determination not to go to Ireland is so strong that in the opinion of the curator, nothing short of force would induce her to go."

In dealing with the case of a *minor pubes* it would, I suppose, even at the highest estimate of our powers, require a very strong case of conflict between the wishes of a young person on the one hand and his or her safety or welfare on the other, to justify us in enforcing our choice of a residence against his or hers. In the present case there is no such conflict. The fact that the parochial board supply this girl's board and have found her this abode cannot alter the facts of her well-being and thriving, or entitle us to make an order which there is no other consideration to support.

I am therefore for refusing the prayer for custody.

As regards the prayer for an order on the respondent to give to the petitioner the addresses of the girls, the Court is equally divided in opinion. If, therefore, the parties cannot otherwise arrange, an order will be pronounced for a hearing before Seven Judges.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"In respect that the petitioner no longer insists in the prayer of the petition so far as it refers to the custody of Mary Flannigan, Refuse said portion of prayer: Further, refuse the prayer of the petition so far as regards the custody of Rose Flannigan, and decerns; and on the motion of parties, *quoad ultra* continue the cause."

Counsel for the Petitioner—Watt. Agent—A. B. Cartwright Wood, W.S.

Counsel for the Respondent—J. A. Reid. Agents—Curror, Cowper, & Curror, W.S.

Thursday, June 23.

FIRST DIVISION.

[Sheriff of Aberdeen.

WALLACE *v.* CULTER MILLS PAPER COMPANY, LIMITED.

Reparation — Employer and Workman—Want of Fencing—Extraordinary Danger—Risk Voluntarily Incurred—"Volenti non fit injuria."

Held (following the case of *Smith* v. *Baker & Sons*, July 21, 1891, H.L. Appeal Cases 325) that it is a question of fact in each case whether a workman, who continues working in knowledge of danger, not necessarily incidental to his employment, has or has not taken the risk upon himself, so as to relieve his employer of responsibility in the event of his meeting with an accident; and that a workman who had repeatedly complained of want of fencing had not taken such risk upon himself and was not barred from claiming reparation for injury because he had not left his employment.

Distinction drawn between a workman being "*sciens*" and being "*volens*," namely, between "encountering danger" and "accepting risk" in the sense of liability for the consequences of injury.

In August 1890 Mrs Barbara Duncan or Wallace, Clovencraig, Parish of Peterculter, Aberdeenshire, brought an action against the Culter Mills Paper Company, Limited, in the same parish for £500, or alternatively under the Employers Liability Act 1880 for £171, 12s., as damages and *solatium* for herself and her children for the death of her husband, who had died upon 25th January 1890 in consequence of an accident met with in the preceding day while in the defenders' employment.

The pursuer averred that the deceased had worked for six years at a calender machine. That on the day of the accident he had discovered some defect in it, to which he called the attention of the engineer or mechanic at the works, and that while he was pointing out the defect he was caught by the wheel and fatally injured. The pursuer further averred that the calender machine which was the cause of the accident was driven by steam power, and at the date of the accident was not fenced or protected in any way whatever, as required by the 5th section of the Factory and Workshop Act 1878. The space between the wall of the building in which this machine is placed and the machine itself was only 2 feet 2 inches or thereby, and along this narrow passage the said deceased James Wallace and others had, in execution of their work, to pass. The machinery was defective, in respect of being unfenced, and the passage referred to was too narrow. The said accident was caused by the fault and negligence of the defenders, or of the person or persons entrusted by them with the superintendence of this particular department of their works, in respect that the said machine was not securely fenced in terms of said Factory and Workshop Act. The fact of the machine being unfenced was known to the defenders or their managers or superintendents of the works.

The defenders pleaded—"(1) The deceased having been killed through no fault of the defenders, or of those for whom they are responsible, they ought to be assoilzied with expenses. (2) Contributory negligence."

