and its true character required a proof to disclose it. But here the account libelled and the pursuer's averments regarding it disclose an account of buying and selling and of nothing else. Unless therefore prescription be to be restricted to unilateral accounts of buying and selling, I see no sound or intelligible principle upon which I can hold that it does not apply to the present case as it is stated on the face of the account and of the record."

The Sheriff (COMRIE THOMSON) recalled this interlocutor "in so far as it limits the pursuer's proof to the writ or oath of the defender; *quoad ultra* adheres to the said interlocutor, allows the parties a proof and to the pursuer a conjunct probation."

The defender appealed, and argued—The Sheriff-Substitute was right; this was not a proper account-current between merchants. The pursuers and the late Francis Batchelor had sold articles to the defender, and the defender in settling had set off certain articles supplied by him, but these amounted only to cross entries, and did not warrant the application of *M'Kinlay* v. *Wilson*, 13 R. 210.

Argued for the respondents—1. They were entitled to inquiry. Prescription did not apply to proper accounts-current between merchants — *M'Kinlay* v. *Wilson*, *supra*. The question was whether this was an account-current. It was stated as such. The defender admitted that transactions had taken place. *Ex facie* it was not an account for goods sold and delivered by the pursuer; it showed a course of dealing between the parties. The sales by the defender amounted to £182, 13s.—a considerable proportion of the account. The Court might therefore regard it as an account-current. 2. If not, at least there should be proof before answer as to the course of dealing in order to ascertain whether it had been properly stated as an account-current. If it were shown that the transactions were treated not as separate but as one, that the items had been set against each other, that a balance had been struck, with periodical payments, the defender's plea of prescription could not be sustained.

At advising—

LORD JUSTICE-CLERK — It is, I think, plain that the transactions which appear in this account amount to no more than the sale of certain articles by the pursuer to the defender, and in settling for them each party set off what he had supplied, *i.e.*, the defender set off the dung he had sent, against the cows supplied by the pursuer, and then there was a money balance. That is all that the pursuer avers, and that is all he would be allowed to prove. Well he has put the words "account-current" at the head of his account, but it cannot make any difference to the actual character of the account what heading he puts on it. It is plainly just a trade account in which certain payments are credited. The Sheriff-Substitute has sustained the plea of prescription, holding that the only proof which can be taken is by reference to writ or oath of the defender. The Sheriff has allowed a proof at large. It is plain that the account is one to which the triennial prescription applies, and as prescription has run, I think we should recal the Sheriff's interlocutor, and revert to that of the Sheriff-Substitute.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court sustained the appeal.

Counsel for the Apellant — N. J. D. Kennedy. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondents — Boyd. Agents—Henderson & Clark, W.S.

Tuesday, June 21.

FIRST DIVISION.

FLANNIGAN *v.* MUIR.

Parent and Child — Custody — Right of Grandmother to Custody of Child of Thirteen Chargeable on Parish—Influence of Child's own Wishes on Subject—Right of Grandmother to Demand Address of Pauper Child from Parochial Board.

An Irishman, resident in Scotland, disappeared, and his child, a girl of thirteen, became chargeable on the parish. Thereafter the man's mother, who resided in Ireland, applied to the Court to ordain the parochial board to give the petitioner the address of her granddaughter, and also to deliver up the child herself to the petitioner. Answers were lodged on behalf of the parochial board, averring that the petitioner was not in a position to maintain the child, and that the child herself expressly desired to remain in Scotland. The curator *ad litem* appointed by the Court to the child adopted the views of the parochial board, and reported that in his opinion nothing short of force would induce the child to go to Ireland.

The Court *refused* to ordain the parochial board to deliver up the child to the grandmother, and were *equally divided* in opinion as to whether the parochial board were bound to give the grandmother the address of the child.

On 28th November 1891 Mrs Elizabeth Murphy or Flannigan, residing at Upper Drumquill, county Monaghan, Ireland, with consent and concurrence of James Flannigan, also residing there, presented a petition to the Court, in which she stated "that the petitioner's son Matthew Flannigan, labourer, King Street, Rutherglen, took ill of fever in the middle of November 1890, and when the fever was at its height, namely, on the 30th of November, he rose from his bed, went out of the house, and has never since been heard of. He is believed to have been drowned in the Clyde. He was a widower, and he left four children —Francis Flannigan and Catherine Flannigan (twins) aged sixteen years, both now

