19, 1846, 9 D. 78 (whole Court); and *Mayor, &c., of Durham* v. *Fowler* (1889), 22 Q.B.D. 394.

At advising—

LORD YOUNG—This is an action against cautioners upon their cautionary obligation to make good the obligations of a traveller employed by the pursuer. The Sheriff-Substitute has assoilzied the defenders from the conclusions of the action, his finding in law proceeding on this finding in fact—"that until the raising of this action the pursuer has failed to communicate to the defenders, as cautioners foresaid, that the said John Maclachlan was negligent in the performance of his duties, and that he was failing to account for the sums of money collected by him while acting as agent for the pursuer." The Sheriff negatives that, for he finds in fact that there was no negligence practically averred, and that the proof does not establish such negligence on the part of the pursuer in regard to the cautioners. He also negatives the idea that the pursuer had entered into an agreement with Maclachlan, giving him time to pay the sums he was due. Now, I am of opinion, with the Sheriff, that there are no facts proved showing negligence on the part of the pursuer to attend to his own legitimate interest and to the legitimate interest of the cautioners—that no negligence of that kind has been established—and that therefore there is no ground here for relieving the cautioners of their obligations.

I am also of opinion with the Sheriff that it has not been established that there was any agreement to give the traveller time. I think there is no ground for that at all; and upon the whole matter my opinion is that, although the pursuer was was not hard to press upon the traveller and bring him to account, there was no such laxity on his part as to relieve the cautioner of his obligation; and I am also clearly of opinion that it is not established that there was any agreement to give him time which would have deprived the cautioners of their right to relief from the principal debtor.

The result is that I agree with the opinion of the Sheriff, and think that the appeal against it ought to be refused, and with expenses in both Courts.

LORD TRAYNER—The Sheriff in this case has decided in favour of the pursuer on the ground that the defenders have failed to prove that the pursuer entered into any agreement with his debtor Maclachlan, giving him time to pay the sums due by him, or had acted otherwise so as to liberate the defenders from their liability as cautioners. I think that decision is well founded both in fact and law. There is really no case presented in the evidence (although it is averred on record) of the pursuers having given or agreed to give the debtor time to pay his debt, under such circumstances as would have led to the cautioners being relieved of their obligation. The case maintained by the defenders as established was that the pursuers, in the knowledge that the debtor was not fulfilling the terms of his obligation, fulfilment of which was guaranteed by them, neglected to give them notice of such failure. Now, even if that defence had been made out, I should not have been prepared to sustain it as a relevant defence. It appears to me to have been settled by a series of decisions (several of which were cited at the bar) that any such neglect on the part of the creditor would not liberate the cautioners. But then I think the defence fails also in fact. The notice which was sent to the defender by "Stubbs Limited" on behalf of the pursuer in January 1896, very shortly after the pursuer became aware of the debtor's defalcations, was sufficiently clear and distinct to have put the cautioners on their inquiry, and to have led them to take any measures they could for their own protection. I am therefore of opinion that the defence fails both on fact and law, and that the appeal should be dismissed.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said (*i.e.*, the Sheriff's) interlocutor: Therefore of new repel the defences and decern against each of the defenders separately for the sum of £15, 2s. 6d., with interest thereon at the rate of £5 per centum per annum from the date of citation: Find the defenders George Patterson and John Cruickshank liable in expenses in this Court," &c.

Counsel for the Pursuer and Respondent—W. Campbell—A. M. Anderson. Agents—Fraser, Stoddart, & Ballingall, W.S.

Counsel for the Defenders and Appellants—Baxter—J. C. Watt. Agent—William Geddes, Solicitor.

Saturday, January 15.

SECOND DIVISION.

[Sheriff-Substitute at Dumbarton.

CAMERON *v.* WALKER.

Reparation — Master and Servant — Unfenced Machinery.

A boy of fourteen years of age, with consent of his father, raised an action against a baker for damages at common law and under the Employers Liability Act 1880. The pursuer averred that while in the employment of the defender he was engaged driving a dough-rolling machine by turning a handle connected with two cog-wheels, which were not guarded in any way;

that while so employed he was instructed by the defender's assistant to attend to an oven door situated behind him, and that in turning round to do so his left hand was caught in the cog-wheels and injured. He further averred that the unguarded condition of the cog-wheels was highly dangerous; that it was usual for cog-wheels in such machines to be guarded by being enclosed in a thin iron guard or cover; and that he had been injured through the fault of the defender in failing to take such a usual and reasonable precaution. *Held* (*diss.* Lord Young) that the action was irrelevant.

