

think we should simply dismiss the petition.

The Court recalled the interlocutor appealed against, and dismissed the petition.

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

Counsel for Respondent—Burnet. Agents—Henry & Scott, S.S.C.

Saturday, July 9.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROBB AND OTHERS *v.* BULLOCH, LADE, & COMPANY.

Reparation—Injury—Fencing—Factory and Workshop Act 1878 (41 Vict. cap. 16).

The Factory and Workshop Act 1878 provides—"5. 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 position or of such construction as to be equally safe to every person employed in the factory as it would be if securely fenced."

The mash-tun in a distillery had a piece of machinery connected with a horizontal shaft from the centre of the mash-tun, and worked by steam power, which travelled round the edge of the mash-tun on a pinion wheel and set certain revolving rakes in motion in the interior of the mash-tun to stir up and mix the mash. Running round the outside mouth of the mash-tun a strong iron guard-rod had been placed which did not run the whole length of the mash-tun. The mash came into the mash-tun through a spout which was fixed in the wall of an adjoining compartment. The duty of a workman was to clean out the spout. To do this he had to stand upon a box or stool at the side of the mash-tun. He had frequently performed this operation before. There was no protecting rod at the place he stood to clear the spout. While so engaged, the stool on which he stood slipped and the revolving machinery caught and fatally injured him. His widow brought an action against his employers on the ground that the mash-tun had not been properly fenced in terms of the provisions of the Factory and Workshop Act 1878.

Held (1) that it was not compulsory under the Act for the employers to fence this piece of machinery, (2) that on the pursuers' averments it was plain that the accident occurred from the accidental slipping of the stool, for which the defenders were not liable, and the action *dismissed* as irrelevant.

Upon 15th June 1891, William Robb, an engineman and fireman in the employment of Bulloch, Lade, & Company, distillers, Loch Katrine Distillery, Glasgow was killed while engaged in his employment at the defenders' distillery.

His widow and children raised an action against his employers for damages on account of his death. It appeared that Robb, who was a man of about 48 years of age at the time of his injury, was fireman and engineman in the defenders' service, and that in his spare time he gave assistance in the mash-house of the distillery; he had been engaged in the same employment for some years.

The pursuers averred that the deceased "was engaged clearing the spout through which the mash passes from the mashing-box in an adjoining compartment into the mash-tun in the mash-house, which spout had become choked or obstructed. The spout is fixed in and comes through the wall between the mashing-box and mash-house, and extends about two feet or so over the mouth of the mash-tun, which is circular in form, so as to run the mash into it. To enable him to clear the spout, he had to stand upon a wooden box or stool and lean or reach over the mouth of the mash-tun to get a wooden shovel or spoon used for the purpose into the spout to clear away the choking or obstruction. A carriage or piece of machinery connected with a horizontal shaft from the centre of the mash-tun, and worked by steam power, travels along the top of the mash-tun on a pinion wheel, and sets certain revolving rakes in motion in the interior of the mash-tun to stir up and mix the mash. The said carriage or machinery comprises a cast-iron sole plate, carried on two wheels (the one a pinion and the other a roller), running on a rack and plain rail forming the top of the mash-tun, and is set in motion by said wheels,—which wheels are duplicated and fitted with a clutch to enable the carriage to be run in either direction, and they are moved by said shaft coming from the centre of the mash-tun, which in its turn receives its motion from a vertical shaft driven by a steam engine. There are in all four pinion wheels and two roller wheels in said carriage or machinery. Running round the outside mouth of the mash-tun a strong iron rod has been placed, so as to fence the said carriage or machinery, and protect the workmen employed in the mash-house from being injured by it. This iron rod does not extend the whole length of the mash-tun. There was no protecting rod or fence of any description at the place where the said deceased William Robb required to work when he was employed in clearing the said spout. While he was leaning or reaching over the top of the mash-tun and clearing the said spout, the said carriage or machinery came round on the opposite side of the spout and caught and jammed and crushed him against the end of the iron rod where it stopped short. . . . The said carriage or machinery which travelled round the top of the mash-tun was part of the mill-gearing used in the

said distillery. It was driven by a steam engine of 30-horse power, and as required by the Factory and Workshop Act 1878, it should either have been securely fenced, or in such position or of such construction as to be equally safe to every person employed in the distillery, as it would have been if it had been securely fenced. . . . The defenders carelessly and negligently failed in this duty, and it was owing to their carelessness and negligence in not securely fencing the said carriage or machinery, that the said deceased William Robb received the injuries which were the cause of his death."

