either under the agreement or the feu-contract is covered by the general arbitration clause in the agreement itself. And therefore I entirely agree in the course which your Lordship proposes—to recall the interlocutor of the Lord Ordinary, and while repeating in substance the findings which he has given in the earlier part of his interlocutor, *quoad ultra* to continue the cause in order that after the defender has formulated his objections, if he sees fit to do so, these may be referred under the general clause of reference.

LORD LOW—I am of the same opinion. There was one argument submitted for the defender upon which your Lordships did not think it necessary to call for a reply. That was the argument that the approval of the defender of the proposed plans was a condition-precedent to anything being done at all, and that the effect of the contract was really to give the defender power to veto the carrying out of the water scheme by refusing to approve of the plans.

I think that that is an untenable proposition. The contract did not relate to a private matter but to a matter concerning the public health, and if the defender has *bona fide* objections to the plans proposed he must formulate these objections so that they may be considered by the pursuers.

The main question is, who is to decide between the pursuers and the defender if they cannot settle their differences in regard to the plans?

I think that it would have been a very suitable arrangement if such questions had been remitted to an engineer of standing such as Mr Tait, but I am afraid that the clause of reference to Mr Tait which the Lord Ordinary has held to apply is limited to a different matter. There is, however, a general clause of reference which I think may be fairly read as covering the case. I therefore agree that the process should be sisted to allow of arbitration proceedings being instituted.

LORD KYLLACHY was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor reclaimed against: Find that the pursuers having submitted to the defender the plans . . . . of the works required to be executed in connection with the scheme of water supply in terms of the agreement (No. 17 of process), the defender is bound to consider said plans, and, in the event of his disapproving thereof, to state specific objections thereto and the grounds of the said objections: Further, appoint the defender to lodge in process a minute setting forth the same by the box-day in the ensuing Christmas vacation: Further, in the event of parties failing to come to agreement with regard to these objections, find that the adjustment of their differences falls to be dealt with by arbitration in terms of clause 4 of the said agreement (No. 17 of process): *Quoad ultra* continue the cause, reserving meantime all questions of expenses."

Counsel for Pursuers (Respondents)—Wilson, K.C.—Chree. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender (Reclaimer)—M. P. Fraser. Agents—Bruce & Black, W.S.

Thursday, November 29.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

HOSIE *v.* FRED. M. WALKER, LIMITED.

Reparation—Master and Servant—Damages—Common Law—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Workman Injured while Doing Something not his Ordered Work—Defect in "Plant"—Relevancy.*

A workman raised an action against his employers concluding for damages at common law or under the Employers Liability Act 1880 for personal injuries received while in their employment. His averments were to the effect that in obedience to the orders of a superintendent, in the sense of the Employers' Liability Act, he was working at a certain machine for planing wood; that the chips planed off collected so as to render his foothold beside the machine insecure; that whereas one brush, as was usual in such works, should have been provided for each machine, to sweep away the chips, only two were provided among fifteen machines; that noticing the unsafe condition of the floor, he requested the superintendent to send a boy to clear away the chips, or to provide him with a brush, but the superintendent merely told him to go on with his work; that thinking it unsafe to continue his work he proceeded to make at said machine a rough scraper to come in place of a brush; that the machine was a proper one to use for the purpose; that in consequence of his insecure footing, the machine "kicked" the wood out of his hands, and he was thrown forward and had four fingers cut off by it; that the machine was a dangerous one, and that its fencing was defective in certain specified ways; that the accident was due to the defenders' negligence, and to their defective system in the above matters.

The Court (*doubting*, Lord Stormonth Darling) *dismissed* the action as irrelevant.

Opinion (*per* the Lord Justice-Clerk) that a small number of brushes was not a defect in plant, and "even if brushes for cleaning chips from floors could be held to be machinery or plant in the sense of the Act, a deficiency in number of brushes to carry on the work without delay could not . . . constitute a defect in 'machinery or plant' in the sense of the statute."

James Hosie, cabinetmaker's machineman, Dobbie's Loan, Glasgow, raised an action in the Sheriff Court at Glasgow against Fred. M. Walker, Limited, bedroom suite manufacturers, Mathieson Road, Glasgow, concluding for payment of £300 as damages at common law, or alternatively for £249, 12s. under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), for personal injuries received while in the defenders' employment.