After a proof (the import of which sufficiently appears from the Sheriff's note and the opinion of the Lord President), the Sheriff-Substitute (HAMILTON GRIERSON) upon 18th May 1891 found (1) that on 24th January 1890 the deceased James Wallace, while working a calender machine belonging to the defenders received injuries from which he died next day; (2) that he had worked for several years at such machines, that he was a careful man and an experienced workman, and that he had worked the

machine in question for at least nine months prior to the accident; (3) that the machine was unfenced; (4) that the pinions by which the deceased was injured fell under section 6 of the Factory and Workshop Act 1878 (41 Vict., cap. 16), and that no notice to fence had been served on the defenders in terms of that section; (5) that between the said pinions and the opposite wall there was a free space of 4 feet 8 inches; and (6) that it was not proved that the deceased ever complained of the machine not being fenced, or that any promise was made to him that it would be fenced, or that he continued to work the machine on the understanding that it would be fenced, and assoilzied the defenders.

He explained in his note that he thought there was not sufficient evidence that the deceased continued to work the machine, although he thought it dangerous, on the faith that the pinions were to be fenced, and stated that in his opinion, the maxim *volenti non fit injuria* applied.

The pursuer appealed to the Sheriff (GUTHRIE SMITH), and upon her petition a new witness, James Ogilvie, was examined before him, and deponed—"For the last three years I have been foreman of the pasting department of the Culter Mills Paper Company. I knew James Wallace, and mind of his meeting with the accident on 24th January 1890. I knew the place where he worked. The deceased often complained to me of the dangerous and unprotected state of the machine. I was the only one in charge of that department at the time, and therefore he complained to me. He seemed to think he was exposed to needless danger from the unprotected state of the machine . . . I did not carry his complaint to his employers. I acknowledged to him when he spoke to me that it was in a dangerous state. I also remember, shortly after the mill was done about three years ago, that the machine often broke down, and Mr Fraser, the mechanic at the works, was frequently about. I heard deceased complain to Fraser and say he might protect it. He went away saying, 'Oh yes, oh yes.' *Cross-examined*—My department was in the same house as the one in which the deceased worked. I acted as Wallace's foreman for about nine months or a year. I ceased to be his foreman when Mr Black came, a year or a year and a half before the accident. The conversations which I have mentioned between me and Wallace were during the time that I was his foreman, and it was when I was his foreman that I heard this conversation between Wallace and Fraser."

Thereafter, upon 4th February 1892, the Sheriff pronounced the following interlocutor:—" . . . . Having heard parties and considered the proof, with the additional evidence led on 11th December last, recalls the interlocutor dated 18th May 1891: Finds that on the 24th January 1890 the deceased James Wallace, while working a calender machine belonging to the defenders, received injuries from which he died in consequence of said machine not being securely fenced, and so dangerous through the fault of the defenders: Repels the defences: Finds the defenders liable in damages; assesses the same at the sum of £300 sterling: Finds the defenders liable in expenses."

