The Court pronounced the following interlocutor:—

"... Vary said interlocutor [of 26th March 1889] to the effect of disallowing in the meantime the prayer of the petition, other than that portion of it which craves for warrant to sequestrate and inventory: *Quoad ultra* adhere to said interlocutor and remit the cause to the Sheriff to proceed further therewith," &c.

Counsel for the Appellant—Dundas. Agent—David Turnbull, W.S.

Counsel for the Respondents—M'Watt. Agents—Macrae, Flett, & Rennie, W.S.

Friday, May 31.

SECOND DIVISION.

EDWARDS *v.* HUTCHEON.

Reparation—Culpa—*Defective and Dangerous Machine—Threshing Mill without a Guard over the Drum.*

Held that a threshing mill without a guard over the drum is a defective and dangerous machine, and that a contractor who supplied such a machine was liable in damages for personal injuries caused thereby, especially as the occurrence took place in a neighbourhood where there had been previous similar accidents.

Jessie Helen Edwards, Rothriehill, Aberdeenshire, aged nineteen, with the consent and concurrence of her father David Edwards, farmer, Rothriehill, brought an action in the Sheriff Court at Aberdeen against William Hutcheon, traction engine proprietor, Parkhill, Newhills, for £500 as damages for injury sustained by her while going to her place as a "looser" upon a threshing machine or mill supplied by him to thresh upon her father's farm.

She averred that "the mill was defective in not having a cover over the drum to prevent accidents when the feeder is not engaged at his work. William Taylor, who was in charge of the feeding of the mill, was not in his proper place. . . . Had the drum been covered, or the said William Taylor been in the feeding-box, the accident might not have happened."

The pursuer pleaded—"(1) The pursuer having been injured in manner above libelled through the insufficient and defective machinery in use belonging to the defender, and under his charge, is entitled to compensation from the defender for said injuries."

The defender pleaded—"(1) No relevant case against defender. (2) There being no fault or negligence on the part of the defender, or of those for whom he is responsible, he should be assoilzied. (3) The risk of the plant used and of the employment being with the injured girl's employer, the action should have been directed against him, the pursuer David Edwards. (4) The plant was not defective."

A proof was allowed, from which it appeared that on 5th October 1887, the defender, who had on several previous occasions threshed for David Edwards, contracted to do the threshing on his farm. As the defender's two threshing machines, which both had guards over the drum, were engaged, he procured a "Robey" (English) threshing machine belonging to three brothers named Taylor, and sent it along with its three owners. In practice the men who come with such machines feed and work them, the farmer only supplying hands to "loose" the sheaves. When a machine has a guard it remains closed until the machine is at full speed and the "feeder" and "looser" are in their places, and it is then opened sufficiently to allow the sheaves to get down to the drum. When the operations began, William Taylor, one of the owners of the machine, was chosen to "feed," and the pursuer to act (for the first time) as a "looser." When the "loosers" were called to take their places the pursuer ascended by the ladder. William Taylor was beside the feeding-box, but not in it, and the machine was getting up speed. The pursuer slipped as she alighted on the platform, and falling across the funnel or "hopper," her foot went down through the feeding-hole into the drum, and her leg was wrenched off below the knee. Her father was present at the time. It was proved that there was a practice of guarding the drums of such machines. The defender admitted that his mills were provided with drums, and that he considered this necessary for safety.

The Sheriff-Substitute (DOVE WILSON) on 12th July 1888 pronounced the following interlocutor:—"Finds that the female pursuer was injured through the fault of the defender, or those for whom he was responsible, in placing her at work upon a dangerous and defective machine supplied by him for the purpose: Finds that the defender is liable in damages: Assesses the same at the sum of £150: Finds the defender liable in expenses, &c.

"*Note.*—The female pursuer was severely injured while working at a portable threshing machine. Four possible causes for the accident require consideration. It may have been due to the female pursuer's own inexperience, to a defect in the machine, to carelessness on the part of those in charge of it, or to carelessness on the female pursuer's own part. I do not think that there is any evidence of carelessness on the part of the female pursuer. Some of the witnesses speak to the girl having gone hastily upon the machine, but if there was any haste upon her part it was more likely due to her being young, and possibly nervous, rather than to her having been careless. I have considerable doubt whether the female pursuer would be entitled to found upon the negligence of those in charge of the machine. They were fellow-servants, engaged in the same employment, and it does not appear sufficiently that the female pursuer was at the time under their orders. She seems then to have been under the orders of her father As against the defender, the inexperience of the female pursuer forms no ground of action. She was not employed by the defender, but by her own father, and although he was much to blame in putting a young and untried girl to such work, no ground of complaint upon this score can be made against the owner of the machine or the person answerable for it. Neither, however, does the girl's inexperience absolve the defender. If the accident was due partly to the girl's in-