Observations on the case of *Milligan* v. *Muir & Company*, October 27, 1891, 19 R. 18.

James M'Kendrick Cameron, a boy of fourteen years of age, with consent of his father Robert Cameron, quarryman, Dunoon, as his curator-at-law, raised in the Sheriff Court at Dunoon, against James Walker, baker there, an action for £400 damages at common law, or otherwise £46, 16s. in terms of the Employers Liability Act 1889.

The pursuer averred—"(Cond. 2) About the middle of June 1897 the defender engaged the pursuer at a wage of 6s. per week to make himself generally useful as directed in defender's bakehouse, which is situated behind defender's shop at Argyll Street, Dunoon. (Cond. 3) In the said bakehouse the defender has a reversible brake or dough-rolling machine. This machine is driven by a handle connected with two cog-wheels. These wheels are situated outside the machine, and at the time of the accident after mentioned were not guarded or protected in any way. The free space of the said bakehouse is restricted, which necessitated persons in the bakehouse coming into close proximity to the said wheels. (Cond. 4) On 16th July 1897 the pursuer, in obedience to instructions received by him from the defender, was engaged driving the said machine by means of the said handle. (Cond. 5) Whilst the pursuer was so employed, Samuel Hamilton, an assistant in defender's employment, who was about to thin some dough by passing it through the said machine, instructed the pursuer to attend to an oven door which was situated behind him. The pursuer turned round to obey this order, and in doing so his left hand was caught by the said cog-wheels, and was seriously mangled and crushed. In consequence of the said accident the pursuer suffered great pain. He had to be taken to the hospital, where the second and third fingers of his left hand were amputated. (Cond. 7) The unguarded condition of the cog-wheels of the said machine was highly dangerous, especially for a boy of the age of the pursuer, and the introduction and continued use thereof was gross and culpable fault and negligence on the part of the defender. (Cond. 8) A thin iron guard or cover could easily have been fitted up to enclose the said cog-wheels, which would have prevented persons working the said machine from coming in contact with them. It is usual for the cog-wheels in such machines to be guarded in this way, and the pursuer was injured through the fault of the defender in failing to take such a usual and reasonable precaution for the safety of those using the said machine. The failure of the defender to have the said wheels guarded or covered was a defect in the ways, works, machinery, and plant of the defender in the sense of the Employers Liability Act 1880. It is believed and averred that since the accident to the pursuer the defender has had the said wheels enclosed in the manner indicated."

The defender pleaded, *inter alia*—"(4) There being no relevant case averred against defender, the action should be dismissed with expenses."

On 23rd November 1897 the Sheriff-Substitute (MARTIN), before answer, allowed parties a proof of their averments.

The pursuer appealed for jury trial.

The defender objected to any issue being granted, and argued—The action was irrelevant. There was no question here of a complex piece of mechanism. The machine was a simple ordinary bit of mechanism turned by hand, and there was no necessity to fence it. The danger was so obvious that the pursuer had only himself to blame for the accident—*Little* v. *Paterson*, November 7, 1890, 28 S.L.R. 64; *Milligan* v. *Muir & Company*, October 27, 1891, 19 R. 18.

Argued for pursuer—There were averments of want of ordinary and reasonable precautions. It was averred that it was usual to fence machines of this kind, and the case was thus distinguished from *Little*. The case of *Milligan* was decided purely on averments showing that the machine was perfectly safe, but had been worked in the wrong way. It was averred in the present case that the machine was dangerous, and that the defender in failing to fence neglected ordinary and reasonable precautions. An issue should therefore be allowed —*Edwards* v. *Hutcheon*, May 31, 1889, 16 R. 694; *Morgan* v. *Hutchins*, 1890, 59 L.J., Q.B.D. 197.

