bank might be ruined, for as it pays checks in the order of their presentation, the account might have been paid while a prior check was outstanding, of which they had no knowledge, and for the payment of which they were still bound. This view is so absurd that it will not be advanced. Is the contract made by a presentment of the holder for payment? Manifestly not, for then the bank is simply called upon to *fulfil* a duty or obligation which is assumed to have been *previously* incurred. Presentment for payment *ex vi termini* involves the notion of an already existing obligation to pay a debt to the presentor, except where payment is voluntary. Does the contract arise when the bank refuses payment? Then it is believed to be the only case in the law when that which was not a contract before becomes such by a refusal to contract. Clearly then the holder has no remedy against the bank. The authorities and dicta which hold that an acceptance is necessary before the holder can bring his action are, among others, National Bank *vs.* Eliot Bank, 5 Am. Law Register 711, Superior Court, Suffolk Co., Mass.; Ballard *vs.* Randall, 1 Gray 606; Bellamy *vs.* Marjoribanks, 7 Exch. R. 404, per PARKE, B.; Chapman *vs.* White, 2 Selden 412. The text writers on bills and notes uniformly express themselves in the same manner. Without doubt, the bank is liable to the *depositor* for all the damages sustained by its refusal to pay a check which he had a right to draw. Marzetti *vs.* Williams, 1 B. & Ad. 415. No claim can be made by the holder of an uncertified check that it can operate in his favor as an assignment to him of so much money as the check represents. This proposition has been often decided. See the leading case of Dykers *vs.* Leather Manufacturers' Bank, 11 Paige 616.

IV. The proposition in the principal case, that the identity of the name of the drawer of the check and of the president of the bank is sufficient to put the holder on his guard, is sustained by Hatcher *vs.* Rocheleau, 18 N. Y. 86; Jackson *vs.* Goes, 13 Johns. 518, per SPENCER, J.; Jackson *vs.* King, 5 Cow. 237; 9 Id. 140.

RECENT ENGLISH DECISIONS.

Exchequer of Pleas, Nov. 7, 1862.

ARBON AND ANOTHER *vs.* FUSSELL.[1]

An agreement for the hire by defendant from plaintiffs of a pair of carriage-horses for twelve months, the defendant to give three months' notice previous to the expiration of the year of her intention to give up the horses, was prepared in duplicate, and one part signed by plaintiffs was sent by them to defendant by her servant, and the other part signed by defendant was retained by plaintiffs. Defendant having given up the horses without notice, plaintiffs brought an action against her on the agreement. Having lost their part, plaintiffs gave

[1] 7 Law Times, N. S. 283.

notice to defendant to produce her part of the agreement at the trial, which was not complied with, nor was any evidence given as to where it was.

It being proved that it was not stamped when sent by plaintiffs to defendant, WILDE, B., refused to admit secondary evidence of its contents; whereupon plaintiffs proceeded to give evidence of a custom in the trade that it was usual for the hirer, under such circumstances, to give a three months' notice. The jury, however, negatived the existence of such a custom, and found a verdict for defendant:

Held, that WILDE, B., was right in rejecting secondary evidence of the contents of the document; and that, as it was proved to have been unstamped at the time it was sent by plaintiffs to defendant, the proper presumption was that it remained still unstamped; and the fact of the defendant's not producing it at the trial after notice so to do, afforded, under the circumstances, no ground for the presumption that it had been subsequently stamped:

The evidence as to the custom of the trade was beside the point which the jury had to determine, and when it was found that the document bore no stamp, the plaintiffs should have been nonsuited.

Per CHANNELL, B.—A written contract governs the rights of the parties to it, and cannot be varied, added to, or qualified; with one exception, that in some cases the custom of a trade may be annexed as incident to the contract; that is, not where the custom contradicts the contract, but where it is consistent with it.

[The pleadings in the case are omitted, as not necessary to its comprehension.]