The pursuer, after stating that he had been in the defenders' employment for some time, and was on the morning of the 25th November 1905 working at an American hand-stripping machine when he was ordered by the foreman, a superintendent in the sense of the Employers' Liability Act, to another machine, made the following averments—"(Cond. 4) At or about 11·30 a.m. on said date the pursuer was ordered by his foreman to resume work at the stripping machine. By means of said machine, which is driven by electricity, planks of wood are planed into the desired shape. The chips of the wood that is being planed collect at the feet of the operator, and if allowed to accumulate render him liable to slip, with danger of his hands going into the knives. Brushes ought to be provided and in readiness to sweep away these chips, but only two brushes were provided by the defenders for the use of fifteen machines, instead of one brush for each machine, as is usual and necessary in such works, and these two brushes, which were inadequate in number and defective in themselves, were rarely to be found by those requiring them. The chips are in use to be cleared away by boys directed by the said foreman. Pursuer observing the unsafe condition of the flooring on account of the large accumulation of chips which render the operator's foothold insecure beside a dangerous machine, asked the said foreman to have the chips cleared away and to send a boy for the purpose, or to provide him with a brush and he would do it himself. The said foreman told him to go to hell and go on with his work. The pursuer in view of said refusal, and thinking, as was the fact, that it was unsafe to his life and limb to continue his work without clearing away the chips, proceeded to make a rough scraper to come in place of the brush, with which the defenders failed or refused to provide him, to aid in the work of clearing away the chips, as was usual and necessary in such circumstances. The said machine was the proper machine to use for the purpose. The pursuer had just started the machine, when the machine, partly owing to the impossibility of securing a firm foothold, 'kicked' the wood out of his hands with the result that, in consequence of his insecure foothold, the pursuer was thrown forward and pursuer's left hand fell against the revolving blades of the machine. The blades cut off four of the fingers of the pursuer's left hand. The knives of said machine revolve at great speed in the direction opposite to that in which the plank is being moved. The machine is said to kick when, on account of a notch in or the dampness of the plank, or the clogging of the machine by chips, or from any other cause, the revolving knives fail to cut the plank as desired. In that case the force driving the knives causes the obstructed blade to force the plank in the direction contrary to that in which said plank was proceeding, with the result that it is driven with great speed and force out of the hands of the operator. The knives are then left uncovered and the hands of the operator fall upon them. . . . (Cond. 5) Said stripping machine is a highly dangerous machine unless it is kept free from chips and the knives are properly fenced and guarded. The said stripping machine was defective in respect that the blades were not protected by an efficient guard. The usual and proper guard is what is called an overhead guard, which effectually prevents the hands of the operator coming in contact with the knives. This is known to the defenders, who are also aware that, owing to the absence of said guard, accidents had occurred at machines of the make of defenders' said stripping machine. Said machine ought to have had a feed-roller to keep the wood flat, but it had no such roller. The absence of such roller made an overhead guard necessary. But the guard the defenders provided was old, antiquated, and defective, not covering the knives at all, and, moreover, permitting the operator's hand to go between the guard and the upright iron back of the machine, where the knives work. Said guard is not, as it ought to be, a guard when the machine is stripping wood. (Cond. 6) The accident to the pursuer was due to the negligence of the defenders, who were bound to take proper precautions for the safety of the pursuer and failed to do so, in respect that—(First) they failed to remove said chips or provide means for the purpose of doing so, as a boy or a brush or other appliance for removing the chips, and insisted on the pursuer going on with said work when they knew it was dangerous for him to do so. (Second) They failed to provide an efficient guard, as required by the Factory Acts and by the Common Law, to protect the operator from injury by the revolving blades of said machine, all as hereinbefore set forth. The defenders are accordingly responsible to the pursuer at Common Law. (Third) The accident was due to the defective system of working in said works. Said system was defective in the particulars detailed in this condescendence, but especially in respect of defective machinery, insufficient plant, and the absence of any provision for the removal of chips, which made the pursuer's work on said machine more than usually dangerous. (Cond. 7) In any event the defenders are responsible to the pursuer under the Employers' Liability Act 1880, section 1, in respect of the defects in ways, works, plant, or machinery already detailed."

The pursuer pleaded—"(1) The pursuer having been injured through the fault of the defenders, is entitled to compensation from them at common law, or under the said Act."

The defenders, *inter alia*, pleaded—"(1) The pursuer's statements are irrelevant."

