at any working hour of the 21st, and seeing that the loading was not finished till 6 or 8 o'clock on the evening of the 28th, the pursuers do not overstate their claim when they state it at fifty-six hours' demurrage. This entitles them to decree for the sum of £45, 16s. 8d.

The Court pronounced this interlocutor—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact (1) that the 'Cassia' arrived at Portugalete to fulfil the contract contained in the charter-party mentioned on record on 17th June 1890; (2) that intimation was given on the same day to the respondents or their agent that said ship was then ready to receive cargo; (3) that said ship was not berthed for loading cargo until the 27th June; (4) that according to the terms of said charter-party, and the custom of said port, the 'Cassia' would have been berthed on the 21st June if berthed in turn, and should have been berthed on that day and her loading commenced; (5) that the failure to berth the 'Cassia' in turn as aforesaid was a breach of said charter-party on the part of the respondents; and (6) that said failure to berth and load the 'Cassia' in turn as aforesaid resulted in the 'Cassia' being detained for a period of at least fifty-six hours beyond the lay-days specified by the charter-party: Find in law that the respondents are liable to the appellants in demurrage at the rate specified in said charter-party for the period of detention foresaid: Therefore decern against the respondents to make payment to the appellants of the sum of £45, 16s. 8d. sterling, with interest as concluded for: Find the respondents liable in the expenses of process both in this Court and in the Sheriff Court," &c.

Counsel for Appellants—C. S. Dickson. Agents—J. & J. Ross, W.S.

Counsel for Respondents—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, October 27.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

MILLIGAN *v.* MUIR & COMPANY.

Reparation—Master and Servant—Insufficient Precautions for Servants' Safety—Dangerous Machine—Fencing—Presence of Foreman—Relevancy.

A lad brought an action of damages against his employers for injuries sustained by his hand slipping from a wheel which he was turning by the rim and not by the handle. He averred that he could not reach the handle because of a quantity of copper lying in the way, that he had been ordered to work by the foreman, who by his presence had acquiesced in his manner of working, and that the wheel ought to have been fenced. He did not aver that he could not have removed the copper, or that the wheel, if properly worked, was in itself dangerous, or that it was machinery in the sense of the Factory Act. *Held* that the action was irrelevant.

Thomas Milligan, aged fifteen, residing at 66 M'Alpine Street, Anderston, Glasgow, brought an action in the Sheriff Court at Glasgow against Robert Muir & Company, coppersmiths, &c., 146 Lancefield Street, Glasgow, to recover damages at common law, and alternatively under the Employers Liability Act 1880, for injuries sustained by him while in their employment. He averred that on 19th April 1891 "he went to a machine, as instructed by his foreman, and in his full knowledge and with his approval, to assist at the working of said machine, which was being used for cutting sheets of copper. Explained that the copper-cutting machine is situated quite close to the wall. The point of the handle, which is on the rim of the wheel, is only 18 inches from the wall. On the date in question there was a considerable quantity of sheets of copper laid against the wall opposite the machine and the handle of the machine, and also on the side of the handle on which pursuer would have stood. A boy, Dunlop, who was considerably taller than pursuer, was working the handle on one side, and pursuer was placed on the other side of the handle facing him. Owing to the presence of masses of copper pursuer could not use the handle, but had to help to turn the fly-wheel by catching the rim. He worked in this manner in sight and with the knowledge of the foreman all day, and was not forbidden to do so. He had been previously working it in the same way, which was the only possible method open to pursuer, and that with foreman's knowledge. . . . Explained that the machine is driven by mechanical power by means of a heavy fly-wheel and handle attached thereto, by which it is driven by hand-power. Pursuer was assisting the lad named Dunlop in turning the fly-wheel, when his left hand, slipping off the wheel, was caught between the large spur and pinion-wheels, which are situated about 4 inches distant from the fly-wheel, and severely crushed. . . . The machine in question, where the pursuer had to work it, is of a most dangerous character. It was the duty of and incumbent on the defenders, in terms of the Factory and Workshops Act, to have the machinery fenced or protected, which could easily have been done at a trifling expense, and without interfering with the usefulness and working of the machinery. Had this reasonable precaution been adopted, the work would have been perfectly safe, and injury rendered impossible. Further, it is usual and customary for such machines to be so fenced."

