This was an action raised in the Sheriff Court of Glasgow by Mrs Roseann Stevenson or Magee, Lennoxtown, widow of Patrick Magee, ploughman, Lennoxtown, against Messrs Dalglish, Falconer & Co. (Limited), calico printers at Lennox Mills, Lennoxtown. The action was for damages and in name of *solatium* for the death of the pursuer's son John Magee, a youth of 18 years of age, who was in the employment of the defenders, and who while in their service met with an accident which resulted in his death. Besides being brought at common law, the action was laid alternatively under the Employers Liability Act of 1880, and the prayer of the petition contained, in addition to a conclusion for £1000, a conclusion praying that the defenders should be found liable in payment of a sum of £70, 4s., or such other sum as should be found due as compensation under the said Act for the injury.

The pursuer averred, *inter alia*, that the accident occurred through the deceased's clothing coming in contact with a rapidly revolving shaft, by which means he was drawn into the machinery and crushed to death. She further alleged that the said shaft was "mill gearing" within the term of the Factory and Workshops Act of 1878, and that being so, it ought to have been covered or boxed in; that during a portion of the time that the deceased was in the defenders' employment the said shaft was partially fenced in with a square wooden box, but that about a week before the accident in question occurred the fencing was removed and the shaft again exposed, in which condition it remained down to the date of the accident. The pursuer also set forth that the defenders had incurred the penalty of £100 provided by the said Factory and Workshops Act for contravention of its provisions.

The defenders averred that the accident occurred through the deceased failing to follow the instructions given to him by them or their foreman; that the deceased had charge of the fencing over the shaft as a part of the machinery under his care, and that he ought to have reported to them or their foreman if the shaft was at any time unfenced. They denied that they removed or gave instructions for the removal of the fencing, or that they were aware that it had been removed.

The pursuer pleaded, that as the deceased had lost his life through the fault or neglect of the defenders, or those for whom they are responsible, the pursuer as his mother was entitled to decree as concluded for. "(2) The defenders having contravened the provisions of the Factories and Workshops Act, are liable in terms of these provisions. (3) The deceased having, while employed as a workman in the service of the defenders, been injured by reason of the negligence of the defenders, or of a person for whom they are reponsible under the Employers Liability Act 1880, the pursuer is entitled to decree in terms of the second conclusion of the petition."

The defenders denied fault, and pleaded, that as the deceased had brought about his own death by disobedience, neglect, or rashness, they were not liable therefor, or in compensation either under the Factory and Workshops Act of 1878 or the Employers Liability Act of 1880, or at common law. "(3) In any event, pursuer is not entitled to recover from defenders any penalty incurred under the Factory and Workshops Act 1878 under this action."

The Sheriff-Substitute having allowed a proof, the pursuer appealed for jury trial. She lodged this issue—"Whether on or about the 26th September 1883 the pursuer's son John Magee, while in the employment of the defenders in the starching and mangling room of their factory at Lennox Mills, Lennoxtown, was caught by an unfenced horizontal unpolished revolving shaft, and killed, through the fault of the defenders, to the loss, injury, and damage of the pursuer. Damages laid at common law at £1000, or under the Employers Liability Act at £70, 6s."

The defenders objected to the proposed issue on the ground that it did not exhaust the cause, and in particular that although in the condescendence a sum of £100 was claimed as a penalty exigible under the Factory and Workshops Act of 1878, and this claim was repeated in the second plea-in-law for the pursuer, yet the proposed issue contained no reference to this claim. Further, the case was one more suited for proof than for jury trial, as it involved questions of law as well as intricate matters of facts relating to machinery.

The pursuer replied, that besides being one of the enumerated causes it was itself a case eminently suited for jury trial.

It being pointed out by the Court that the £100 penalty provided by the Factory and Workshops Act 1878 (sec. 82), must be recovered by summary conviction before a Court of summary jurisdiction under sec. 89, the pursuer's counsel agreed to delete the second plea-in-law above quoted, and this having been done at the bar,

Lord President—I cannot say that I have the slightest doubt about the appropriateness of trying this case by jury. I think also that we should allow the schedule to stand as it is, so as to enable the jury in assessing the damages to have clearly before their minds the alternative grounds upon quoted, which this action is laid.

Lords Mure and Adam concurred.

Counsel for Pursuer—Boyd. Agent—Thomas Hart, L.A.

Counsel for Defenders—Jameson. Agents—Auld & Macdonald, W.S.

Wednesday, May 28.

SECOND DIVISION.

[Sheriff of Aberdeen.