On 14th May 1906 the Sheriff-Substitute (FYFE) pronounced the following interlocutor:—" . . . Sustains defender's first plea *quoad* all the grounds of action except that set forth in the second count of condescendence 6; *quoad hoc* allows a proof, and sends the case to the diet roll of 31st May current: *Quoad ultra* repels the defences."

Note.—"Under the Employers' Liability Act, pursuer's averment is that the work the foreman ordered him to perform was to plane planks of wood into a desired shape. But his own statement is that this was not what he was doing when he was injured. What he was doing nobody asked him to do. He was making a tool which he intended to use, not for the purpose of planing planks, but for the purpose of sweeping away rubbish, which the foreman had not asked him to do.

"Under the Employers' Liability Act the employer is only liable vicariously for injury sustained in the execution of work ordered by a superintendent.

"No such case is disclosed here, nor is there any case disclosed of defect in ways, works, plant, or machinery in the sense of the Act.

"I do not think a statutory claim is relevantly averred.

"As regards the Common Law claim, the first head of alleged negligence is (*a*) that the employers failed to provide a brush for removing chips; and (*b*) that they insisted on pursuer planing without the chips being removed, which was dangerous. It is clear upon pursuer's own statement that (*b*) is not the employers' responsibility; for defenders, who are a limited company, took no personal supervision. As regards (*a*) there might be some colourable liability if the failure to provide a brush, and the injury to pursuer, bore to each other the relationship of cause and effect. It does not seem to me that it is relevantly averred that they did. I do not think, therefore, that the first common law ground of liability is relevantly averred.

"The third ground of common law liability stated is, I think, obviously irrelevant.

"There remains only the second ground—that the machine at which the pursuer was set to work was inefficiently guarded. I have considerable hesitation in holding even this relevant, but there is, perhaps, enough stated to entitle pursuer to inquiry.

"I have therefore allowed a proof upon this one matter."

The pursuer appealed to the Sheriff (GUTHRIE), who on 10th July 1906 recalled his Substitute's interlocutor and allowed a proof before answer.

Note.—"Sheriff Fyfe in disallowing proof as to part of this cause has probably been influenced by the doctrine stated by Sheriff Glegg in his Work on Reparation at p. 454, founding on the case of *Sutherland* v. *Monkland Railway Co.*, 19 D. 1904. I am not sure that that case is entirely the same as this, and some light was thrown upon the subject by the cases under the Workmen's Compensation Act quoted by the appellant. I particularly refer to the dictum of Lord Kinnear in *Durham* v. *Brown Brothers*, 1 Fr. at p. 286, 'that a man does not cease to be in the course of his employment merely because he is not actually engaged in doing what is specially prescribed to him if in the course of his employment an emergency arises and without deserting his employment he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his master.' That doctrine is at least sufficient to justify the allowing of a proof before answer; whether it is applicable or not will fall to be decided at the end of the day. Meantime I think the averment is sufficient. I have less hesitation, as a proof has already been allowed as to part of the case by Sheriff Fyfe, and I do not think that there is any advantage in dividing the cause into two parts."

The pursuer appealed to the Court of Session for jury trial. The defenders took objection to the relevancy.

Argued for the respondents (defenders)—The pursuer's averments were irrelevant. The accident was due to pursuer doing something not his work, and which he had not been ordered to do. It was in fact due to his trespassing—his using the machine for a purpose for which it was not intended. There was accordingly no case under subsection 3 of section 1 of the Employers' Liability Act 1880. If after his protest no brush was provided, he might either have refused to go on with his work or gone on with it, and if he had chosen the latter alternative and had been injured, that would have been a different case. Pursuer did not even aver that what he did was the best or only method of removing the chips. A trespasser could not complain of lack of proper fencing; moreover, a mere general averment that a machine was dangerous and imperfectly fenced did not make a case relevant—*Cameron* v. *Walker*, January 15, 1898, 25 R. 449, 35 S.L.R. 347—and further, the accident was not due to the want of fencing, but was due to the pursuer stumbling—*Greer* v. *Turnbull & Company*, October 27, 1891, 19 R. 21, 29 S.L.R. 38. The case of *Hindle* v. *Birtwhistle* (*cit. infra*) had no application. If there was to be inquiry it should be by proof.