residing with the petitioner, and Mary Flannigan, born 19th February 1878, and Rose Flannigan, born 16th May 1879. The two last-named children became chargeable to the parish of Bothwell, and the Parochial Board of said parish still maintains them and has charge of them, but declines to disclose their whereabouts to the petitioner. The petitioner's son James Flannigan, their uncle, who resides with the petitioner, in the beginning of October 1891 applied to Mr James Muir, inspector of poor of the said parish of Bothwell, as representing the petitioner, to get the custody of the said children Mary Flannigan and Rose Flannigan, but Mr Muir wrote him on 16th October refusing the application, and he subsequently repeated his refusal, and declined even to give the address of the children, although informed that the elder children above named were residing with the petitioner. The petitioner is able to maintain the said Mary Flannigan and Rose Flannigan, and desires their custody. The said James Flannigan, the children's uncle, concurs in the present application. They have no other near relative."

The petitioner therefore craved the Court to order service of the petition on James Muir, as representing the Parochial Board of the parish of Bothwell, and thereafter "to find that the petitioner is entitled to the custody of the said children Mary Flannigan and Rose Flannigan; and to decern and ordain the said James Muir, as representing the Parochial Board of the said parish, forthwith to give the address of the said children and to deliver up the said children to the petitioner."

On 16th December 1891 the respondent lodged answers, in which he stated—"The respondent admits that Mary Flannigan and Rose Flannigan, daughters of Matthew Flannigan, labourer, who in 1890 resided at King Street, Rutherglen, became, and are still chargeable (both being boarded out) to the parish of Bothwell, in which parish their said father, and they through him, had at the date of chargeability their parochial settlement. The said Mary and Rose Flannigan were both born in Scotland, the former on 1st July 1877 and the latter on 16th May 1879, and thus are both minors. The elder, Mary, is now about to enter domestic service in Scotland. The respondent further admits that Matthew Flannigan disappeared about 30th November 1890, but his death is not admitted. The respondent admits that he, as inspector foresaid, has declined to give the custody of Mary and Rose Flannigan to the said James Flannigan, or to disclose their address. In so refusing to give the custody to the said James Flannigan, or to the present petitioner, the respondent is acting in accordance with the instructions of his board, and as he and the said board believe, in the best interests of the minors. The said minors themselves expressly desire that they should remain in Scotland, where they were born and have been brought up. They have never seen either the petitioner or the said James Flannigan. The respondent denies that the petitioner is in a position to maintain the said Mary and Rose Flannigan. She is tenant of a small holding, five acres in extent, the rent of which is £3 per annum, and has no other means of subsistence. The concurring petitioner also lives on said holding, and the respondent believes and avers that the said minors would, if sent to the petitioner, be sent out to work for the support of the petitioner. The whole circumstances have been laid before the Board of Supervision, and the position of the respondent has received their sanction and approval."

The respondent therefore submitted "that the prayer of the petition should be refused, in respect—(1) The petitioner has not set forth, and does not possess, any title to insist in said petition. (2) The said Mary and Rose Flannigan, being both minors *puberes*, are entitled to choose their place of residence, and they have declined to go to Ireland. (3) The petitioner is not in a position to maintain said minors. (4) Under the provisions of 54 and 55 Vict. cap. 3, the Court has in such cases discretion to consider the special circumstances of each case, and, in particular, it is provided by section 4 thereof that 'Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice;' and the said minors have made their own free choice to remain in Scotland."

On 20th February 1892 the Court appointed the respondent James Muir to intimate the petition and answers to Rose Flannigan and also appointed Mr George Gillespie, Advocate, curator *ad litem* to the said Rose Flannigan, and allowed him to see the process.

On 8th March Mr Gillespie reported to the Court "that since his appointment he had had a meeting in Edinburgh with his ward, who had come to Edinburgh in the care of a daughter of the person with whom she is now boarded. The ward was healthy looking, well dressed, and evidently well cared for. The girl who accompanied her was eighteen years old, of exceptionally good manners, neat and well dressed. She was very kind in her behaviour to the ward, who, again, seemed much attached to her. The curator had some talk alone with the ward. She spoke quite frankly and intelligently. She stated that the family with whom she was boarded, fed and lodged her well, and were kind to her. They were Catholics, and she attended a convent school. The curator observed that she could read well, and could write fairly. Her sister Mary, she stated, was in service in the country town in which she (the ward) is boarded, and came to see her frequently. Mary had, before she went to service, boarded with the same family as the ward now boards with. She expressed most distinctly her determination not to go to Ireland, or to see her grandmother or uncle. The curator is satisfied that this determination is genuine, and has not been inspired by anyone. It depends not on any dislike of