At the trial, before WILDE, B., and a special jury, at the Middlesex sittings after Trinity Term, the following facts appeared:—The plaintiffs were jobmasters, near Portman-square, and the defendant a lady of independent fortune, residing occasionally in London, and at other times in different parts of the country, had hired horses of the plaintiffs on the terms of an agreement, which defendant alleged had been come to six months after the hiring, under the following circumstances: On 8th January, 1857, defendant sent her coachman to plaintiffs to know the rate at which horses were supplied, and in reply plaintiffs gave the coachman their terms in a note, which defendant called a "proposal," but which was as follows:—"Mem. of agreement made 8th January, 1857, between Mrs. Fussell, of, &c., on the one part, and James Arbon & Son, of, &c., on the other part. Mrs. F. agrees to take, and J. A. & Son agree to let, a pair of carriage horses for three months, eighty-four days, for the sum of twenty guineas per month;

but should Mrs. F. desire to keep the said horses for six months of twenty-eight days, then at the rate of eighteen guineas per month, or if for twelve months of 365 days, the rate to be 150*l.* per year. J. A. & Son to shoe and forage the said horses." It was not signed by either party. Defendant arranged to take the horses, but signed no agreement as to the time for which she would take them, nor was any time then named. After six months the coachman called again on plaintiffs, to say Mrs. F. would take them for twelve months, whereupon plaintiffs prepared an agreement in duplicate, and sent it by the coachman to the defendant for approval. Defendant returned the agreement signed by her, and plaintiffs forwarded to her, by the coachman, the duplicate signed by them. It was dated 8th January, 1857, and was to the following effect:—"Mrs. F. agrees to take, and J. A. & Son agree to let, a pair of carriage horses for one year for the sum of 150*l.*, with six guineas for the use of utensils. A. & Son to forage and shoe the said horses when in London, and to allow 28*s.* per week for the keep, &c., of the said horses when out of London. A. & Son further agree, should either or both the said horses fall ill or lame, to provide others in their place on their being returned home. Mrs. F. also further agrees to give three months' notice previous to the expiration of the year, or of any future year, of her intention to give up the horses."

Under this agreement the defendant continued to use the horses until December, 1859, when she gave them up without notice. In November, 1859, defendant's coachman was driving her carriage with plaintiffs' horses, when one of them was injured and died in consequence of a collision with a van, and which, as plaintiffs were informed by defendant's coachman and butler, arose from the careless driving of the vanman. Relying on the statements so made to them, plaintiffs brought an action against the owner of the van to recover damages, but failed in consequence of its appearing on the trial that the accident arose from the careless driving of defendant's coachman.

Plaintiffs having lost their duplicate of the agreement signed by defendant, WILDE, B., refused to admit secondary evidence of

its contents to be given, it being proved not to have been stamped. Plaintiffs' counsel then proposed to give secondary evidence of the duplicate signed by plaintiffs and sent to defendant, notice to produce it having been given to defendant, and not having been complied with, and no evidence having been given as to where it was. But, it being elicited, on cross-examination by defendant's counsel, that their part also, when it was given by plaintiffs to the coachman, was not stamped, the learned Baron refused to receive secondary evidence of it.

Under these circumstances, plaintiffs were thrown back on the original agreement, or "proposal," which they put in, plaintiffs paying the penalty for stamping it in Court. As this document contained nothing about notice, they gave evidence of a custom in the trade that three months' notice of intention to terminate a yearly hiring was usual; and also of a custom that the hirer was liable for an injury to the horses occurring through the negligence of the hirer or his servants.

The jury found a verdict for defendant, and against the plaintiffs, on all the questions left to them by the learned judge, viz., that there was no general custom in the trade acted on by those who let and those who hire with regard to the liability of the hirer; that defendant's coachman was not negligent; that defendant used the horses in a proper manner; and that there was no necessity for a three months' notice; and thereupon WILDE, B., stayed execution, in order to give plaintiffs an opportunity of moving.

Garth (with whom was *Huddleston*, Q. C.) now moved for a new trial on the ground of the improper rejection of evidence, and also that the verdict was against evidence. It was contended at the trial, and it was submitted now, that secondary evidence of the duplicate sent by the coachman was admissible. It was traced to defendant's possession, notice to produce it was given, and although it was not stamped when it left plaintiffs' hands, yet it might have been stamped subsequently, and there was no proof to the contrary, or that the document was not at that moment in existence in a stamped state. It was on defendant to prove that it was not. By