Argued for the pursuer (appellant)—The averments were relevant both at Common Law and under the Employers' Liability Act 1880. The mere fact that a workman was not doing his ordinary work at the time of the accident made no difference if he was doing something incidental to it and in the interest, not of himself, but of his master. The machinery was insufficiently fenced both at Common Law and under the Factory and Workshop Act 1878 (41 and 42 Vict. cap. 16), sec. 5 (3), as amended by the Factory and Workshop Act 1891 (54 and 55 Vict. cap. 75), sec. 6, by which "all dangerous parts of the machinery" must be securely fenced; and this obligation was not

confined to machinery which was dangerous in the ordinary course of working—*Hindle* v. *Birtwhistle*, [1897] 1 Q.B. 192; *Kelly* v. *Glebe Sugar Refining Company*, June 17, 1893, 20 R. 833, 30 S.L.R. 758. In any case, there were relevant averments under sec. 1 (1) of the Employers' Liability Act 1880 of defects in the "ways," which were insecure owing to the chips, and in the "plant," because there were not enough brushes through the fault of the superintendent. The injuries were serious and the case should go to jury trial.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the pursuer in this action has not set forth averments entitling him to go to probation.

His case is that he was put in danger by two faults of his employers, or those for whom they are responsible—(1) that he was not provided with a brush to clear the floor of the chips from his machine, so that he might not be in risk of slipping if they remained on the floor, and (2) that they failed properly to guard the cutter of the stripping machine at which he worked. He says that he asked the foreman to send a boy with a brush or to provide him with a brush, and that the foreman refused and told him to go on with his work; that thereupon he set to work to use the machine, not to do his work of stripping planks, but to cut a rough scraper out of wood by using the planing machine for that purpose, that in doing so the piece of wood got "kicked" out of his hand, and that in consequence of this and of the insecure foothold he fell forward and was caught by the cutter and injured.

Now while I fully accept the dictum of Lord Kinnear as stated in the Sheriff's note, I am unable to see how it can be applied in the present case. I cannot hold that it applies to a workman using a dangerous machine—which may cause an injury—to do work for which it was not designed. Here "emergency" is not truly in question. The clearing away of chips from a floor in front of a bench does not present itself to an ordinary mind as a thing that cannot be effected without special appliances. Some modes of doing it may be more convenient than others, but it certainly can be done without any special appliance at all when the only object is to obtain a sure foothold on the floor. And if the workman chooses to use the machine at which he works to make some special appliance of his own devising, and which was not a thing in ordinary use for the purpose, I cannot see that in doing so he will be doing his employer's work. And if he was not, there can be no relation of cause and effect which would bring the case within the common law liability of a master. It is therefore unnecessary to consider any question as to the machine itself or of fencing.

If this be so, then the question arises whether there is any case under the Employers' Liability Act as regards an order given by a superintendent. Here there was no order given by the foreman to do what was being done at the time of the accident, viz., the using of the machine to cut out a scraper to be used on the floor.

It was suggested in argument that a case might be made under the Employers' Liability Act, in respect that the small number of brushes in the workroom constituted a defect in the "plant" of the factory. I am unable to read the clause of the Act as applying to such a case. If there were too few brushes, that might probably retard the work, as a man might have to wait while a brush was in use at another machine until it could be brought to his bench. Even if brushes for cleaning chips from floors could be held to be machinery or plant in the sense of the Act, a deficiency in number of brushes to carry on the work without delay could not in my opinion constitute a "defect" in "machinery or plant" in the sense of the statute.

On these grounds I am of opinion that the defenders' plea on relevancy must be sustained and the action dismissed.

LORD STORMONTH DARLING—Personally I should have preferred if your Lordships had affirmed the Sheriff's judgment and allowed a proof before answer on the case generally, for I agree with him that if there were to be a proof there is no advantage in dividing the case into two parts—one turning on statutory and the other on common law liability.

But I feel the force of your Lordship's criticisms on relevancy, and I do not entertain any doubts as to the course proposed so strongly as to dissent.

LORD LOW—I have had the advantage of reading the opinion which your Lordship has just read, and as I entirely concur I do not wish to add anything.

The LORD JUSTICE-CLERK intimated that LORD KYLLACHY, who was present at the hearing but not at the advising, was of the same opinion.

The Court recalled the interlocutor of the Sheriff dated 10th July 1906, and also that of the Sheriff-Substitute dated 14th May 1906, sustained the defenders' first plea-in-law, and dismissed the action.

Counsel for the Pursuer (Appellant)—Crabb Watt, K.C.—W. J. Robertson. Agent—G. G. Pattison, W.S.

Counsel for the Defenders (Respondents)—Deas. Agents—Mitchell & Baxter, W.S.