LORD JUSTICE-CLERK—The facts averred here are that this pursuer lost some of his fingers in turning the handle of a dough-rolling machine. There is no averment that if he had been working it in the ordinary way there would have been any danger. The allegation is that in doing his work he turned to obey an order and his left hand was caught by the cog-wheels and was crushed. It is not stated that while turning round he was under any necessity to go on working the machine, and it is difficult to see how that could be. Accordingly, if he had stopped turning that machine the accident would not have happened. It is a machine worked by hand, and of course would stop when the hand ceased to turn it. Then he says that the cog-wheels should have been enclosed by a thin iron guard, and that it is usual for the cog-wheels of such machines to be guarded in this way, and that the accident was caused through the absence of this precaution. Now, I think that if it were sufficient in such cases as the present to make an

action relevant that there is an averment that it is a usual precaution to fence, every pursuer could make his action relevant by merely putting in such a general averment. We had exactly the same averment in the case of *Milligan* v. *Muir & Co.*, October 27, 1891, 19 R. 18. There it was alleged, as it is alleged here, that it was a usual practice to have the wheels fenced; but notwithstanding that averment we unanimously came to the conclusion that it was not sufficient to entitle the pursuer to go to trial that he had made such an averment. I was very anxious in the course of the debate to get at the view of the pursuer here, and Lord Moncreiff succeeded in bringing that out—namely, that whatever the machine may be, and whatever the nature of the accident, if he simply says that the machine was dangerous without specifying in what it was dangerous, except that it was so, and if he avers that that class of machine is usually fenced, that necessarily entitles him to an issue. I cannot adopt that view looking to the case of *Milligan*. I take that to be a distinct authority in the present case, and I am not prepared to go against that authority unless we had a larger Court present than we have here.

LORD YOUNG—The case is certainly one of importance looking to the views which your Lordship has expressed, and which I understand to be concurred in by our learned brother Lord Moncreiff. My own opinion is so distinctly different that I must express it, and it is because of these contrary views, and only because of these contrary views, that the case is of importance. I do not mean that it is not of interest and importance in itself, for a boy of fifteen has been seriously disabled for life. He has been so injured that he has lost several fingers. His averment as to how this happened is that in the bakehouse where he was employed there is a reversible brake or dough-rolling machine. This machine is driven by a handle connected with two cog-wheels. These wheels are situated outside the machine, and at the time of the accident were not guarded or protected in any way. He says the free space of the bakehouse is restricted, and that that necessitated persons in the bakehouse coming into close proximity to the said wheels. Now, I pause here merely to observe that I have no knowledge of this machine—none whatever—and if I desire to acquire knowledge about I should not apply to a learned lawyer for information, but I should apply to those who are acquainted with such machines. It is not a matter of law, nor is it a matter of common knowledge—at least I am not one of those who have the common knowledge. Now, it is averred with respect to this machine, that while the pursuer was employed by the defender "an assistant in defender's employment who was about to thin some dough by passing it through the said machine, instructed the pursuer to attend to an oven door which was situated behind him. The pursuer turned round to obey this order, and in doing so his left hand was caught by the said cog-wheels and was seriously mangled and crushed. In consequence of the said accident the pursuer suffered great pain. He had to be taken to the hospital, where the second and third fingers of his left hand were amputated."

I am not in a position, and should not think anyone is, to condemn the boy for turning round as he says he did. Whether his conduct was condemnable or not is not matter of law without knowledge of the whole facts, and we cannot condemn his conduct on his statement. It may be condemnable or not, but we have not the details to enable us to dispose of this case or deal with it from the consideration that his conduct was blameworthy in any respect, and still less to say that it was so blameworthy as to preclude him from claiming a remedy from anybody responsible for the accident which he has met with, if he is not guilty of blameworthy conduct. There are degrees of blame. Pursuer may be to blame, but not so to blame as to preclude him from claiming a remedy from the person through whose fault he suffered his injuries. Then he goes on to say in article 7 that "the unguarded condition of the cog-wheels of the said machine was highly dangerous, especially for a boy of the age of the pursuer, and the introduction and continued use thereof was gross and culpable fault and negligence on the part of the defender. A thin iron guard or cover could easily have been fitted up to enclose the said cogwheels, which would have prevented persons working the said machine from coming in contact with them. It is usual for the cog-wheels in such machines to be guarded in this way, and the pursuer was injured through the fault of the defender in failing to take such a usual and reasonable precaution for the safety of those using the said machine." Now, the pursuer offers and undertakes to prove that. Can I, as a lawyer, aver that he cannot prove it—that he will be unable to prove it? Can I say from my knowledge of law—and I have no knowledge of anything else, but presumably I know the law of Scotland—I say presumably—that he cannot prove these averments — that this machine was dangerous for any boy working at it and not guilty of blameworthy conduct on his part? Can I say as matter of law that that cannot be so, and that he cannot possibly prove it? He undertakes to prove it, and he now seeks what, according to my view of the law, the Court is bound to give him, an opportunity of proving it, and to say that he cannot is, in my opinion, entirely unwarrantable. Many pursuers fail to prove their averments, but that is after the Court has given them an opportunity of proving them if they can, and I think we are bound to give this pursuer an opportunity of proving his averments if he can, and that we cannot say beforehand that it is impossible that he should.