not producing it defendant deprived the Court of the opportunity of seeing whether it was stamped or not, and the plaintiffs of having it stamped if it turned out to be unstamped. The horses were returned without a three months' notice, and if that agreement had been put in plaintiffs could have shown by the terms of it the necessity of such a notice. Not having been produced after notice, when it may possibly have been subsequently stamped, it must, as against defendant, who refused to produce it, and into whose possession it had been traced, be presumed to have been stamped. [CHANNELL, B.—It is laid down in Chitty on Stamps that where a party refuses to produce an instrument after notice, the presumption against him is that it was properly stamped *until the contrary appear*, and to that effect are the various cases. Now here the evidence was that when it left plaintiffs' possession the document was unstamped. That presumption therefore in this case would be the other way.] Then as to the other point, that the verdict was against evidence. We gave evidence of a custom in the trade that a three months' notice was usual, which was not contradicted, and though the jury found against plaintiffs on that point, the judge summed up in plaintiffs' favour upon it. So also we gave evidence of a custom for the hirer to be responsible in case of an accident occurring through his negligence, or that of his servant, and submitted that the accident here clearly arose from the carelessness of the coachman. [POLLOCK, C. B.—You don't want a custom for that.] The learned judge rather took that view in summing up, but defendant's counsel urged, that if defendant had appointed a competent coachman an accident would not render her liable. On that also the jury found against plaintiffs.

POLLOCK, C. B.—There will be no rule on this case, the facts of which are very simple. The agreement on which the plaintiffs originally went was drawn up in duplicate, and the evidence was, that neither part was stamped when they were signed by the parties. The plaintiffs had lost their part, and the defendant did not produce her part on notice to do so at the trial. Mr. *Garth* has contended that it should be presumed the defendant's part of the document

was stamped, and it is proposed that we should admit secondary evidence of it. I am at a loss to see what foundation there is under the circumstances for saying that, because defendant did not produce this document at the trial after notice so to do, therefore we are to presume that it was stamped, and to admit secondary evidence of its contents. The question is, what conclusion ought my brother WILDE to have arrived at? Was he bound to have received evidence of it as of a stamped document, or to have come to the conclusion that it was stamped? I think he was not, and that he was right in the conclusion to which he came. It may be that in the case of certain instruments which have been acted on, and which could not have been acted on without a stamp, and where there may have been a penalty for not stamping, and where *omnia rite esse acta* would apply, that there it may be presumed that such instruments were duly stamped. But there is no penalty upon drawing an agreement on unstamped paper, save the inconvenience to the party of being unable to give it in evidence until the stamp duty and an additional sum by way of fine has been paid. It is not like the case of a check or a receipt; and where, moreover, as in this case, the instrument is proved not to have been stamped when last seen, then, as my brother CHANNELL has shown, the presumption is that it is still unstamped. On that point I think the verdict was right, and if it had been for the plaintiffs, the defendant might have moved to set it aside. In fact, no proceedings ought to have taken place after it was found that the document bore no stamp. As to the custom, I think the verdict on that was beside the merits of the case, and plaintiffs should have been nonsuited; but no application has been made to turn the verdict into a nonsuit. The rule must be refused.

BRAMWELL, B.—I think my brother WILDE was perfectly right in his ruling. If he was right in coming to the conclusion that the instrument was not stamped, he was right in keeping it from the jury. I own I think the proper conclusion to come to under the circumstances is, that it was not stamped; for it being proved that it was not stamped when it was sent by the plaintiffs to the defendant, the presumption I think is strongly against its having

been subsequently stamped. As to the other point, I think Mr. *Garth* was better off at the trial than he ought to have been, for his case having broken down on the agreement opened to the jury, he said, "I will give evidence of a custom, and fall back upon another proposal," and that he was allowed to do instead of being nonsuited.

CHANNELL, B.—I am of the same opinion, that there should be no rule. I agree with my Lord Chief Baron and my brother BRAMWELL, that the secondary evidence ought not to have been received of this contract, and that such evidence, when tendered, was rightly rejected. Then the point arises, whether a rule should be granted on the other ground, that the verdict of the jury upon the question that was submitted to them was a verdict against the evidence. That was a verdict by which the jury negatived the custom of giving three months' notice, which the plaintiff set up. I must say that I am very loth at all times to interfere with the finding of a jury, unless I see that it is clearly wrong. In this case the evidence was all on one side. We ought to see that the matter which was submitted to the jury was pertinent to the question which they had to determine. According to my notion, it was quite beside the question. I am of opinion, that where parties enter into a written contract, that written contract governs the rights of the parties. You cannot vary it; you cannot add to it; you cannot qualify it. There is one exception, namely, that in some cases you may annex the custom of the trade as an incident to the contract; that is, not where the custom of the trade contradicts the contract, but where it is a custom that is consistent with it. That is, where the parties contract with reference to the custom, where it is not incorporated in the agreement, but where they have confined the agreement to other matters, you must determine what the agreement really is, and whether you can annex the custom as an incident to such an instrument or not. Therefore, I think the inquiry was immaterial, and that no rule should be granted upon the ground that the verdict was against the evidence. If they were justified in doing as they did, there is an end of the application as to the verdict being against the weight of evidence, and I am not

disposed to grant a new trial unless I see that the inquiry was pertinent to the duty which the jury had to discharge.