"*Note.*—I have no difficulty in holding, upon the evidence, that the direct cause of this very painful accident was that the pinions on the right-hand side of the calender machine in question were unfenced. There were four such machines standing in a row at a distance of about 4 feet 8 inches from the wall, and if, in the opinion of the defenders and their engineers and mechanics, the other three required fencing, I cannot see how this particular one was left unprotected. That it has since been fenced is a fact not to be pressed against an employer, for we may all profit by experience, but it proves at least that it was quite practicable to do it without interfering with the working of the machine, and I agree with the witnesses who think that it ought to have been fenced. It seems to me that the want of fencing exposed the workman placed in charge of the machine to an amount of risk which was quite inexcusable. The Sheriff-Substitute has dismissed the action on the ground that the pursuers had failed to prove that the deceased ever complained of the danger, or that he continued at his work on the faith that the machine would be fenced, and therefore the maxim *volenti non fit injuria* applies. But the additional evidence which has been led since the Sheriff-Substitute's judgment clearly shows that this is erroneous. Besides M'Donald's evidence we have now the important testimony of the witness Ogilvie, which was taken before myself, and which (notwithstanding some discrepancy about dates) I saw no reason to disbelieve. The effect of their joint evidence is to discredit entirely the evidence of Fraser, the mechanic, who appears to be the person really to blame for the accident. He says the machine required no fencing. That is certainly not the fact; everybody else, the factory inspector included, says the contrary. He denies that the deceased ever complained to him of the danger he was incurring. I am satisfied that he often complained, both to Fraser and others, and that these complaints, met at the time by promises that they would be attended to, were either postponed or forgotten until the evil day came which, in its sad and distressing circumstances, was to justify the fears and apprehensions of the deceased. This is clear from an incident which must have occurred only a few days before the 24th of January, when the accident happened—'The deceased,' says M'Donald, 'said to me that the engineer had promised to put a guard upon the pinions by the New Year, and that the New Year was past and it was not done yet.' If this be so, I do not see how the maxim *volenti non fit injuria* can apply. That is a maxim which has no special application to the law of master and servant. It simply means that a man is barred from complaining of any act which he has invited, or the risk of which he has himself under-

taken—a principle founded on obvious good sense and justice. But evidently a man cannot be said to have undertaken a certain risk by the mere fact of continuing in his employment when all the time he is complaining, and is in fact induced to remain either by assurances that the danger which he apprehends is imaginary, or by promises that it will be remedied. The workman may trust the assurance given, because he is entitled to rely on the superior knowledge, information, and judgment of the employer, and to act on the presumption that the latter has taken what he considers all necessary precautions, and will not expose him to needless risk. If, again, the answer to the workman's complaints is a promise never fulfilled, the master accepts the responsibility; in effect he says—"The risk is mine, not yours," and the maxim has no application. Whether some of the cases often quoted on this point have been well decided may be doubted, for in a recent case in the House of Lords, *Smith* v. *Baker*, 1891, App. Cas. 325, it was said—'When a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty.' In other words, it is unreasonable to expect a man, as soon as he finds himself under a careless master, or exposed to a danger which in a more carefully conducted work would be avoided, to throw down his tools and leave the work; and it is equally unreasonable to hold that unless he take this very unreasonable course he is without redress; the responsibility is the master's, and it cannot be transferred from him to the servant without his consent. If, as the House of Lords held in the above case, continuance at his work in the knowledge of the danger without remonstrance will not justify a court of law in inferring that the servant agreed to take the risk on himself, it would I conceive be entirely wrong to hold, on the facts in this case, that there was any such agreement. I do not think that the case falls under either section 5 or section 6 of the Factory and Workshop Act of 1878; but, apart from the statute, no master is entitled to make the position of a workman needlessly dangerous. If danger be inseparable from the particular employment, it is free to the servant to accept it or not, and having decided to risk it he has no complaint against his master. But it is otherwise when the master so acts as to aggravate the danger either by furnishing a defective machine, by adopting a defective method of using it, or by neglecting the necessary guards and precautions which are essential to the man's safety. I do not therefore decide against the defenders either upon the Factory Act or the Employers Liability Act, but on the broad principles of the common law, of which, I am bound to say, there has been in this case, in my opinion, a lamentable violation. In fixing the damages I have taken into account the fact that the widow is suing for herself and children, and looking to the precedent furnished by the case of *Anderson* v. *Kidd*, 18th March 1881 (not reported, but mentioned by the Lord President, 11 R. 870)—a case in which I understand a verdict was allowed to stand on the footing that £300 should go to the widow—the sum awarded appears to be reasonable."

