not doubt, is beneficial in its operation and within the general spirit of the enacting words of the Local Government Act. I may perhaps add that if the bye-law is held to be effective I do not think that the point stated in the second question creates any difficulty. The fact that a large number of persons were proved to have effected bets or settled bets with the accused is, I think, sufficient to prove that he was "frequenting" the street within the meaning of the bye-law.

The Court dismissed the appeal.

Counsel for the Appellant—A. M. Anderson. Agent—Andrew H. Hogg, S.S.C.

Counsel for the Respondent—Wilson, K.C.—Horne. Agents—Simpson & Marwick, W.S.

COURT OF SESSION.

Thursday, March 10.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

JACK *v.* RIVET, BOLT, AND NUT COMPANY, LIMITED.

Reparation — Master and Servant — Unfenced Machinery — Factory and Workshop Act 1901 (1 *Edw. VII. c.* 22), *sec.* 10.

A girl, aged sixteen years, who had been injured by an accident in a rivet, bolt, and nut factory, raised an action in the Sheriff Court for damages at common law and under the Employers Liability Act 1880 against her employers. She averred that she, while engaged working at a machine for finishing bolts and nuts, had in the course of her duty to go to an adjoining machine for the purpose of getting nuts to be finished by her at the machine of which she was in charge; that while waiting for the nuts the bolt used by her for testing the nuts accidentally fell into the trough of the adjoining machine; that she stooped to recover the bolt, and while in the act of raising herself her hair was caught by the spindle of the machine, and her head drawn in by the moving machinery, and seriously injured. She averred that her injuries were caused by the fault and negligence of the employers and their foreman, in respect that they were in breach of their duty at common law, and under the Factory and Workshop Act 1901, sec. 10, in not having the machine guarded, as was usual in similar workshops, and in particular in not having the spindle of the machine protected, it projecting in such a way as to render it a source of danger to persons who had occasion to be near. The Sheriff-Substitute allowed a proof before answer.

On appeal, the Court, while expressing doubt as to the relevancy of the action, remitted the case to the Sheriff-Substitute to take the proof allowed by him.

Catherine Jack, 180 Gallowgate, Glasgow, with the consent and concurrence of her father Isaac Jack, as her curator and administrator-in-law, brought this action in the Sheriff Court of Lanarkshire at Glasgow against the Rivet, Bolt, and Nut Company, Limited, having their registered office at 121 St Vincent Street, Glasgow, for payment of £1000 in name of damages, or otherwise for payment of £78 as compensation in terms of the Employers Liability Act 1880.

The pursuer, who was sixteen years of age, averred that—"(Cond. 3) On or about 6th August 1903 she was in the employment of the defenders at their Scotia Works, Glasgow, and was engaged working at a finishing-machine for finishing bolts and nuts. On said date the defenders employed Mr Robertson as superintendent, manager, or foreman, within the meaning of the Employers Liability Act 1880, in connection with the said works. The pursuer in the course of her duty had to go from her own machine to an adjoining machine for the purpose of getting nuts to be finished by her at the machine of which she was in charge. (Cond. 4) On said date she had gone for a panful of nuts, and while she was waiting for the nuts, the bolt used by her for testing the nuts accidentally fell into the trough of the said adjoining machine, which was attended by a girl named Dickson. The pursuer stooped to recover the bolt, and while in the act of raising herself her hair was caught up by the spindle of the machine attended to by the girl Dickson, and the moving machinery drew in pursuer's head and tore her scalp off." The pursuer further averred—"(Cond. 6) The injuries to the pursuer were caused by reason of the fault and negligence of the defenders and of their foreman thesaid Mr Robertson, for whom the defenders are responsible in terms of the of the Employers Liability Act 1880. It was the duty of the defenders" *both at common law and under the Act* 1 *Edw. VII. c.* 22, *sec.* 10 (the words in italics were inserted as an amendment) "to have had the running parts of the said machine guarded in such a way as would have prevented their workers from sustaining accident. The machine in question was one in which the pursuer in the course of her duty had to pass, and it was one which should have been guarded and protected so that the workers in the course of their regular employment could not be subjected to any undue risk. The spindle of this particular machine was not protected in any way, and it projected in such a way as to render it a source of danger to those who had occasion to be near it or pass it. It was the duty of the defenders, or of their said foreman in the exercise of the superintendence entrusted to him, to have said machine fenced or protected in such a manner as would have prevented accidents occurring. This is customary and usual in similar workshops where machinery is used. No precautions were taken, how-

ever, either by the defenders or by their foreman, and the accident to the pursuer, and the injury and loss which she has sustained, have been caused through the fault and negligence of the defenders and their said foreman as before set forth."