I suggested in the course of the argument the case of these averments being admitted

in point of fact, whether it could be said then that there was any answer to the conclusions in the action of liability. I do not think that any rational objection has been stated to the proposition that if it were admitted that this machine, standing where it was, and worked in the manner that it was, was unsafe if unfenced to those who were employed in so working it, and that its unfenced condition led to the boy's fingers being cut off, then there was liability. If there is a failure to prove it, of course that ends the case. If it is shown that although it ought to have been fenced, nevertheless the boy attending it acted in such a negligent way as the master was not reasonably entitled to suppose he would do; that also will be an answer to the action. But to say that there is no case presented for inquiry here is what I cannot assent to.

And with respect to the case of *Milligan*, I should venture to say this—that, unless it is to be regarded as a special case upon such grounds and views as were suggested to us by the learned counsel for the pursuer, I entirely dissent from that decision —I cannot regard it as a decision to the effect that, as a general principle, a pursuer who has suffered injury shall not have an opportunity of proving that the injury which he suffered is attributable to a machine, unsafe because it was unfenced. If it were to be regarded as a decision to that effect, it is a decision contrary to a hundred cases which have been sent to trial on the contrary view without any objection. I cannot regard it, therefore, as a decision on any such question as that, and neither can I assent to any of the views which have been argued before us here in regard to particular machines which were referred to in particular cases, that there is a common knowledge on the part of the Court which entitles it to disregard the averments on the ground that it is impossible to say that the pursuer may be entitled to damages. There may be cases of that kind. There may be the case of a kitchen fire or a room fire, and a pursuer may aver that it is unsafe not to have a fence the whole length and breadth of the fire. There are extravagant cases of that kind and other instances—ludicrous cases such as nobody but a lunatic would put on record. But this is not a case of that kind at all, and I therefore desire to record my distinct opinion to the contrary of the decision which I understand is about to be pronounced.

Lord Moncreiff — I agree with your Lordship in the chair that the pursuer's averments are irrelevant and should not be sent to trial, and I concur in all the grounds of judgment which your Lordship has stated. I think the case is one of considerable importance, because Mr Salvesen candidly admitted that his contention was that in every case which turns upon the condition of machinery it is a sufficient ground for it being sent to trial, that on record the pursuer avers that the machine was dangerous and that it is the usual practice to fence such a machine. The contention was that it is not open to the Court to consider the necessity for fencing, and that such a case must be sent to trial without further discussion. I am not prepared to assent to that view, and further, I think we are precluded by the case of *Milligan* from doing so. I find there a statement that the machine was dangerous, and that it was usual and customary to fence such a machine; and notwithstanding the statement that it was dangerous, and that it was usual to fence such a machine, the Court unanimously held the action irrelevant and dismissed it. In that case your Lordship in the chair said—"It is plain that this is a machine which is to be worked entirely by hand. If it is worked in the ordinary way, *i.e.*, by these two boys, each holding on to one side of the handle, and turning it steadily, no accident such as that which befel the pursuer could possibly happen." That authority, I think, is a complete answer, at all events for us sitting in this Court, to the general proposition contended for by Mr Salvesen. I think there may be cases, and this is one of them, in which it is plain on the statements of the pursuer himself that the machine was of such a simple description that we cannot accept the statement that it should have been fenced, and that the accident would not have occurred if it had been fenced. The machine here is driven by a handle connected with two cog-wheels, and pursuer himself supplied the motive-power. It seems to me that on the pursuer's own statements, which we must hold as true, the accident occurred, not in consequence of his hand getting into the cog-wheel, but in consequence of his continuing to turn the handle of the machine and attending to something else at the same time. I think that gives a very simple solution of this question, indeed it amounts to an admission of contributory negligence, assuming that the defender was negligent in not having the machine fenced. It is not necessary to proceed on that ground, because I entirely concur with your Lordship in the chair in thinking that unless we were to hold in the case of every simple machine, such as a mangle, the case must go to trial where such averments are made, we cannot sustain the relevancy of this action.