Ireland or her relatives,—for she has never been in Ireland, and never heard anything of her relatives either from her father while he lived, or from anyone else,—but upon her liking for her present surroundings and her prospects. She intends, in about two years' time, to go into service, like her sister. Her 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. She is boarded with a labourer in a country town. His wages are about 20s. a week. He has living with him his wife, two sons, aged respectively twenty and seventeen, and earning respectively 20s. and 12s. a week, and he has two daughters aged twenty-four and eighteen. The elder daughter is a domestic servant, and is not resident with her father. The other daughter was the girl whom the curator saw. She gave both the Flannigans excellent characters, and confirmed generally what the curator had been told by the ward herself. She had been educated in the same school as that which the ward now attends. There was laid before the curator the information which the respondent had collected, by correspondence and by a visit to the locality, as to the character and the circumstances of the petitioner and her son James Flannigan. *Prima facie* it justifies the statement made in the answers. Looking to the whole circumstances of the case, and in particular to the plain determination of the ward, the curator adopts the answers lodged by the respondent, and concurs in craving the Court to refuse the petition."

During the argument counsel for the petitioner intimated that she no longer insisted in the prayer of the petition so far as it referred to the custody of Mary Flannigan.

Argued for the petitioner—The petitioner had a title to ask the Court to order the respondent to deliver up the child to her—*Denny* v. *Macnish*, January 16, 1863, 1 Macph. 268. The petitioner was only doing her duty in coming forward to support the child, and the Parochial Board were not entitled to pauperise the child when her relatives were willing to support her. A father was entitled to regulate the residence of his child even after the latter attained puberty—Erskine's Principles, i. 7, 36—and here the petitioner was *in loco parentis*. 55 and 56 Vict. cap. 3, sec. 5, defined parent as "any person at law liable to maintain such child or entitled to his custody." Even if the wishes of the minor influenced the question, and she was entitled to choose her place of residence, it was quite impossible for her to make an unbiassed choice without seeing the petitioner or hearing the petitioner's view on the matter. She could not judge without knowing the other side. Many cases could be cited in which the Court had ordained the person having the children to disclose their address to the nearest relatives, *e.g.*, one of the latest cases — *Hutchison* v. *Hutchison*, December 13, 1890, 18 R. 237.

Argued for the respondent—The application was incompetent, and the prayer of the petition should be refused. The death of the father was not admitted, and had never been proved. This was a necessary step before the grandmother could claim the child as nearest relative. Even if the father was dead, the petitioner had no legal right to make the demand for the child—*Smith* v. *Smith's Trustees*, December 13, 1890, 18 R. 241. Besides, except perhaps in the case of a minor having a father, in which complications might arise, the law was quite settled that a minor was entitled to fix his or her own residence—Fraser's Parent and Child, p. 363. In this case the minor had clearly expressed her determination not to leave her present home, and had never wished to see her Irish relatives. This was sufficient for the determination of the case, and the prayer of the petition should be refused.

At advising—

LORD PRESIDENT—The leading prayer of this petition is for the custody of two girls who are of the ages of fifteen and thirteen respectively. Their father and mother are dead. The girls were born and have always lived in Scotland, their father having been a labourer in Glasgow. He died or disappeared in 1890, and the girls then became chargeable to the Parochial Board of Bothwell. They were boarded out; the elder is now in service; the younger is still boarded out but looks forward to soon engaging in service.

In these circumstances we have to deal with this application.

The petitioner, who is the paternal grandmother of the girls, does not now press for the custody of the elder girl, and as she is fifteen and a maidservant this is not surprising. She persists, however, in her prayer for the custody of the younger girl.

The petitioner seems to take a view of her rights which is free from all complexity, for in the petition she gives the Court no information whatever as to her own circumstances, or as to the manner of upbringing which she proposes for her grandchild.

On the other hand, we have obtained from the curator *ad litem* whom your Lordships appointed, a very satisfactory account of the position and prospects of the girl as she is at present. She is comfortably boarded with a family of her own faith, who treat her well, and to whom she is attached; she is being properly educated, and looks forward to going into service like her sister, who had been boarded in the same family, and whom she sees frequently. The report by the curator *ad litem* shows that the girl is well where she is, and I have heard nothing to suggest that she would be better with the petitioner, even if we had to determine this question irrespective of her own wishes.

Those wishes, however, are of the most definite kind. She desires to stay where she is and to go into service in Scotland like her sister. She expressed to the curator *ad litem* most distinctly her determination not to go to Ireland, and he adds, "her

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