The defenders appealed to the First Division of the Court of Session, and argued—1. There was no fault upon their part. They were not bound either at common law or under the statute to fence this machine. It was not a source of danger to a workman while engaged in the ordinary course of his duty. The accident here had occurred to a workman while going into a dangerous position for the purpose of pointing out a defect. Before doing so he ought to have stopped the machine. Even if there was fault in not fencing, that was a fault which occurred after the erection of the machine, and accordingly was the fault of the foreman, for which at common law at least the defenders—a limited company without personal knowledge—could not be held liable. 2. The maxim *volenti non fit injuria* applied. Both at common law and under the statute that was a good defence. By continuing to work in the face of a known danger the pursuer had taken risk upon himself, and his employer, although in fault, was relieved of any responsibility. The whole series of recent Scotch cases were to that effect, and would be swept away unless this appealed was sustained—*M'Neill* v. *Wallace & Company*, July 7, 1853, 15 D. 818; *Crichton* v. *Keir & Crichton*, February 14, 1863, 1 Macph. 407; *M'Gee* v. *Eglinton Iron Company*, June 9, 1883, 10 R. 955; *Wilson* v. *Wishaw Coal Company*, June 21, 1883, 10 R. 1021; *Fraser* v. *Hovel*, December 16, 1887, 15 R. 178; *M'Ternan* v. *White & Bee*, January 25, 1890, 17 R. 368; see also *Griffiths* v. *London & St Katherine Docks Company*, June 24, 1884, 13 Q.B.D. 259; and *Thomas* v. *Quartermaine*, March 21, 1887, 18 Q.B.D. 685. It was said that the recent case of *Smith* v. *Baker & Sons*, July 21, 1891, H.L. App. Cas. 325, was in the pursuer's favour, but it did not profess to overrule the Scotch cases, although doubtless exceptions was taken to *Thomas* v. *Quartermaine*. The extent to which a workman appreciated the risk he ran might be an element in determining whether he could be held to have accepted the risk, but there was no case in which a workman who went on without fencing was found entitled to claim because of the want of it. In *Clarke* v. *Holmes*, February 11, 1862, 7 Hurl. & Nor. 937, and 36 L.J. (Exch.) 356 (since canvassed), a statutory requirement had been neglected, and the workman having complained was held not to be barred from claiming because he went on working while the fencing was out of order.

Argued for the respondent—1. He had certainly a good case under the statute, because the foreman was to blame in not providing fencing, but he had also a good case at common law, because upon their

secretary's admission the defenders personally knew of the defect. 2. There was no contributory negligence. He had to go where he went in order to point out the defect. 3. The maxim *volenti non fit injuria* did not apply. Mere knowledge of a danger did not imply willingness to incur risk so as to relieve the employer of responsibility. Doubtless he took some risk upon himself —the risk of moving machinery—but not the extraordinary risk of unfenced moving machinery. It was always a question of circumstances whether a workman had taken the risk so as to relieve his employer of liability. Far from doing that here, he had kept on complaining, and thereby virtually saying, "I go on at your risk." He was not barred from claiming because he had not left his work after complaining — *Holmes* v. *Worthington*, 1861, 2 Foster & Finlason, 533; *Clarke* v. *Holmes*, *supra*. There might be conflict among the cases cited, but several were in the pursuer's favour, and the recent case in the House of Lords of *Smith* v. *Baker*, *supra*, was conclusive. See also *Sword* v. *Cameron*, February 13, 1839, 1 D. 493 (approved of in *Smith* v. *Baker*); *Bartonshill Coal Company* v. *M'Guire*, June 1858, 3 Macq. 300 (opinions although not the judgment); *Woodley* v. *Metropolitan District Railway Company*, February 14, 1877, 2 Exch. Div. 384; *Stuart* v. *Evans*, May 23, 1883, 49 Law Times 138; *Yarmouth* v. *France*, August 11, 1887, 19 Q.B.D. 647.

At advising—

LORD PRESIDENT—The facts relating to the death of James Wallace are not complicated. His business was to work a calender machine. Some defect had occurred in the machine (the particular nature of which it is not at all necessary for present purposes to ascertain), and while he was in accordance with his duty pointing out this defect to the overseer, his clothes got caught by the machine, he was drawn into it and killed.