ADAMS *v.* TOWN COUNCIL OF ABERDEEN.

Reparation—Negligence—Street—Open Manhole.

A boy was injured by falling into a manhole which had been opened in a street in town, and at which several men were engaged at work. In an action of damages against the employers of the men, it appeared that the men engaged at the manhole had used all reasonable precautions, and that the boy was at the time of the accident looking

behind him as he came running along the street. The Court *assoilzied* the defenders.

James Adams, Aberdeen, sued the Town Council of Aberdeen for £100, as damages for injury done to his son aged nine, under the following circumstances, which appeared in the proof. The defenders having ordered the common sewer in Union Street to be cleaned, employed three men in the operation. It was performed as follows:—A scrubber to which a chain was attached was introduced into the sewer, and drawn backwards and forwards by means of two crab winches from a manhole in St Catherine's Wynd to a manhole in Union Street. The latter was protected on three sides, the front part of it alone being open to the extent of 2 feet in width, and over it two men were working a winch, another man guarding the manhole in St Catherine's Wynd. A crowd following a drunk woman who was being led to the Police Office, passed the men. The lad ran after the crowd, and just as he was at the manhole he turned to look back over his left shoulder and ran right into the hole before the men could call out to him. The result was he received the injuries which led to this action being raised.

The Sheriff-Substitute (Dove Wilson) found that the pursuer had failed to prove that the accident happened through the fault or negligence of the defenders' servants, and therefore assoilzied the defenders from the conclusions of the action.

"*Note.*—I do not think the defenders can be blamed for the accident. It was necessary for them to have the manhole open in order to clean the sewer, and it is impossible for the defenders, though they are bound to keep the streets safe, always to have the streets in such a state of safety as to dispense with the exercise of reasonable care on the part of those using them. The men were working at the manhole at the time; they had three sides of it protected; and the fourth, which was open for use, was a danger only to a person who came rapidly upon it without looking. The open part was two feet wide, and the winch which the defenders were working over it was a conspicuous object. The place, though open to the extent stated, was not left unguarded, as there were two men working at the winch at the time, and both so engaged as to be facing the open side. In these circumstances the pursuer's son having left the footpavement to walk or run along the carriageway after a crowd, turned round to see some person or thing behind him, but did not stop, and before the men could even call out, fell down the hole. It seems to me the main cause of the accident was the pursuer's son's want of forethought, and not the defenders' operations. He had gone unnecessarily upon a part of the street where care is always necessary, and he had neglected to use it.

"The circumstances of the pursuer's son being very young does not make much difference. He was old enough to know that he should not have been in the middle of the streets without keeping a look out, and if he was not old enough to take care of himself, he should not have been permitted to be where he was without someone to look after him. The boy's youth would only have been a material point in the event of distinct negligence having been proved on the defenders' part, and I cannot say that I think that the having the manhole open was, in the circumstances, an act of negligence."

On appeal the Sheriff (Guthrie Smith) adhered.

The pursuer appealed, and argued—It was the duty of the defenders to have had the manhole fenced in a sufficient manner in the interests of the public using the thoroughfare. But for the insufficient fencing the accident would not have happened, and the defenders' must be held liable for the omission.

Authorities—*Auld* v. *M'Bey*, February 17, 1881, 8 R. 495; *Burton* v. *Moorhead*, July 1, 1881, 8 R. 892; *Frasers* v. *Edinburgh Street Tramways Company*, December 2, 1882, 10 R. 264.

The Court did not call on counsel for the respondents.

At advising—

Lord Justice-Clerk—I have no doubt about this case. It is not one of contributory negligence at all. None whatever has been proved against the defenders. They cannot provide for the safety of passengers who choose to walk along the streets without taking the ordinary precaution of using their eyes in order to see where they are going. It is a stupid and altogether provoking habit, and must be checked. On the evidence it is proved that the defenders used every precaution in the operations on the street. These were performed in the usual manner, with the usual machinery, and usual amount of men to manage it; and the accident happened simply because the poor lad ran through the crowd with his head turned the other way and not looking where he was going. We should be setting the worst example possible if we were to give any encouragement to actions of this kind.

Lord Young, Lord Craighill, and Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Find that the injury sustained by the pursuer is not attributable to the fault or negligence of the defenders or of any person for whom they are responsible: Therefore dismiss the appeal: Affirm the judgment appealed against: Find the defenders entitled to expenses in this Court," &c.

Counsel for Appellant—Campbell Smith—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondents—J. P. B. Robertson—Jameson. Agent—T. J. Gordon, W.S.