experience and partly to the defective nature of the machine, and if it would not have happened with a properly constructed machine, the defender will be responsible for his fault, if he committed one, in supplying the machine. Where more than one person has through his fault materially contributed to cause an accident, each is liable in law to the injured party in the whole consequences. This brings us to the questions whether the accident was caused or materially contributed to by a defect in the machine, and whether the defender was to blame in supplying it. Upon the first of these questions I entertain no doubt. The machine was one which was very dangerous to those who had to do such work in connection with it as was expected from the female pursuer. She had to stand upon an elevated platform close to a funnel, at the bottom of which a drum revolved at a high speed. The least mistake or slip might cause her to fall upon the drum and to be mutilated. I think it clear that such a machine ought to have a guard. In England a guard is requisite by statute, and I think that the common law makes so simple and obvious precaution against a seen danger necessary in Scotland. The use of the guard is to cover the drum altogether while the machine is not threshing, and while it is threshing to contract the opening over the drum to the narrowest extent which will permit the supplying of the sheaves. As the machine was not threshing at the time of the accident the guard might have been closed, and the female pursuer's accidental fall might have been attended with perfect safety. Even if the guard had been open the pursuer might have had a chance of escape, as the guard might have checked her fall before she reached the drum. It seems to me to be beyond doubt that a person who supplies such a machine is at fault if it be sent out to work without a guard. Had there been no previous experience of danger from such machines a person might be allowed to plead that he could not be expected to think of it. But this is the third serious injury to girls from unguarded machines of this kind which has been made the subject of action in this Court within a comparatively short time. The danger therefore must have been notorious and patent to all persons supplying and using such machines. The last question is, whether the defender is to be held responsible for supplying the defective machine. I think that he must be. The contract to supply the machine was made with him as it was he who was to be paid for the work. For his own convenience he employed another person to do the work, and employed that other person's machine. As the contract with the defender was to supply a proper machine for the work, I think it follows that it was his duty when he deputed the performance to another to see that the other supplied the article which he was bound to supply. In regard to the amount of damages nothing requires to be said. I have simply followed the precedents set in former actions in this Court."

An appeal to the Sheriff (GUTHRIE SMITH) was dismissed on 26th November 1888.

The defender appealed to the Court of Session, and argued—The action was irrelevant as against him. He was only an intermediary between the Taylors and the pursuer Edwards. The machine was not his. He was not responsible for it having no guard. His own had guards, but a guard would not have prevented this accident. Even if there had been a guard it would have been open as the machine had been started, and from the way the girl fell her foot would have gone in by the hole left for the sheaves. The accident was not caused by any defect in the machine, but by the way in which the ladder had been placed, and by the "feeder" not being in his place. These were not faults of his or of those for whom he was responsible, and, in any case, they were faults of collaborateurs of the injured girl or of her father, who was present, saw the position of the ladder and of the "feeder," and yet allowed her to go up—*M'Carthy* v. *Young*, 1861, 6 Hurs. & Nor. 329.

Argued for respondents—It was a new idea that the contract was not with the appellant but with the Taylors. There was no plea to that effect, and the appellant's own evidence was against that view. He was bound to supply a safe machine. The want of a guard made the machine defective and dangerous, and for that want the appellant was responsible. He knew the necessity of guards, for he had them on his own machine. It was not in the mouth of the appellant to say that possibly, even if a guard had been there, the accident might have occurred—*Edgar* v. *Law & Brand*, December 15, 1871, 10 Macph. 236.

At advising—

LORD JUSTICE-CLERK—This is certainly a somewhat difficult and narrow case. We need not pay any attention to the argument of the defender that he was not the party contracted with, but only a go-between. He was in the practice of providing threshing machines for this farm, and not having one of his own in at the time he undertook to get one. The whole bargain was with him. He provided the machine, and was to be paid for it. If anything has occurred for which the pursuer is entitled to recover damages it is from the person who provided the machine—that is, from the present defender—that they must be recovered.

The difficult question is, whether the circumstances disclosed make it plain that there was fault on the part of the provider of the machine for which he is responsible? The real point is, whether or not there should have been a guard across the mouth, or what I have called the "hopper," of this threshing machine? It is certainly proved that it is usual in practice to have such a guard, and that they are preventive of real danger. The defender himself depones—"My mills have guards on the drum," and in answer to the question, "Do you consider that necessary for safety?" he answers, "Yes." It is quite plain therefore that there is a practice to this effect, and that the defender was aware of it, and a party to the necessity of providing such guards. But it is said that even if there had been a guard this accident would not have been prevented, because such guards must be open when the machine is going. I am not so clear about that. Even if open and upright it would have been of the greatest protection and help, in affording anyone stumbling, as this girl did, something to lay hold of. If her body had been sufficiently far forward to fall over the guard it would have prevented her foot getting down upon the drum. But further, if there had been a

guard it ought to have been shut at the time this accident happened. No doubt the machine must be set in motion to get up speed before the threshing begins, but until the "feeder" is in his place, and the other workers in position, the guard ought not to be opened.