Rule refused.

The preceding case, which is condensed from the report in the Law Times, though not perhaps of much intrinsic importance, may be of use for future reference on the questions which must soon arise under the recent Internal Revenue Act. No doubt much practical inconvenience in the trial of cases will be occasioned by the provisions of that act, and it is well to anticipate them by a reference to some of the decisions under similar statutes in England.

It is settled there that where an instrument, actually produced at Nisi Prius, appears not to have been duly stamped, it is not to be treated, for that reason, as non-existent, so as to let in secondary evidence of its contents. Alcock *vs.* Delay, 4 Ell. & Bl. 660. This proposition is sufficiently obvious. It is not, however, so easy to say how far such evidence is admissible, on a general allegation and proof of the existence and loss of an instrument affected by the stamp laws, or that it is in the possession of the other party, who has refused to produce it on call. There can be no doubt that if the general rule on the subject were applied without qualification, there would be a strong temptation on litigants to make an artificial loss of documents supply the lack of proper stamps. It is held, notwithstanding, that the presumption in the case of a lost instrument is, in the first instance, that it was duly stamped, and that it lies on the party objecting to secondary evidence of its contents on the contrary allegation, to prove the fact that it was not stamped; and the same doctrine applies with peculiar force to the case of an instrument in the possession of the party which he fails to produce. Creap *vs.* Andrson, 1 Stark. N. P. 34; Pooley *vs.* Goodwin, 4 Ad. & Ell. 94; Hart *vs.* Hart, 1 Hare 1; Closmadeuc *vs.* Carrel, 18 Comm. B. 44. If, however, it be shown that the instrument was unstamped at the time of its execution, or at some subsequent time, the presumption is rebutted, and it will then lie on the party offering the evidence to show that it was afterwards stamped within the period allowed by law. Crowthers *vs.* Solomons, 6 Comm. B. 758; Closmadeuc *vs.* Carrel, *ut supra*. This, however, need not be by direct proof, but may be rested on any reasonable presumption of fact. Thus in Closmadeuc *vs.* Carrel, *ut supra*, the proper stamp duty on a charter-party had been paid within the fourteen days allowed for the purpose by the 5 & 6 Vict. c. 79, s. 21, and the instrument left at the office of the distributor of stamps at C. for transmission by mail to London to be there stamped; but it could never be found afterwards. There was no direct evidence that it was ever in fact mailed; but the clerk at C. testified that he always sent off the documents left with him, by mail on the same day that he received them. It was held that this sufficiently raised the presumption that the charter-party had been duly stamped before its loss, as the different officials by whom the instrument should have been transmitted and stamped, must be taken to have done their duty.

There is another class of cases on this subject which might, at first sight, seem not altogether consistent with those the result of which has just been stated. Thus in Slatterlie *vs.* Pooley, 6 Mees. & W. 664, which was an action

on a covenant on a composition deed, to indemnify the plaintiff against certain debts set forth in a schedule annexed to the deed, which schedule was unstamped, it was held that evidence of an admission by the defendant that a particular debt in respect to which the suit was brought, was included in the schedule, was admissible. This was, however, put on the ground that the admissions of a party as to the contents of an instrument, when competent at all, are primary and not secondary evidence. There had been previous conflicting decisions on this subject (see 5 Month. Law Mag. 175), which were settled by this case; and it has been since followed in Pritchard *vs.* Bagshaw, 11 Com. Bench 456, and elsewhere. The general doctrine on the subject of admissions, in this respect, will be found stated in 1 Greenl. on Ev. § 96. H. W.

In the Exchequer Chamber.—Appeal from the Court of Exchequer. Feb. 7th, 1862.

HOLMES *vs.* CLARKE.[1]

Where the fence put round certain mill machinery, required by statute to be fenced, had been broken, and the owner having notice of the defect was guilty of negligence in not using reasonable care to have his machinery properly secured, a servant who had entered into his employment when the machinery was fenced, and who continued in the service after knowledge that the fence was gone, in the reasonable expectation, induced by the expressions of the owner and his manager to him, that the defect would be repaired, without negligence on his own part, met with an injury by reason of the machinery being unfenced:—*Held*, that he could maintain an action for the injury against his employer.