The fault on the part of the defenders, alleged to have caused the death and to found liability, is, that the machine was unfenced, whereas it ought to have been fenced. In my opinion it is proved that as matter of reasonable precaution against ordinary danger the machine ought to have been fenced, and that the want of fencing caused the accident. Further, the evidence of the defenders' secretary brings home to the defenders themselves the direct responsibility for the want of fencing. The claim of the pursuer is therefore one at common law, and does not depend on the Employers Liability Act 1880.

The defenders, however, have maintained the application of the maxim *volenti non fit injuria*, and this was strenuously maintained. Here again the facts are free both from controversy and complexity.

The absence of fencing was of course palpable. It is, I think, proved that Wallace complained of the want of fencing as constituting a needless danger. Knowledge of the fact which created the danger, and of the danger thereby added to his work by the fault of his employer, are thus brought home to him. He was, therefore, to use the phraseology of recent decisions, *sciens*—was he *volens?*

That he was not willing, but on the contrary was unwilling, that the machine should remain unfenced is directly proved. But there remains the question whether by going on working while the machine remained unfenced he demonstrated (for there is no other evidence of it) a willingness to accept the risk. Now, much of the difficulty which has gathered round this legal question has arisen from the ambiguity of the terms "risk" and "accepting the risk." If "risk" means simply "danger" and "accepting the risk" means "encountering the danger," then every workman who is *sciens* of a dangerous defect in machinery and goes on working accepts the risk in that sense, for he exposes his life and limbs to the danger of loss or injury. But about such a workman there remains over the question, whether he "accepts the risk" in this other sense, that he agrees to relieve his master of the consequences of any injury caused by what, *ex hypothesi*, is the master's fault, and insures himself against the risk. In the case before us there is no evidence of any such agreement. The occurrence of injury owing to the want of fencing was a chance and not a certainty, nor a chance approaching a certainty, and the measure of probability of injury was still less calculable or exactly appreciable in the case (which is that before us) of the workman having (in course of his duty) to do what he had never done before, viz., approach the machine in order to point out something in the inside of the machine. So far as the evidence shows, the attitude of Wallace when he communicated with the representative of his employers on the subject was one of protest against the want of fencing, and I think the proper inference from his conduct is, that complaining of the defect and not getting it at once removed he let his employers take the consequences of their omission so long as it should continue.

The defenders with commendable distinctness confined their argument to the legal question which they desired to raise, and did not challenge the amount of the Sheriff's award. I am for dismissing the appeal.

LORD ADAM—I think it is proved in this case that the calender machine in question was defective and dangerous in respect that it was unfenced; that the defenders knew that it was unfenced, but allowed it to remain in that condition because they did not think that it was dangerous; that the deceased James Wallace knew and believed that it was dangerous in respect that it was unfenced, but that he nevertheless continued to work at the machine; that on 24th January 1890, while engaged in pointing out a defect in the machine to the engineer at the works, he was caught by a wheel or other part of the machine,

which was at work at the time, and was drawn into it and received injuries of which he died next day; that the accident would not have occurred had the machine been fenced; that Wallace had frequently complained of the unfenced condition of the machine; and in particular, that he had complained to Fraser, the engineer of the works in charge of it, who had promised to have it fenced by the New Year, but that this had not been done.

These being the facts of the case, the question is, whether they disclose any valid ground of action against the defenders? The defenders maintained to us that they did not, because they showed that as Wallace knew the dangerous condition of the calender machine, he must be held to have undertaken the risk of injury resulting therefrom, and that therefore, in accordance with the maxim *volenti non fit injuria*," the pursuer could not recover damages.

I may say that I think that if the pursuer is entitled to recover damages at all, she is entitled to do so at common law. It is no answer to say that the defender did not know that the machine was dangerous, if in point of fact it was so.

