Thursday, June 15.

FIRST DIVISION.

GAFF AND OTHERS, PETITIONERS.

Process—Petition—Judicial Factor—Petition for Appointment of Judicial Factor on Building Society's Estate—Nobile Officium.

Certain members of a building society presented a petition in the Inner House, stating that circumstances had rendered it impossible to wind up the society under the Building Societies Act 1874, and craving the appointment of a judicial factor.

Held that the petition should be presented to the Junior Lord Ordinary.

In 1890 an instrument of dissolution of the Second Edinburgh and Leith 493rd Starr-Bowkett Building Society was executed, and in March 1891 the trustee appointed under this instrument raised an action against Aitken, a member of the society, for a debt alleged to be due by him to the society. Aitken pleaded "No title to sue," and this plea was sustained and the action dismissed, on the ground that the instrument of dissolution had not been validly executed in terms of section 32 of the Building Societies Act 1874—(*vide* vol. xxix. 456, and 19 R. 603).

Thomas Gaff, and other members of the society, thereafter presented a petition to the First Division for the appointment of a judicial factor on the estate of the society, so far as not already ingathered or distributed.

The petitioners stated that there was now no trustee or board of management or other officer of the society who could demand payment of the debt due by Aitken; that under the rules no one could now call a meeting; and that it was "impossible to terminate or dissolve the society under section 32 of the Building Societies Act 1874."

The petitioner argued that the petition, being an appeal to the *nobile officium* of the Court, was properly presented in the Inner House.

The Court declined to entertain the petition, on the ground that it should have been presented in the Outer House.

Counsel for the Petitioners—Galloway. Agent—Robert John Calver, S.S.C.

Saturday, June 17.

FIRST DIVISION.

KELLY *v.* GLEBE SUGAR REFINING COMPANY.

Reparation—Master and Servant—Duty of Fencing Machinery—Factory and Workshops Act 1878 (41 *Vict. cap.* 16), *sec.* 5, *sub-sec.* 3—*Factory and Workshops Act* 1891 (54 *and* 55 *Vict. cap.* 75), *sec.* 6.

A violation of the provisions of the Factory and Workshops Acts 1878 and 1891, in relation to the fencing of machinery, is fault on the part of the owners of the factory, which will *prima facie* entitle the workmen belonging to the factory to damages if they have been injured in consequence of the violation of the statutory provisions, although they may not have been actually engaged in the performance of the duties of their employment at the time of the injury.

In December 1892, William Kelly, foreman labourer, Mill Street, Greenock, brought an action in the Sheriff Court at Greenock for damages for the death of his son William, a boy of fifteen, who was employed by the defenders, the Glebe Sugar Refining Company, and was killed by being caught by an unfenced shaft which was in motion in an apartment of the defenders' factory.

The pursuer averred—(Cond. 4) "In said apartment on said top flat there stands a a small horizontal engine with a horizontal shaft projecting from it. The said shaft, which is about 4 inches in diameter, extends along the floor of the said apartment for about 5 feet at a height of about 18 inches above the floor. At the end of the shaft there are two pulleys with leather belts round them, used for the purpose of driving an elevator with buckets attached thereto, which raises raw sugar from the ground floor of the refinery to said flat. The said shaft stands exposed on the floor of said apartment, without being fenced or guarded in any way. The buckets in the elevators are emptied into a hopper, from which the sugar is transferred into barrows, and it was deceased's duty to sweep up all sugar that might fall on the floor from the buckets, hoppers, and barrows, and generally to keep the floor clean. The deceased was never warned of any danger arising from the said shaft. The statements in answer, so far as inconsistent herewith, are denied. The position of the shaft, belting, and pulleys is not such as to render fencing unnecessary. Reference is made to condescendence 6." To this the defenders answered—(Ans. 4) "Admitted that there is in the top flat the machinery stated. The engine, elevator, and buckets are fenced, the shaft, belting, and pulleys are in such a position as not to require fencing. *Quoad ultra* denied. The sugar from the buckets in the elevator falls into a hopper and thence into barrows, which are placed beneath it by two barrow men. The duty of the deceased was