The defenders admitted that the pursuer on the date in question was in their employment at their Scotia works; that they employed Mr Robertson as foreman in connection with the said works; and that on the date in question the pursuer, while standing at a machine attended by a girl named Dickson stooped in such a way that her hair was caught in the spindle of the said machine and the scalp torn off. *Quoad ultra* denied the pursuer's averments, and explained "that the portion of the spindle which caught the pursuer's hair could not possibly have been worked with any guard upon it, and that the machine was, as far as possible, amply guarded. Explained further that the machine could have been immediately stopped, and anything which had fallen been removed without the slightest risk of injury to anyone. Explained further that the accident was caused solely by the fault and negligence of the pursuer, or her own fault and negligence materially contributed thereto: (first), in being at the machine in question, where she had no right or duty to be; and (secondly) in attempting to pick up the article she accidentally dropped while the machine was in motion, instead of getting it stopped prior to securing the said article."

The pursuer pleaded, *inter alia*—"(1) The pursuer having, while a servant of the defenders, been injured through the fault of the defenders or of their servant for whom the defenders are responsible, is entitled to reparation, with expenses. (2) The defenders having caused the pursuer to suffer loss, injury, and damage through the defective condition of their machinery and plant, are bound to compensate pursuer."

The defenders pleaded, *inter alia*, as follows—"(1) The pursuer's averments being irrelevant and insufficient to sustain her pleas, the action should be dismissed with expenses. (3) The defenders are entitled to absolvitor with expenses, in respect that the injuries sustained by the pursuer were caused by her own fault and negligence, or her own fault and negligence materially contributed thereto."

The Sheriff-Substitute (BALFOUR), by interlocutor dated January 12, 1904, before answer allowed the parties a proof of their averments.

The pursuer appealed, and argued—The action was relevant. Even though contributory negligence on the part of the appellant was proved, that was no answer if, as was averred, there was a breach by the respondents of the statutory duty conferred on them by the Factory and Workshop Act, 1901, 1 Edw. VII., c. 22, sec. 10. The case should be sent to a jury in the ordinary way.

Argued for the respondents—The action was irrelevant, in respect that there is not set forth any connection as of cause and effect between the non-fencing of the machine and the accident—*Robb* v. *Bulloch, Lade, & Company*, July 9, 1892, 19 R. 971, 29 S.L.R. 832. The amendment added nothing to the relevancy of the action, since appellant could always be entitled to refer to a public general statute. The question was whether, on the appellant's own averments, what occurred was a thing which a reasonable administrator would provide against. This, in any view, was a narrow question, involving careful discrimination between relevant and irrelevant evidence, and therefore was more fitted for trial by the Sheriff than before a jury. The Factory and Workshop Act 1901 (1 Edw. VII., c. 22), sec. 10, to which reference was made in the appellant's amendment, enacts as follows—"With respect to the fencing of machinery in a factory the following provisions shall have effect:—(*c*) All dangerous part of the machinery, and every part of the mill gearing, must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

LORD PRESIDENT—This is certainly an action of a peculiar kind. I do not feel warranted in saying that the allegations on which it proceeds are not relevant, but I think the relevancy is, to say the least, doubtful. The pursuer was stooping to pick up a bolt which had fallen into a trough adjoining a machine, and her hair came within the range of the running gear, with the result that her scalp was torn off. Now it seems to be very doubtful whether the girl should have put her head there at all, and in the conduct of this case great care will have to be exercised in order to distinguish between relevant and irrelevant evidence under these circumstances; and having regard to the delicate and narrow nature of the case I think that a right result is more likely to be arrived at if proof is led before the Sheriff than if the case is sent for trial before a jury, and I am therefore of opinion that the case should be sent back in order that the proof allowed by the Sheriff should be led.