The pursuer pleaded—"(1) Pursuer having been injured as before narrated through

the fault or negligence at common law of the defenders, or those for whom they are responsible, he is entitled to decree. . . . . (3) The defenders, or those for whom they are responsible, having been in fault in failing to have fenced or protected the machinery in question, as they were bound to do both at common law and under the Factory and Workshops Acts, they are liable to the pursuer in terms of the first conclusion."

The defenders pleaded—"(1) The pursuers' statements are irrelevant."

On 22d June 1891 the Sheriff-Substitute (LEES) allowed a proof before answer.

"*Note.*—The pursuer says that his hand was caught between the large spur and pinion-wheels adjoining the fly-wheel of a copper-cutting machine. He avers that the machinery should have been fenced, and that it is usual to fence such machinery. This is perhaps a little vague, and if the defenders averred that the machinery should not be fenced, it would be reasonable to desiderate from the pursuer some statement as to how the fencing should be provided. This issue, however, can hardly be said to be raised. And probably the structural difficulty in fencing the machinery in question might not be great. There must therefore be a proof so far of the allegations of parties.

"But an important question seems likely to arise as to whether there was a statutory obligation on the defenders to fence the machinery. The defenders contend that there was no such obligation. I should fancy that the pinion-wheel might probably enough be the means of communicating motion from the first moving power, and in that event it might answer to the description of mill gearing which would require to be fenced. But it seems doubtful whether in any aspect the machinery in question comes within the provisions of the statute. I have therefore thought it best to allow a proof under reservation of pleas of parties, because when a description of the machine is given by a competent person, it will at once appear whether the condition of matters was such that fencing was obligatory under the statute."

The pursuer appealed to the Court of Session for jury trial, when the defenders argued in support of their plea of irrelevancy—(1) There was no averment of fault on the part of anyone for whom they were responsible. On his own showing the accident was due to the pursuer's carelessness. He might have removed the copper if it was in his way. (2) There was no obligation upon them to fence either at common law or under the Factory Acts. Fencing was not here a reasonable precaution—*Little* v. *Paterson & Son*, November 7, 1890, 28 S.L.R. 64. The wheel here was not "machinery in a factory;" it was not driven by mechanical power, and did not therefore fall under the provisions of the Factory Act 1878 (41 and 42 Vict. c. 16), sec. 5, subsec. 1, and sec. 93. (3) No express order to work in the way the pursuer had done had been given by the foreman. His presence was not equivalent to such an order.

Argued for pursuer—(1) He had been ordered to work when in consequence of the presence of the copper he could not turn the wheel otherwise than as he had done. For that order of their foreman the defenders were responsible. The pursuer was not barred from recovering damages because he knew of the risk—*Baddeley* v. *Earl of Granville*, 1887, L.R., 19 Q.B.D. 423; and *Smith* v. *Baker & Sons*, July 21, 1891, H. of L., 7 Times Law Rep. 679, and cases there commented upon; Employers Liability Act 1880 (43 and 44 Vict. c. 42), sec. 1, sub-secs. 2 and 3; (2) The defenders were bound to have fenced this wheel at common law as a reasonable precaution, and under the Factory Act 1878, sec. 5, sub-secs. 1 and 3, and secs. 93 and 96. This wheel was driven by mechanical power. [LORD TRAYNER—Was it not driven by "manual labour" as distinguished from "mechanical power?"]

At advising—

LORD JUSTICE-CLERK—The pursuer here is a lad of fifteen, who sues his employers for damages in consequence of an injury he met with at a machine used for cutting sheets of copper. The case he presents is that it was the duty of himself and another boy to turn a wheel by means of a projecting handle—the two boys standing opposite one another. He avers that on the particular occasion in question, in consequence of a considerable quantity of sheets of copper being laid against the wall he had no room to stand and could not hold the handle in the usual manner, but had to help to turn the wheel by laying hold of the rim. His hand slipped off the wheel and came down behind the wheel I presume—but the exact way in which the accident occurred is not very clearly set forth—and was injured.

The machine is one moved by hand, and if worked in the usual way I do not see how any accident could occur. It is said by the pursuer that he could not turn it in the usual way because of the presence of the sheets of copper. That does not appear to me a good ground of action. It is not said that he could not have moved them. The case is not one favourable to the pursuer, and he would need to have made much more specific averments before he could have been entitled to a proof with a view to making his employers liable.