The defenders pleaded that the action was irrelevant, and that the accused had been guilty of contributory negligence.

Upon 25th August 1891 the Sheriff-Substitute (BALFOUR) allowed the parties a proof of their averments.

"*Note.*— . . . It appears to me that according to recent English authorities the plea of contributory negligence is not available to the defenders. They had a statutory duty to perform in fencing the machinery, and the defence arising from the maxim *volenti non fit injuria* is not applicable in cases where the injury arises from the breach of such duty. See the cases of *Holmes v. Clark*, 7 J. (N.S.) 397; *Britton v. Great Western Cotton Company*, L. R., 7 Exchq. 130; and *Baddeley v. Earl Granville*, 19 Q.B.D. 423.

"It was maintained that the provisions of the Factory Act did not apply to the machinery in question, but there is no such plea on record, and the greater portion of the machinery is, in point of fact, fenced."

Upon 27th January 1892 the Sheriff-Principal (BERRY) adhered.

The pursuers appealed.

Case cited—*Smith v. Baker & Sons*, July 21, 1891, 1 App. Cas. 325.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts*]—The Sheriff-Substitute has allowed the pursuers a proof of his averments, and he gives as the principal reason for doing so that there is an averment that there was a statutory duty on the employers under the Factory and Workshop Act 1878 to fence the machinery. I have examined the Act with care, and I am unable to see under any one of the heads of machinery ordered to be fenced, a description which has any application to this case. None of them can be even suggested as having any application except No. 3—[*Here his Lordship read the section*]. Now, I cannot look upon this apparatus which went round the mash-tub as falling within the provisions of that sub-section of the Act, and so I can see no ground for holding that the defenders ought to have fenced it.

It is said that it was fenced but not sufficiently so, but it is plain that the fence referred to was put in front to prevent danger to passers-by, and not for the protection of the workmen whose duty re-

quired them to work at the mash-tun.

The work had been carried on for many years under the same system, and there appears to have been no danger to the workman engaged if he took care of himself. Either this man when cleaning out the spout on this occasion did something which he had never done before in his ordinary practice, or some accident which could not reasonably be expected to take place happened. In either view it is plain that the master was not liable.

It was not alleged that there was any fault in the stool, which it is said slipped away, or that the master had been asked to do anything to prevent an accident arising from such a cause. I am not speaking of any case of seen danger. All that I mean is, that as the pursuer had done his work for years without complaint, he must be held to be satisfied with the appliances he used for the work.

In these circumstances I am not able to hold that the pursuers have stated a relevant case.

Lord Young, who is absent, has authorised me to say that he concurs.

LORD RUTHERFURD CLARK—I confess I have found great difficulty with this case, and I should have been inclined to send it to a jury, but as your Lordships are agreed I do not dissent.

LORD TRAYNER—I agree with your Lordship in the chair. I think there is no statutory duty upon the employers to fence this machinery. The deceased, who had been in the employment of the defenders, had for many years worked under the system now complained of. It is not said that this regrettable accident occurred from any unusual cause. On the contrary, I think that on the pursuers' own averments it is plain that the accident occurred from the accidental slipping of the stool, and the defenders are not to blame for that.

The Court recalled the Sheriff's interlocutor, and found that the pursuers' case was irrelevant.

Counsel for Appellants—Shaw—Burnet, Agents—Carmichael & Miller, W.S.

Counsel for Respondents—Ure—Wilton, Agents—Emslie & Guthrie, S.S.C.