to stand by the hopper while the barrows were filling, to prevent the sugar from running over the side of the barrows, and to shovel up any sugar which might do so. It was not the boy's duty to keep the floor of the loft clean." (Cond. 6) "The unfenced state of the said shaft constituted a defect in the condition of the machinery and plant, connected with or used by the defenders in their said business. Said defect was well known to the defenders, and those in their employment entrusted by them with the duty of seeing that their ways, works, and machinery and plant were in proper condition. It was the duty of the defenders or of those for whom they are responsible to have had the said shaft fenced, and their failure to do so was due to negligence on their part. In its unfenced condition the said shaft was unsafe, and constituted a source of danger to the servants in their employment. The defenders were also obliged, by the Factory and Workshops Acts, 1878 to 1891, and in particular by section 5 of the Act 41 and 42 Vic. c. 16, and section 6 of the Act 54 and 55 Vic. c. 75, to fence the said shaft. If the said shaft had been fenced the accident to pursuer's son would not have happened. The deceased was unaware of the said defect and negligence. The statements in answer are denied. The said unfenced shaft stands, as already mentioned, on the floor of the apartment in which the deceased worked. It is quite open to employees, and they have frequently legitimate occasion to pass close to it. The pursuer's son had such occasion at the time of the accident." The defenders answered —(Ans. 6) "Denied. The shaft in question is not a dangerous part of the machinery of the refinery. It is at a place in the refinery where no employee has any occasion to go, and is so surrounded by tanks, engine, and other parts of the machinery, as to be perfectly safe. The boy's own negligence was the sole cause of the disaster."

The pursuer pleaded—"(1) The pursuer having sustained loss, injury, and damage through the death of his son, caused by the fault or negligence of the defenders, or of those for whom they are responsible, is entitled to reparation from them as concluded for, with expenses. (2) The pursuer's said son having been killed through the defective and unfenced condition of the machinery or plant connected with or used in the business of the defenders, the pursuer is entitled under the Employers Liability Act and also at common law, to *solatium* and damages for the loss, injury, and damage sustained by him thereby."

The defenders pleaded—"(2) The accident not having been occasioned by the fault of the defenders, they are entitled to be assoilzied. (3) The accident having been caused or materially contributed to by the negligence of the deceased, the defenders are entitled to be assoilzied."

The pursuer having appealed for jury trial, the case was tried before Lord Adam and a jury on March 23rd 1893, when the jury returned a verdict for the pursuer with £100 damages.

The defenders moved for a new trial on the ground that the verdict was against the weight of the evidence, and obtained a rule.

The nature of the evidence led at the trial and the arguments of parties sufficiently appear from the opinion of Lord Adam.

At advising—

LORD ADAM—There is no doubt as to how this unfortunate boy met his death. He was a boy of fifteen who was in the employment of the defenders, the Glebe Sugar Refining Company. In their factory there is a part of the machinery which is unfenced—a shaft, which is raised about 19 inches above the floor and revolves at the rate of 100 revolutions a minute. This shaft was usually in a very dirty greasy state, and was in that state when the boy met his death. It also appears that the atmosphere in this part of the factory is very hot, in consequence of which the workmen employed there take off all their ordinary clothes and put on something lighter, and the boy was in the habit of wearing what is called a kilt when he was at his work. Now, the evidence shows that he met his death in consequence of his kilt becoming entangled in the revolving shaft, probably because he slipped when attempting to cross over it, owing to its greasy condition. That is how he met his death, and there is little doubt as to how he came to be in a position to meet his death in this way. The accident took place on a September morning, by which time of course the mornings were beginning to get cold, and he had formed the intention of choosing a warmer part of the room as the place for changing his clothes, and had that morning taken his box across to the end of the room and put it beside the hot-water cistern. Then shortly before the breakfast hour came on, he informed a companion that he meant to go for some wood in order to tie it to some rivets that were beside the hot-water cistern and then to put nails into it from which to hang clothes. His companion advised him to wait till after breakfast when he would have more time. He did not take this advice, but went past his companion, singing, to a part of the room where wood and lumber were kept. Apparently he did not succeed in finding wood to suit his purpose, for when his body was found there was no wood beside him. But instead of returning by the way by which he had come, he chose what was the shorter way—down a somewhat narrow and slippery passage and then over the shaft—with this result, that when he reached the point at which it was necessary to cross the shaft, and while evidently endeavouring to step across it, his kilt was caught in the shaft and he was killed.