LORD M'LAREN—It must not be lost sight of that a very large proportion of the cases that are tried in consequence of the liability created by the Employers Liability Act are cases raising questions of law, sometimes as to whether the person whose negligence is said to have caused the injury falls within the description of persons for whom the employer is liable, and sometimes as to whether in the special circumstances of the case it can be said there was negligence on the part of anyone. Now I think it is not an unfair statement of the motive of one of the clauses of the Employers Liability Act to say that the consideration that claims under the Act would involve matter of law was in

in view of the Legislature when such cases were appointed to be tried in the first instance before the Sheriff, but with of course a right of appeal to a higher Court where all questions of law as well as of fact would be determined. No doubt it was also contemplated that they might be removed into the Court of Session for trial, and of course there are cases where it is apparent that no question of law is stated but only questions of pure fact suited for jury trial. The present case, as it appears to me, is one much more likely to turn on law than on fact; and while a right of appeal is given under the 73rd section of the Court of Session Act to any person who may conceive that his case is suited for jury trial, the Court is not bound to adopt that conception. In my judgment this is not a case specially suited for jury trial, but one which would be better disposed of by remitting to the Sheriff, in order that the case may be tried in the way in which it was contemplated by the Legislature that the ordinary run of cases would be tried, although I am afraid but a small proportion of them are in fact tried in that way.

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court remitted the cause to the Sheriff-Substitute for proof as allowed by him.

Counsel for the Pursuer and Appellant—C. N. Johnston, K.C.—Constable. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—Salvesen, K.C.—Hunter. Agents—Millar, Robson, & M'Lean, W.S.

COURT OF TEINDS.

Friday, March 18.

(Before the Lord President, Lord Adam, Lord M'Laren, Lord Kinnear, and Lord Low.)

SIR JOHN CHEYNE, PETITIONER.

Teinds — Process — Disjunction and Erection of Parish Quoad Sacra—Petition to Substitute Amended for Original Deed of Constitution—Procedure.

The church and parish of Oban were by decree of the Court of Teinds in 1867 disjoined from the united parish of Kilmore and Kilbryde and erected into the church and parish of Oban *quoad sacra*. A deed of constitution had, in accordance with usual practice, been previously adjusted and approved of by the Church Courts. It provided for the management of the affairs of the church by a body of trustees holding office for life, some of whom were trustees *ex officiis*, others elected. The titles to the church, burying-ground, and manse were taken in their favour and they were personally bound, failing ordinary church revenue, to keep the fabrics in repair. In 1903, it being thought desirable that the affairs of the church should be managed by an elected church committee, a petition was presented to the Court of Teinds by the Procurator-Fiscal of the Church of Scotland craving that an amended deed of constitution might be received by the Clerk of Teinds and lodged in the process of disjunction and erection in substitution for the one existing.

The Court, after reports by the Clerk of Teinds adverse to the petitioner's proposals, ultimately remitted to the Lord Ordinary on the Teinds to consider the petition and whole proceedings, and to adjust the amendments proposed. The Lord Ordinary thereafter adjusted amendments on the original deed of constitution giving effect to the petitioner's proposals in so far as compatible with the preservation of the rights and obligations of the trustees with regard to the titles of the church, manse, and burying-ground and the maintenance of the fabrics, and the Court *authorised* the Clerk to receive a supplementary deed of constitution in terms of and subject to the conditions expressed in the deed adjusted by the Lord Ordinary.

This was a petition to the Court of Teinds presented on 8th January 1903 by Sir John Cheyne, K.C., Procurator for the Church of Scotland, craving for authority to lodge an amended deed of constitution in the process of disjunction and erection of the parish of Oban, in order that the same might be acted upon in time coming in substitution for the existing constitution. The petitioner, as Procurator of the Church of Scotland, was an *ex officio* trustee both under the original deed of constitution and the proposed amended deed.

The petition set forth, *inter alia*.—"That by an Act passed in the Parliament of Scotland in the year 1707, intituled 'An Act anent Plantation of Kirks and Valuation of Teinds,' your Lordships are empowered, authorised, and appointed to judge, cognosce, and determine in all affairs and cases whatsoever which by the laws and Acts of Parliament of the Kingdom of Scotland were formerly referred to and did pertain and belong to the jurisdiction and cognisance of the commissioners appointed for the plantation of kirks and valuation of teinds, as fully and freely in all respects as your Lordships do or may do in other civil causes.

"By the New Parishes Scotland Act 1844 (7 and 8 Vict. c. 44) powers are given to your Lordships, upon the application of any person or persons who shall have acquired or undertaken to acquire a church and to endow the same, to inquire into the circumstances, and after due intimation to all parties having interest, to erect such church into a parish church in connection with the Church of Scotland and to mark