

Friday, July 4.

SECOND DIVISION.

[Lord Shand, Ordinary.]

TRALL V. SMALL & BOASE.

*Master and Servant—Reparation for Bodily Injury—
Fault—7 and 8 Vict. c. 15, § 21, 19 and 20 Vict.
c. 38, § 4.*

A boy under fourteen years of age lost his right arm in the course of such employment in a factory as made it necessary he should put his arm within two feet of several unfenced revolving wheels, part of the machine at which he was ordinarily employed.—*Held* that the machine, from its position, was accessible to women and young persons in the course of their work; that it was the duty of the employers to have fenced the gearing; and that they were liable in damages, which were assessed at £150.

The summons in this suit, at the instance of Andrew Trall, against Small & Boase, hemp-spinners, Leven, concluded for payment of £1000 in name of damages, and as *solatium* for injuries sustained by the pursuer. The facts were as follows:—

On 27th September 1871 the pursuer, Andrew Trall, entered the employment of the defenders at their works at Leven. He was engaged by Andrew Nicoll, manager of the works for the defenders, by whom his duties were pointed out to him.

In order to convert hemp bale ropes into tow, before being spun into yarn they are subjected to a process of teasing, for which purpose a "breaker" or "carding machine" or "teaser" is used. The services of a man and a boy are required to attend to the machine in thus converting the ropes into tow.

James Wallace was the man employed by the defenders to feed the machine, and the pursuer, Andrew Trall, was engaged to assist. The ropes passing through the machine are teased by the "duffer" or "worker," and the tow is delivered upon the floor in front of the machine. The duty of the pursuer, as instructed by Andrew Nicoll, was to collect the tow as it was delivered, and place it in bags. He was also instructed, in the event of the tow overlapping the "duffer" or "worker," to slip a travelling-belt at the side of the machine off a pulley, whereby the revolution of the "duffer" is stopped. On this side of the machine, and surrounding the travelling-belt, are numerous cog-wheels, termed the lesser gearing, kept in constant and rapid motion. A space of eighteen inches intervenes between this side of the machine and a wall. When the pursuer required to slip off the belt he had to exercise great caution in consequence of the dangerous proximity of the lesser gearing on that side of the machine.

On Monday, 9th October 1871, or about that date, the pursuer Andrew Trall, a boy under fourteen years of age, was engaged at the machine, and was collecting the tow, when the "duffer" or "worker" became choked, and he, in pursuance of the instructions given to him as already set forth, slipped off the belt from the pulley, cleaned out the "duffer" or "worker," and replaced the belt on the pulley. Immediately after having done this, his right hand was caught by and dragged in between, two of the wheels of the lesser

gearing, and was so crushed that his arm had at once to be amputated a little below the elbow.

The statute 7th and 8th Victoria, cap. 15, sec. 21, enacts "that every fly-wheel directly connected with the steam-engine, or water-wheel, or other mechanical power, whether in the engine-house or not, and every part of a steam-engine and water-wheel, and every hoist or teagle, near to which children or young persons are liable to pass, or be employed, and all parts of the mill-gearing in a factory, shall be securely fenced; and every wheel-race not otherwise secured shall be fenced close to the edge of the wheel-race; and the said protection to each part shall not be removed while the parts required to be fenced are in motion by the action of the steam engine, water-wheel, or other mechanical power for any manufacturing process."

After the accident the defenders caused the machinery to be protected by a wooden shrouding.

The defenders in their answers explained that the pursuer at the time he met with the accident was not engaged in the discharge of any part of his duties, but had, in opposition to orders, pushed himself into the space between the machine and the wall, where he had no right to go.