I have probably said enough for the disposal of this case, but other averments were referred to in the course of the argument which I may look at. It is said that this machine ought to have been fenced, but considering the fact that this was a machine driven by hand and that in the ordinary case the working of it was unattended by danger, I do not see what object there could be in fencing it. The object of fencing is to prevent the hands of persons passing machinery kept in motion by mechanical force, coming in contact with such machinery. It was not suggested by the pursuer that if this machine had been worked by the handle there would have been any need of fencing, and evidently

there would not have been, for in that case the pursuer's hand would not have come near the wheel.

Again, it is said that the foreman saw the way in which the pursuer was working and acquiesced in it, but it is not said the foreman gave him any order so to work.

On the whole matter, I think the pursuer having worked as he did, upon his own showing, in a manner which was not the ordinary way, has no case against the defenders.

I am of opinion that the case should be dismissed as irrelevant.

LORDS YOUNG, RUTHERFURD CLARK, and TRAYNER concurred.

The Court dismissed the action as irrelevant.

Counsel for the Pursuer—Ralston. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders—Jameson—Fleming. Agents — Drummond & Reid, W.S.

Tuesday, October 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GREER *v.* TURNBULL & COMPANY.

Reparation—Master and Servant—Insufficient Precaution for Servant's Safety—Relevancy.

A workman sued for damages for injuries sustained in working his employer's crane, and averred—"The crane is in the moulding-shop of defenders' works, and is used principally for lifting the moulding-boxes. It is placed in line with two columns supporting the roof of the moulding-shed, and within about 19 inches of one of these columns. In the same moulding-shed there is a circular moulding-pit about 12 feet deep and about 8 feet in diameter, and between this pit and the crane at the nearest point there is only some 19 inches or so of space." He had to lift a box from behind the crane to the side of the moulding-pit, and to do so it was necessary to turn round the crane on its base. "In turning round the crane it became necessary for pursuer to pass along the edge of the moulding-pit, which was uncovered, and as the room left to pass was so small that the crane handle overhung the pit, he stumbled on the edge of the pit, and in an endeavour to regain his balance his left hand was caught in the wheels of the crane and the thumb torn off. The mouth of said pit was, on the date of the accident, uncovered, excepting that two planks were laid across the edges, one at the side next the crane and another at the other. It was the duty of the defenders to have had a complete covering over this pit, and had it been covered the accident could not have happened. It is usual in other works to have a complete covering over such pits when not in use."

The Court *held* that the record disclosed that the pursuer's injuries arose from his stumble on the narrow passage, and that neither the condition of the passage nor of the adjoining moulding-pit had anything to do with such injuries, and at all events did not cause them, and *dismissed* the action as irrelevant.

Robert Greer, ironmoulder, Bishopbriggs, sued his employers, Alexander Turnbull & Company, engineers there, for damages for injuries sustained by him while working a crane belonging to the defenders upon 14th February 1891.

He averred—"(Cond. 2) The crane is in the moulding-shop of defenders' works, and is used principally for lifting the moulding-boxes. It is placed in line with two columns supporting the roof of the moulding-shed, and within about 19 inches of one of these columns. In the same moulding-shed there is a circular moulding-pit, about 12 feet deep and about 8 feet in diameter, and between this pit and the crane at the nearest point there is only some 19 inches or so of space." He was lifting a box from behind the crane to the side of the moulding-pit, and to do so it was necessary to turn the crane round on its base. "(Cond. 4) In turning round the crane it became necessary for pursuer to pass along the edge of the moulding-pit, which was uncovered, and as the room left to pass was so small that the crane handle overhung the pit, he stumbled on the edge of the pit, and in an endeavour to regain his balance his left hand was caught in the wheels of the crane and the thumb torn off. (Cond. 5) The mouth of said pit was, on the date of the accident, uncovered, excepting that two planks were laid across the edges, one at the side next the crane and another at the other. (Cond. 6) It was the duty of the defenders to have had a complete covering over this pit, and had it been covered the accident could not have happened. It is usual in other works to have a complete covering over such pits when not in use. (Cond. 7) Repeated complaints had been made by the pursuer and others of the men to the then foreman, Andrew Rutherfurd, about the want of such a cover for the pit, and about the crane handle jamming against the said column, and he had in turn complained to Mr Turnbull, a partner of the defenders' firm. Mr Turnbull had frequently promised to have these defects remedied, but this had never been done."

The pursuer pleaded—"(1) The pursuer having while in the employment of the defenders been injured in manner libelled through the defective and uncovered condition of said pit, and defective position of said crane, for which the defenders are responsible, they are liable in reparation. (2) The pursuer having been injured through the fault of the defenders, is entitled to decree and expenses as craved."