An appeal was brought in this case, by the defendant, to review the decision of the Court of Exchequer, discharging a rule obtained by the defendant to enter a verdict for him, or a nonsuit, or for a new trial.

The pleadings and facts are stated at length in the report below,[2] but the following summary of them will explain the case.

The plaintiff was an under overlooker, employed at weekly wages

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1 31 L. T. Exch. 356. Decided in the Sittings after Hilary Term, coram Cockburn, C. J., Wightman, J., Willes, J., Crompton, J., Byles, J., and Keating, J.

2 30 Law J. Rep. (N. S.) Exch. 135.

by the defendant, a cotton-spinner at Manchester. It was the plaintiff's duty to oil the machinery in the defendant's cotton factory. The mill-gearing was fenced when the plaintiff entered the service by an iron guard, which had been broken about a year before the accident mentioned below, and had not been mended again, although the plaintiff had called the manager's attention to it, and he had promised it should be repaired, and the defendant himself had looked at it, and had spoken about having it mended. While engaged in oiling the machinery the plaintiff's arm was caught by the machine and torn off.

The action was brought to recover compensation for the injury.

The plea alleged that the plaintiff was a servant of the defendant, and knew that the mill-gearing was unfenced, and that the injury arose by reason of the plaintiff's own negligence. The jury negatived any negligence on the part of the plaintiff, and found a verdict for him, and that the injury was brought about by the want of proper caution on the part of the defendant.

T. Jones, for the appellant, the defendant below.—The plaintiff is not entitled to recover. He engaged in the service of the defendant voluntarily, and having accepted the risks incidental to the employment cannot sue his master for the injury he has met with in his service. *Seymour* vs. *Maddox*, 16 Q. B. Rep. 326; S. C. 20 Law J. Rep. (N. S.) Q. B. 327. The conversation with the manager about the want of the fence does not alter the legal position of the parties. *Dynen* vs. *Leach*, 6 Hurl. & N. 349; 26 Law J. Rep. (N. S.) Exch. 221; *Alsop* vs. *Yates*, 2 Hurl. & N. 768; S. C. 27 Law J. Rep. (N. S.) Exch. 156. Had the plaintiff felt that he could not do the work safely for want of the fence he ought to have left the service and not continued in it. *Skipp* vs. *The Eastern Counties Railway Company*, 9 Exch. Rep. 223; S. C. 23 Law J. Rep. (N. S.) Exch. 23. The effect of the conversation cannot amount to more than this, that the plaintiff contracted to remain in the service, and continued to incur the risk of the unfenced machinery until the fence should be replaced. The plaintiff, in fact, contributed to the injury himself, and therefore cannot

recover. He knew of the danger, and yet incurred the risk. His rashness may be called contributing negligence in one sense. At any rate, it is negligence sufficient to bar the action, notwithstanding the finding of the jury that the plaintiff was not guilty of negligence. *Caswell* v. *Worth*, 5 El. & B. 849, S. C. 25 Law J. Rep. (N. S.) Q. B. 121, and *Cowley* vs. *The Mayor &c., of Sunderland*, 6 Hurl. & N. 565, S. C. 30 Law J. Rep. (N. S.) Exch. 127. The Factory Acts, which require masters in manufactories to fence machinery for the protection of women and children, impose no such duty in respect of men of full age. *Coe* vs. *Platt*, 6 Exch. Rep. 752, S. C. 20 Law J. Rep. (N. S.) Exch. 407, was decided before the statute 19 & 20 Vict. c. 38 was passed. Suppose in a colliery there had been some omission of a precaution ordered by statute for the benefit of apprentices, and a tremendous colliery accident had happened, and three hundred men killed, but no apprentice hurt, could it be said that the representatives of each of those men who had engaged to take the risk of accidents in consideration of their wages could sue the master because the statutable duty as to apprentices had not been performed? *Paterson* v. *Wallace*, 1 Macq. 748, and *Barton Hill Coal Company* vs. *Reid*, 3 Id. 288, do not apply.

