory precautions for the safety of workpeople have been neglected, falls to be regarded with very great jealousy; and in the second place it seems to me that the principle given effect to in the case of *Radley* v. *London & North-Western Railway Company* (L.R., App. Cases i., 759) is applicable here.—'Although the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defender could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him;' there the primary fault was the fault of system which permitted the jolly women to clean unfenced machinery while in motion. I have arrived at the conclusion on the above grounds that there is liability."

The defender appealed to the Sheriff (BERRY), but on 3rd November 1893 the Sheriff adhered.

The defender appealed, and argued—(1)

The drum and revolving plate of the jolly machine were not part of the mill gearing. They were only connected with the mill gearing when the strap was placed round the plate. Not being part of the mill gearing there was no statutory duty to fence them on the defenders. (2) If the drum and revolving plate were parts of the mill gearing they were properly fenced. The fencing was enough to prevent an accident and the accident was caused not by the want of fencing but by the pursuer going to the wrong side of the fencing. "Securely" fenced means fenced with safety to persons doing their proper work in the mill. The fence here was sufficient for everything but the wilful acts of the pursuer. She approached the machine deliberately on the wrong side, and this was the proximate cause of the accident—*Caswell* v. *North*, January 18, 1856, 5 E. & B. 849; opinion of Lord Ormidale in *Gibb* v. *Crombie*, July 6, 1875, 2 R. 892.

Argued for the pursuer—The drum and plate, or at least the latter, was a part of the mill gearing. It was not properly fenced. A breach of the Factory Act having therefore been committed by the defenders they were liable for the accident. The dangerous character of the employment of cleaning this wheel was not so obvious that the pursuer must be taken to have known it—*Britton* v. *Great Western Cotton Company*, January 29, 1872, L.R., 7 Exch. 130. The reasoning of the Sheriff-Substitute was sound and his judgment should be adhered to.

At advising—

LORD JUSTICE-CLERK—It is clearly proved as matter of fact that the women working in this factory had as part of their recognised duty to clean the revolving disc which was the means of communicating motion to the machine when in motion. It appears that in other factories that is not permitted. It is also quite clear that the revolving disc and its axle were part of the gearing of the pottery machinery. Under the statute such gearing required to be fenced. The question whether this machine was fenced or not depended upon whether the board which stood upright in front of the table where the pursuer worked was fencing. It might in a sense be called fencing, but this was certain that it did not fence a part of the gearing which might cause danger if a person happened to go near it. In this case the pursuer had to go near it in order to clean the machine. It was said that the pursuer was not entitled to claim damages because she cleaned the machine in a way dangerous to herself by going to the side where her hand might be drawn in. It appears to me that that was just one of the things that the Legislature had provided for by ordaining that such gearing should be fenced. Here it was clear that the gearing was not fenced at a point where there was manifest danger.

It is said on the part of the defender that he may have been at fault, but that the pursuer contributed to bring about the accident by deliberately going to the side of the machine where the danger existed. Now, I think the Legislature intended to provide not against a person putting their hand or any part of their person wilfully, deliberately, and intentionally into danger from mere wanton bravado or anything of that kind, but against a person committing the mistake, the inadvertent mistake it might be, of going to the wrong side of the machine and thereby getting injured.

I think that is quite a sufficient ground for upholding the Sheriff's judgment, and I therefore do not express any opinion upon the question whether the defender was not also in fault for allowing a woman to clean this machine.

LORD RUTHERFURD CLARK—I am of the same opinion. It is quite clear that the upright wheel formed part of the mill gearing and should have been fenced. It is also quite clear that it was not fenced at all and that the pursuer was thereby injured. She could not have sustained injury if the defender had performed his statutory duty.

I do not mean to say that if the pursuer had received her injury through her own culpable recklessness there might not have been a good defence. But the present accident may have arisen through inadvertence and nothing more, inadvertence arising through the women in this factory being allowed to clean the machinery while in motion.

LORD TRAYNER—I am of the same opinion.

LORD YOUNG was absent.

The Court refused the appeal.

Counsel for Pursuer—Salvesen—A. S. D. Thomson. Agents—Hutton & Jack, Solicitors.

Counsel for Defender — Shaw — Sym. Agent—John Rhind, S.S.C.

Saturday, February 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

OLIPHANT *v.* JOHNSTONE & MACLEOD.

Reparation—Master and Servant—Defect in Machinery—Relevancy—No Specific Statement of Defect.

A carter raised an action against a firm of manufacturers in Glasgow for damages for injuries received by him. He averred that after obtaining delivery of goods, which he had been sent to receive from them, on the top flat of their premises, and depositing them in a hoist to be taken to the ground flat, he stepped into the hoist along with the attendant, and that the hoist during the descent fell to the ground with such violence as to throw him out and seriously injure him. He further averred