If we were to look only to the previous decisions in our own law, there would be difficulty in coming to a clear conclusion in favour of the pursuer in this case. The cases of *The Eglinton Iron Company* v. *M'Gee*, *Fraser* v. *Hood*, and other cases to which we were referred, point to an opposite conclusion; while the cases of *Sword* v. *Cameron* and *The Bartonshill Coal Company* v. *M'Guire*, tend, as was pointed out in the House of Lords in the case of *Smith* v. *Baker & Sons*, to support the pursuer's case.

It appears to me, however, that the case of *Smith* v. *Baker & Sons* rules the present case. It is true that that case was not an appeal in a Scotch case, but there is no difference in the laws of England and Scotland as regards this matter. The case was decided on a review of the previous cases—Scotch as well as English—and I think it is of equal authority as if it had been decided in a Scotch appeal.

I think it was determined in that case that it was a question of fact in each case whether a workman who has been injured in the course of his employment has agreed, either expressly or by implication, to take the risk of the injuries he may have sustained; or, as it is put by Lord Watson, whether he has agreed that if any injury should befall him, the risk was to be his and not his master's—"risk" being here used as applicable to liability for the consequences of the injury, and not of course to the personal injury.

A workman may very well be presumed to have undertaken the risk of all injuries occurring in the ordinary course of his occupation, whether that occupation be a dangerous one or not, but where, as in this case, the injury has resulted from the negligence of the employers, the workman cannot be presumed to have undertaken the risk of injuries resulting from that negligence. Nor will the fact that he continued in his employment in the knowledge of the danger necessarily imply that he agreed to accept the risk. In the words of Lord Herschell, "Where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty."

Except that Wallace continued his work at this unfenced machine, there is no other fact founded on by the defenders to show that he undertook the risk. On the other hand, it is proved that he complained to Fraser, the engineer, of the unfenced condition of the machine, and received a promise that it should be fenced—facts which show that he did not consent that the machine should remain unfenced, and that he did not willingly work with it in that condition. I am of opinion that the appeal should be refused.

LORD M'LAREN—There can be no doubt that a workman by engaging in a hazardous service takes upon himself all the ordinary risks incident to the employment. I agree with your Lordships, and I think it is in accordance with the judgment in *Smith* v. *Baker & Sons*, that the question whether a workman has taken extraordinary risks upon himself is one of fact to be ascertained in the course of the cause.

The true principle was laid down by Lord Kinnear in *M'Gee* v. *Eglinton Iron Company*, where, after stating the defenders' argument that as the workman voluntarily worked in the face of danger he did so at his own risk, his Lordship says—"It may be that the pursuer should have refused to work with implements which he knew to be improper and insufficient. But I do not think this can safely be determined upon the record and without inquiry. There was a duty upon both parties, and it is a question for a jury to consider whether in the circumstances which may be proved at the trial the fault lay with the defenders or with the pursuer himself."

Now, the judgment of the Court in *M'Gee's* case was one of dismissal of the action, but on looking at the opinions one sees that the decision proceeds entirely upon the condition of the record in the particular case, and the case cannot be considered as laying down general principles inconsistent with what I conceive to be the true principle announced by the Lord Ordinary and more fully developed in *Smith* v. *Baker & Sons*.

There are cases (it is easy to figure them) where a workman does take upon himself special risks. For instance, the case of a sailor or engineer engaging to proceed on a voyage in a ship which is in such a condition as not to be classed at Lloyd's, but which is not so unsound that the Board of Trade would prevent its going to sea. No doubt, if the sailor or engineer proceeds to sea knowing that the vessel is unclassed, he takes the risk consequent upon his service