The only difficulty then is, whether there is sufficient here to satisfy us that there should have been a guard. It is perfectly true that no owner is bound to have all the latest appliances, and that he does his duty if he has what are generally known to the trade as proper precautions. But the precaution of a guard is well-known and recognised as a proper precaution, and therefore the defender must be liable because he had not taken that proper precaution.

I am the more moved to this view because accidents of this sort, owing to the want of a cover to the drum, have been somewhat frequent, and on the whole matter I am of opinion that there is no sufficient ground here for interfering with the judgments of both the Sheriffs.

LORD YOUNG—I am of the same opinion, and I can state in a few sentences the exact views on which I proceed. The Sheriff-Substitute and the Sheriff-Principal are both of opinion, and have so found, that this young woman lost her foot in consequence of the defective and dangerous condition of the threshing machine in question. I think there is reasonable evidence to support that view. Now, that being the fact as found by the Sheriffs upon reasonable evidence, what is the law?

The machine was supplied by the defender along with the services of two men to work it under a contract by which he undertook to do the threshing at the farm where this accident occurred. It was not exactly a contract of letting out the machine but of doing the threshing at the farm, sending not only the machine but men to work it, the farmer being only bound to supply men to feed it. This is the contract averred, and, I think, the contract proved. The defender himself says in evidence—"I have occasionally threshed for Mr Edwards. A few days before we went to the threshing at Mr Edwards he came to see about it. On that occasion I said to Mr Edwards that I would come soon. I found that I was so busy that I could not get soon. I accordingly saw him one night, and told him that I would send a mill. I said that the Taylors had got a mill out and that I would send them. . . . When I cannot get to a place I try to get another mill to go. On such occasions I draw the money and I pay the man that I send the same money that I get." We can pay no attention to the view that he did not contract himself but only acted as an intermediary. Now, was it his duty to send a safe machine? I think under the contract it was. I agree with the Sheriff-Substitute that a person who supplies such a machine under such a contract is at fault when he sends out a machine without a guard. If there had been no previous accidents it might have been pleaded that such a precaution was unnecessary, but the Sheriff-Substitute tells us that this is the third serious injury to girls from unguarded machines of this kind which have been made the subject of action in the Sheriff Court within a comparatively short time.

The Sheriff, after referring to the statute in England making guards to threshing machines compulsory, observes that while that statute is applicable to England only, the common law of Scotland implies as much, and I am with him in that opinion. The case becomes so clear as this. Assuming the facts as found proved by the Sheriffs and the law as they think it to be, is there any escape from liability on the part of the defender? The only thing to be said is that the farmer was present and seeing the state of the machine allowed his daughter to feed it. I cannot agree with the view that that act by the farmer bars his daughter from suing this action with his consent and concurrence. This case is by no means a gross one. It is a narrow case, but I do not feel justified in setting aside the judgment of both Sheriffs either in fact or law.

LORD RUTHERFURD CLARK — This case is attended with some difficulty, but on the whole I agree with your Lordships.

LORD LEE concurred.

The Court pronounced this interlocutor:—

"Find in fact that the defender on 5th October 1887 contracted with David Edwards, father of the pursuer, Jessie Helen Edwards, to thresh out part of the grain crop on the farm of the latter, and next day sent an engine and threshing machine with attendants to do the work: Find the machine supplied by the defender for that purpose was defective and dangerous in respect there was no guard to the drum, and that the injury sustained by the said pursuer when taking her place on the machine to assist said attendants as feeder is attributable to the want of such guard: Find in law that the defender is liable to her in damages accordingly: Therefore dismiss the appeal and affirm the judgments of the Sheriff and Sheriff-Substitute appealed against: Of new assess the damages at £150 sterling."

Counsel for the Pursuer — Gloag — Glegg. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender—M'Lennan. Agents—Macpherson & Mackay, W.S.

Friday, May 31.

FIRST DIVISION.

[Sheriff of Dumfriesshire.

MATHESON *v.* MATHESON AND OTHERS.

Judicial Factor — Curator Bonis — *Inventory—Statement of Accounts—Exoneration and Discharge.*

In June 1880 an executor *qua* factor for three pupil children was appointed and confirmed by the Sheriff of Inverness. In August 1882 he was appointed their *curator bonis* by the Sheriff of Dumfries, the children having meanwhile succeeded to certain legacies. The inventory and accounts