The pleas in law for the pursuer were:—(1) The pursuer, Andrew Trall, having sustained serious loss, injury, and damage through the fault and negligence of the defenders, or those for whom they are responsible, he is entitled to decree against them as concluded for, with expenses. (2) The pursuer, Andrew Trall, having sustained severe and permanent bodily injury through the neglect of the defenders, or those for whom they are responsible, in not causing the lesser gearing of the machine at which the pursuer was engaged, and from which he sustained the injury, to be securely fenced, in terms of the 21st section of the statute quoted in the condescendence, he is entitled to decree against them as concluded for.

The pleas in law for the defenders were:—(1) The pursuer has not set forth facts relevant or sufficient to infer liability against the defenders, and the action should be dismissed, with expenses. (2) The pursuer's averments being untrue, the defenders should be assoilzied. (3) The accident in question not having been occasioned by any fault on the part of the defenders, and *separatim*, having been caused by the pursuer's own fault, the defenders should be assoilzied, with expenses.

The Lord Ordinary, after a proof, pronounced the following interlocutor:—

"*Edinburgh, 6th February, 1873.*—The Lord Ordinary having heard and considered the evidence, and heard counsel for the parties—Finds that the pursuers have failed to prove that the injuries sustained by the minor pursuer, Andrew Trall, on or about 9th October 1871, at the defenders' works in Leven, were caused by fault or negligence on the part of the defenders. Therefore, assoilzies the defenders from the conclusions of the summons, and decerns; Finds the pursuers liable in expenses, allows an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

"*Note.*—The Lord Ordinary stated his views of the evidence in detail to the parties in giving judgment. He thinks it sufficient here to state (1) That he is of opinion on the evidence that, having regard to the place in the defenders' works at which the machine by which the pursuer was injured was situated, there was no obligation by statute or

otherwise on the defenders to fence the machine as alleged by the pursuer. (2) That the pursuer has failed to prove, as maintained by his counsel at the debate at the close of the evidence (although not pleaded on record), that there was neglect on the defenders' part, or on the part of those for whom they are responsible, to give the pursuer proper and necessary instructions for the performance of a duty said to be attended with danger. (3) And that, even if the working of the machine had been attended with danger, and there had been a failure to give the pursuer proper or necessary instructions, the fault lay with the manager or foreman of the works, who were with the pursuer in the service of the defenders, and these persons having been men of experience and well fitted for their duties, the defenders would not in law be liable for their fault in omitting to perform the duty of warning the pursuer."

The pursuer reclaimed.

Cases cited—*Grizzle v. Frost*, 3 Foster and Finlayson, 625; *Wilson v. Merry*; E. L. R. 1 Scotch Appeals, 326; *Pollok*, 8 Macph., 615; *Gemmell*, 23 D. 425.

At advising—

LORD JUSTICE-CLERK—The Court are always unwilling to differ from the Judge who has taken the proof as to the import of the evidence, as he has many advantages from having heard the evidence and seen the witnesses, which a Court of review does not possess. But, on the best consideration I have been able to give to the proof as recorded in this case, I cannot agree with any of the findings of the Lord Ordinary.

Divested of immaterial details, the facts seem to be these:—The machine in question was one for carding tow, which was worked by a man at the feeding end and a boy at the end of discharge. It consisted of a carding cylinder, revolving with considerable velocity, and several wheels which were essential to certain parts of its operation. These wheels were placed on the right hand of the machine looking from the feeding-table, and consequently on the left hand of the boy, who worked opposite it where the tow was discharged. Part of the machinery was worked by a belt passing over two revolving cylinders, by the removal of which by the hand the machine when choked could be relieved without stopping the general motive power. This machine was placed in a building with the right portion of it, on which the revolving wheels were situated, within thirteen or fourteen inches of the wall; the belt in question worked in this space. Some three months before the pursuer, who was a boy under fourteen, was engaged at this machine its mechanism had been completely covered in and fenced; but, owing to some alterations on it, the fencing had been removed, and when the pursuer commenced the working there was nothing to prevent him going between the machine and the right hand wall. His duty was when the machine got clogged to remove the belt in question from the cylinders on which it worked, and thereby suspend for the time the revolution of part of the machine until it cleared itself. It appears from the evidence of the pursuer that he was in the habit of performing this operation by squeezing himself between the machine and the wall, where the wheels in question were revolving, and so making his way to the cylinder on which the belt worked at the opposite end of the machine, and, after taking off the belt when