in an unclassed vessel, although it is true that by a large expenditure the ship might be restored to its class. The other extreme is the case of a workman who notices a slight defect in the machine with which he is working, but who does not wish to put his master and the other workmen to the inconvenience of the day's work being stopped for repairs. Now, if the man could not without breach of contract throw up his service on the ground of this known defect, it is hard to say that by continuing to work he takes on himself the risk of personal injury, which may be the result of working with a defective machine. In the absence of any evidence tending to show that the workman had agreed to relieve the master of his responsibility for negligence, I should not infer the existence of such an agreement. In the present case it appears that the pursuer's husband knew or was of opinion that a certain part of the mechanism ought to be fenced, but it would strike one as a sharp and perhaps not quite legitimate proceeding if the deceased workman had thrown up his employment because the machine was not fenced immediately after he called the foreman's attention to it.

I agree with your Lordship in holding it not proved in this case that the deceased had taken upon himself the risk of the injury from the unfenced machinery, and that the interlocutor of the Sheriff ought in substance to be affirmed.

Lord Kinnear—I am of the same opinion. I think the only difficulty arises from the difficulty of reconciling some of the previous decisions.

I agree in what I think was indicated by Lord M'Laren, that there is nothing in the decisions which tends directly to invalidate the distinction which has been taken, as regards liability, between the risks which are necessarily incident to a dangerous employment and those additional risks which may be unnecessarily created for the employed by the fault or negligence of the employer. But then, of course, it is possible that a servant may agree to take such risks upon himself if he choose, and in some of the cases cited, it appears to me to have been assumed that if a man comes to harm through his employer's negligence, his knowledge of the fault when he incurred the danger is in itself conclusive evidence that he has taken the risk upon himself, or in other words, has agreed to relieve his employer of the consequences of his fault.

Now, if that is to be regarded as an inference of fact it seems a somewhat violent assumption, but I think that but for the decision in *Smith* v. *Baker & Sons* we should have had to consider whether or not it was imposed on us by previous judgments as a proposition in law.

But I agree with your Lordship that we are relieved of that difficulty by the decision of the House of Lords in *Smith* v. *Baker & Sons*, and that we are not required by any rule of law to consider the servant's knowledge of a danger arising from the master's fault as equivalent to an agreement to relieve the master of liability. The question whether a man who knows of his danger has agreed to take the risk upon himself is a question of fact to be determined with reference to all the circumstances of the case.

Upon the evidence in this case, I agree that the pursuer's husband did not voluntarily agree to relieve his employer of the liability to fence the machine properly, and I think the Sheriff's judgment is right.

In consequence of observations made by the Court a joint-minute was lodged by the parties, stating that the defenders and appellants were willing to pay the sum of damages proposed to be awarded on a discharge by the pursuer and her whole family, and an obligation having been given to grant such a discharge, counsel for the parties concurred in decree being pronounced in this action for the sum of £300 in favour of the pursuer.

The Court thereafter pronounced the following interlocutor:—

> "The Lords . . . recal the interlocutor of the Sheriff appealed against: Find in fact that on 24th January 1890 the pursuer's husband James Wallace, while in the course of his duty in the employment of the defenders, pointing out to an engineer a defect in the calender machine at which he worked, came in contact with part of the machinery, was drawn into the machine and received bodily injuries whereof he died on the following day; that the said machine was unfenced, whereas it ought, for the due safety of the workmen, to have been fenced; that the death of the said James Wallace was caused by the want of fencing; that the machine was left unfenced through the fault of the defenders; that on or prior to 24th January 1890 the said James Wallace knew that the said machine was unfenced; that the said James Wallace had on several occasions prior to the said date complained to the foreman in charge of the department in which he worked, and also to the engineer in charge of fencing in the defenders' mills, of the want of fencing of the machine in question as creating a needless danger in working it: Find in law that the defenders are liable at common law in reparation for the death of the said James Wallace: In respect of the joint-minute, decern against the defenders for payment to the pursuer of the sum of £300 sterling." . . .

Counsel for Pursuer and Respondent—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for Defenders and Appellants—Ure—Salvesen. Agents—Macpherson & Mackay, W.S.