Now, it may be said that this boy was not engaged in any part of his duties when he was killed, and that he had no duty which would take him so near the shaft while it was in motion. It is not perhaps very material to inquire into the exact nature of his duties. His duty generally

was to keep the floor clean by sweeping away the sugar which fell on it, but he had no specific instructions from the manager, and there is a conflict of evidence as to whether his duties did not tie him constantly to the immediate neighbourhood of the hopper, so long at least as the machinery was in motion. Some of the witnesses say that his duties were entirely limited to that. On the other hand, there are witnesses who say that his duties were of a more extensive character, that it was his duty to sweep away sugar wherever it might happen to be. But, as I have said, in the view which I take of the case it is not very material to determine the exact scope of his duties.

The first question depends on the provision of the Factory and Workshops Act, which is in the following terms—"All dangerous parts of the machinery and every part of the mill-gearing shall either be securely fenced or be in such a position or of such a construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced." That is the provision of the Act by which the Legislature has interfered for the purpose of protecting "every person employed in the factory." Now, it cannot be disputed that this shaft was part of the mill-gearing, and it certainly was not fenced. Therefore the question comes to be, whether it was in such a position or of such construction as to be equally safe as it would have been if it had been securely fenced? The argument of the defenders was, that as no person employed in the factory had any duty which would take him near the shaft while it was in motion, it must be taken to have been as securely fenced as it would have been had it been entirely fenced. I left it to the jury to say whether on the evidence it was to be taken to be as equally safe as if it had been securely fenced. And there is no doubt that the jury must have come to the conclusion that it was not, because they have returned a verdict for the pursuer.

Then it was contended by the defenders that the protection given by the Act did not extend to persons who, although they were employed in the factory, were not at the time of the accident engaged in the performance of any duty towards their employers. I told the jury that that was not the law. I told them that the protection of the Act extended to every person employed in the factory, and that it was not necessary that at the time of the accident he should be actually engaged in the performance of his duty. Workmen may get into danger although they are not actually employed in the execution of their work at the time, and I am not aware that there is anything in the Factory Acts which should exclude them from the statutory protection. If, then, that is the sound view of the law, what is the result? The result is that the owners of this factory are in fault for not having this shaft securely fenced, and are *prima facie* liable in damages for the consequences of that fault, for I cannot adopt the view that their liability is limited to the penalty imposed by the statute for the neglect of its provisions. I think that the neglect of the statutory provisions creates a *prima facie* case of fault against the factory owners which will render them liable in damages to their employees who may have been injured through that fault.

There remains, therefore, the question of contributory negligence. I told the jury that this was not a question of law but a question of fact. I told them that the question was whether in the whole circumstances as disclosed by the evidence this shaft was so manifestly dangerous to a boy of fifteen as to make him so much in fault in going near it, as he did, that he could not recover. Now, on that question of fact the jury must have come to the conclusion that the boy was not thus in fault, and it is not disputed that there was evidence on both sides of this question. I am unable therefore to see any reason for disturbing the conclusion at which the jury arrived, and on the whole matter I think the verdict should stand.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court discharged the rule, refused to grant a new trial, and of consent applied the verdict.

Counsel for the Pursuer—Comrie Thomson—M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for the Defenders—Ure. Agent—Hugh Patten, W.S.

Tuesday, June 20.

FIRST DIVISION.

FENWICK, PETITIONER.

Custody of Child—Appointment of Tutor by the Mother—Tutor Domiciled in Canada—Guardianship of Infants Act 1886.

A domiciled Scotsman having failed to appoint a tutor to his pupil son, his widow, on the day of her death, nominated by will a Canadian lady to be the boy's guardian. This lady, founding upon her rights as sole tutor under the Guardianship of Infants Act 1886, presented a petition to the Court of Session for custody of the child. She had previously declined to give the father's trustees, who had then the charge of the boy, and who possessed the fullest control in reference to the persons to whom the money left for his maintenance was to be paid, any information as to her own position and means.

The petition was refused *in hoc statu*, on the ground that in the interests of the child the Court would not give him up to a person whose ordinary residence was out of their jurisdiction, and of