the machine got choked, to return in the same way between the wheels, which still continued to revolve, and the wall. He had only been engaged two days at the machine when, according to his account, on returning from lifting the belt his sleeve caught in one of the revolving wheels, and his right arm was so much injured that it had to be amputated below the elbow. The present action has been brought against the mill owners to recover damages for his injury.

The first question is whether the defenders were in fault for not having this machine fenced. Under the Statute 7 and 8 Vict., cap. 15, sec. 51, it is enacted *inter alia* that all parts of the mill-gearing in a factory shall be securely fenced; and had that Statute regulated the present question, I entertain no doubt that the machine was not properly fenced. It is quite true that the machine was placed against the wall, but not so placed as to prevent a boy passing in the way the pursuer describes. But it is said that this Statute was altered by the Act of 1856, by which the operation of this clause was limited to such machinery as women and young persons are liable to come in contact with, and it is pleaded that the true reading of that Statute is that no fencing is required unless in such a situation as children or young persons in the ordinary and regular course of their employment are in danger of coming in contact with, and thus it is argued that if the pursuer was not working the machine according to ordinary rule, no fencing was required.

I am of opinion that such is not the true construction of the Act of 1856, the true meaning of which is to limit the operation of the 7th and 8th Vict. to such parts of the gearing as from its physical position are accessible to women and young persons in the course of their work. That Act was passed in consequence of a decision by the Queen's Bench in a case of *Doel v. Shepherd* (*Law Times*, January 18, 1856, not 1826, p. 216; 5 Ellis & Blackburn, 856), in which the question arose whether the Statute of 7 and 8 Vict. applied to machinery which was in such a situation as not to be dangerous to any one, the machinery in that case having been seven feet from the ground. But Lord Campbell (Chief-Justice) said "the sooner such an interpretation of the Statute is corrected the better. The Legislature has not said that where there shall be danger machinery shall be fenced, but has declared, in the most absolute manner, that in all the cases mentioned the machinery shall be fenced."

As this judgment, which was contrary to the opinion of Mr Justice Cresswell, imposed on the mill owners a very serious obligation in regard to those parts of the machinery that were truly not accessible to children and young persons engaged in mills, the Limiting Statute of 1856 was passed; but it was by no means intended to restrict the operation of the 7th and 8th Vict., along with which its provisions were directed to be read, farther than to render it unnecessary to fence machinery in regard to which there was no reasonable risk that children and young persons should be exposed to it. In the present case this machine had been previously fenced. The evidence shows that it was subsequently fenced; and Paterson, who was in the employment of the defenders at the time, says that he thinks the fencing should have been replaced, and that the machine was not safe without it.

It certainly does not necessarily follow that because the machine was not properly fenced every accident thereby occasioned to those employed in working it can found a claim of damages against the mill owner. In the case I have referred to as decided by Lord Campbell it was found that although the machine was not properly fenced, yet that the injury having been caused by the improper act of the man injured he was not entitled to recover. But that, in the first place, was the case of an adult under the former law. It is obvious that the continuation of the former law, as regards children and young persons, necessarily implies that they are more likely to come in contact with the dangerous parts of the machinery than adults, and the object of the statute was to have the machinery so fenced that in the course of their ordinary employment they could not come in contact with it. Without saying that a boy under fourteen cannot be guilty of contributory negligence, where the statutory provision has been violated, I do not think that such is the case here. The evidence leaves it very much in doubt what the instructions were which the pursuer received. The defender says that he told him always to go round by the feeding end of the machine. The pursuer himself says that he received no such instructions; and the man Wallace, who fed the machine and was there all the time until the accident happened, says that he cannot tell whether the pursuer went round by the back—that is by the feeding end; and at last says that he sometimes went the one way and sometimes the other. The result of the evidence to my mind is, that the boy was in the habit of squeezing between the wall and the machine, as the shortest way, when he required to take the belt off; and that he never was checked for doing so by the man Wallace who stood at the other end of the machine. It is remarkable that although this man was present when the accident occurred he is wholly unable to tell where the boy was when it happened. Mr Nicoll thinks that the boy could not have gone between the machine and the wall from the place where he worked; but this, I think, is not supported by the evidence.