I think that both of the cases cited for the pursuer differ from the present. In *Edwards* v. *Hutcheon* the motive power was steam at the time the accident occurred, and in the case of *Morgan* the accident did not occur to the boy who was turning the machine, but to another who was feeding the machine. The distinction in the present case, I think, is that the accident occurred to the boy who was turning the machine and should have stopped turning it before looking round.

Lord Justice-Clerk — I may say, in order to prevent misapprehension, that I do not consider the averments that the

machine ought to have been fenced, and that such machines are in usual practice fenced, as an averment at all to be disregarded by any means. I think it goes a long way to relevancy if that is averred, but this will not apply to every machine. If the averment were made in regard to a machine in ordinary domestic use, and which we all know perfectly well, namely, a mangle, such a statement would be disregarded because, according to the knowledge of mankind, such a statement was not according to fact. A pursuer does not make a statement relevant by simply putting in a statement in which there can be no truth. I do not think that this is a case of that kind at all, but all I say in regard to the case of *Milligan* is that it is an authority that we may hold a case to be irrelevant although it is averred that a machine was not fenced which caused the accident and that it is the custom to fence such machines. That was the unanimous decision of the Second Division, including Lord Young.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Sustain the fourth plea-in-law for the defender, dismiss the action, and decern."

Counsel for the Pursuer — Salvesen — —M'Clure. Agents— Simpson & Marwick, W.S.

Counsel for the Defender—W. Campbell —M'Lennan. Agent—J. Murray Lawson, S.S.C.

Friday, January 21.

FIRST DIVISION.

[Lord Pearson, Ordinary.

WADDELL AND OTHERS (TRUSTEES FOR THE GENERAL PROPERTY INVESTMENT COMPANY, LIMITED) *v.* CAMPBELL.

Superior and Vassal — Feu-Contract—Condition in Feu-Contract—Interest of Superior.

A feu-contract provided that the vassal should be obliged to build tenements of a certain kind on the land feued, and that such tenements should be covered with blue Scotch slates.

In a note of suspension and interdict presented by the superior to have the vassal interdicted from covering the tenements with slates of another kind, the vassal averred that the slates he was using were better in quality and dearer in price than blue Scotch slates, and pleaded that the superior had no interest to insist in the interdict.

Held (*aff.* judgment of Lord Pearson) that the superior was entitled to enforce the condition as to slates in the feu-contract.

On 28th April 1897 George Waddell and others, trustees for the General Property Investment Company, Limited, presented a note of suspension and interdict against James Campbell, builder, Edinburgh, to have him interdicted from covering the tenements in course of erection by him on a certain plot of ground with slates other than blue Scotch slates.

The complainers averred that they had feued the piece of ground in question to the respondent in January 1897, and that (Stat. 2)—"By said feu-contract it was expressly provided and declared that the respondent and his heirs and successors in the feu should be bound and obliged to erect, and thereafter to maintain and uphold, upon the said piece of ground two flatted tenements of the height of four storeys, and that 'such tenements shall be covered with blue Scotch slates.'" They further averred that the feu-contract provided for the ground reverting to the superiors in the event of any of its conditions being violated.

The complainers proceeded (Stat. 4)—"The respondent is in course of erecting tenements on said piece of land in terms of the obligation in the feu-contract. He, however, purposes instead of employing blue Scotch slates, as provided in the feu-contract, to cover the roofs of said tenements with inferior Cumberland slates. Before the respondent commenced to roof the tenements with said slates he was warned by the complainers' ground officer that he must not do so without obtaining their consent to such a deviation from the terms of the feu-contract. The respondent nevertheless, without obtaining said consent, proceeded to put the slates on the roofs. On this coming to their knowledge the complainers at once, by their architect and law-agents, intimated to the respondent that that would not be allowed, and that he must adhere to the terms of the feu-contract. He, however, refuses to do so, and maintains his right to make use of other than blue Scotch slates, and in particular, to make use of Cumberland slates, and he is proceeding to cover the roofs with said Cumberland slates. Said slates are of a cheap, unsightly, and inferior description, quite different from blue Scotch slates. Their use by the respondent is in direct contravention of his obligations under the feu-contract, is injurious to the amenity and attractiveness of the complainers' adjoining feuing ground, and is to the complainers' prejudice. In these circumstances the present action has been rendered necessary."

The respondent admitted that the feu-charter contained the alleged condition with regard to slates, and in answer to Stat. 4 explained "that prior to the raising of the present note the respondent had covered the roofs of the buildings in question with slates of a bright green colour, obtained from the quarries of Westmoreland. The complainers knew that the respondent had contracted for the slating of