On these two points, therefore, I am of opinion that this machine ought to have been fenced, and that the pursuer being under fourteen, and engaged at the time in his ordinary occupation, has not liberated the defenders from their responsibility by taking that method of discharging his duty. It ought not to have been left open to him to do so. This being so, I am also of opinion that the responsibility of fencing the machine lay with the employer and not with any subordinate.

The machine has been since fenced; and, without giving undue weight to that circumstance, I think it shows that it was possible to fence it. I have no doubt that the employers thought that the machine was safe enough, and that they did not anticipate the mode of working which the pursuer adopted. But they ought to have performed their statutory duty, and must be liable for the consequences of not having done so.

LORD COWAN—I concur. I have carefully considered this case and the statutes, on the true construction of which the decision depends, and I have very few observations to offer, except that, from the first, it has struck my mind as a great peculiarity in this case, that the machinery left unfenced was part of the very machine at which the pursuer worked, and that in doing his ordinary work he was

brought within two feet of this unfenced machine. Now, I consider that a dangerous machine.

LORD BENHOLME—I concur. I think the words of the Statute are clear, and do not allow any consideration of mere carelessness on the part of the boy to be taken into account. I think the Statute obliges us to give damages.

LORD NEAVES—I concur. The object of the Legislature is clear. It is lawful for mill owners to employ children and young persons in their mills, which is a great advantage to them; but, in compensation, they are required to put their mills and machinery in such a way as, if accessible, they shall be safely guarded, so as to exclude the risk of children and young persons coming into contact with them. A machine which is inaccessible does not require fencing, but, as has been explained, that is only by a recent change in the law. It is no answer to say that a child or young person neglected instructions. The very fact of being a boy assumes that he is rash, and therefore the Legislature has required a physical precaution to be taken. I don't say that there may not be cases of contributory negligence by a boy, but this is not such a case; here the boy was employed near it, and it was accessible on both sides.

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Counsel for Defenders—G. Smith and P. Fraser.
Agent—J. Galletly, S.S.C.

Friday, June 27.

SECOND DIVISION.

[Lord Gifford, Ordinary.]

JEX-BLAKE AND OTHERS v. SENATUS
ACADEMICUS OF THE UNIVERSITY OF
EDINBURGH, AND THE CHANCELLOR
THEREOF.

*University—Deed of Foundation—Construction—
Powers of University Court.*

Held (by a majority of the whole Court)—

(1) That in respect of the language of the deeds of foundation, and the uniform practice of the University of Edinburgh, female students are not admissible within it for matriculation and education; (2) That regulations passed by the University Court, which authorised the admission of women as students in the University, were *ultra vires* of the Court.

The circumstances out of which this suit arose were as follows:—On 20th March 1869, the pursuer, Miss Jex-Blake, addressed a letter to the Dean of the Medical Faculty of the University of Edinburgh, requesting permission to attend the lectures to the medical school during the coming session, under such conditions or reservations as might seem desirable. At their meeting on March 23, the Medical Faculty acceded to this request; and on 27th March 1869 the Senatus Academicus, by a majority of 14 votes to 4, sustained that decision, and granted the said pursuer permission to attend classes tentatively, and without matriculation, during the ensuing session. On appeal against this resolution, the University Court, on 19th April 1869, pronounced the following judgment—"The Court con-