Bliss, for the respondent, the plaintiff below.—The action will lie. It is material that when the plaintiff entered the service the machinery was duly fenced. The contract, in effect, before the accident, was that the plaintiff would oil the machinery, and that the defendant would keep it properly fenced. The plaintiff complained to the manager, which is the same as complaining to the defendant. *Senior* vs. *Ward*, 28 Law J. Rep. (N. S.) Q. B. 139. He continued in the service under the expectation that it would be speedily repaired. This is very different from the case of a man who originally engages to work at dangerous unfenced machinery. The plaintiff never engaged to take upon himself the risk of unfenced machinery. The plaintiff's knowledge of the danger cannot affect his liability unless he consented to incur the risk. Knowledge is not proof of negligence, only one ingredient in the proof. *Clayards* vs. *Dethick*, 12 Q. B. Rep. 439; *Thompson* vs. *The North-Eastern Rail-*

way Company, 30 Law J. Rep. (N. S.) Q. B. 67; *Roberts* vs. *Smith*, 2 Hurl. & N. 213, S. C. 26 Law J. Rep. (N. S.) Exch. 319; *Mellors* vs. *Shaw*, 30 Law J. Rep. (N. S.) Q. B. 333; *Ashworth* vs. *Stanwix*, Ibid. 183; *Priestly* vs. *Fowler*, 3 Mee. & W. 1, S. C. 7 Law J. Rep. (N. S.) Exch. 42; *Williams* vs. *Clough*, 3 H. L. Cas. 258. A duty was imposed on the defendant to fence this machinery. In consequence of the defendant's neglect of this legal duty an injury has happened to the plaintiff. For that the defendant ought to be responsible. Though the main object of the Factory Acts was to protect women and children, the duty they impose on the manufacturer to put up a guard is general. The statute 19 & 20 Vict. c. 38, only modifies the application of the statute 7 & 8 Vict. c. 15, and does not affect the applicability of the cases decided on it. *Coe* vs. *Platt* and *Caswell* vs. *Worth* show that the same right of action is given to adults as to women and children if any injury arises from unfenced machinery. When a duty is imposed by statute, and an injury arises to another from a breach of that duty, the person injured is entitled to recover. *Crouch* vs. *Steel*, 3 El. & B. 402; S. C. 23 Law J. Rep. (N. S.) Q. B. 121.

(He was stopped by the Court.)

T. Jones replied.

At the close of the argument

The Court stated that judgment would be given for the plaintiff, but took time to consider how it should be expressed.

Cur. adv. vult.

Judgment was now delivered by

COCKBURN, C. J.—In this case I am of opinion that the decision of the Court of Exchequer should be upheld; though not precisely on the grounds on which that decision appears to have proceeded. I think the question, whether any liability in the defendant arises under the statutes 7 & 8 Vict c. 15 and 19 & 20 Vict. c. 38, is open to considerable doubt, owing to the plaintiff being an adult. It appears to me, however, unnecessary to decide this question, being clearly of opinion that, independently of any statutory duty or obligation, there was negligence in the defendant in not

fencing the machinery on which the plaintiff was employed; and although the declaration in this case is based on the alleged statutory duty of the defendant to fence the machinery, the leave to move was reserved on the question of negligence, and there is full power to amend the pleadings, and we can, therefore, so mould the declaration as to make it applicable to the grounds on which we think the case should be decided. I consider the doctrine laid down by the House of Lords in the case of the *Barton's Hill Coal Company* vs. *Reid*, as the law of Scotland with reference to the duty of a master, as applicable to the law of England also; namely, that where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects, from which increased and unnecessary danger may arise. No doubt when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it, or, if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger, which both the contracting parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept. In the present case, at the time the plaintiff entered on the employment, the machinery was properly fenced; on its ceasing to be so, the manager of the defendant on the remonstrance of the plaintiff, promised, in the presence of the defendant, the master, that the defect should be made good. It must be taken, therefore, that at the time the contract between the plaintiff and the defendant was entered into, it was contemplated by the parties that the machinery should be fenced. It follows that through the negligence of the master in omitting to keep the

machinery fenced the servant has been exposed to danger to which he ought not to have been exposed; and the injury of which he complains having thus arisen, the defendant is justly and properly liable. It was indeed strongly urged upon us, on the part of the defendant, that as the plaintiff upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on as he might have done, continued to perform his service with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is therefore in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion that there is a sound distinction between the case of a servant, who knowingly enters into a contract to work on defective machinery, and that of one, who on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under the promise that the defect shall be remedied. In the latter case it seems to me that the servant by no means waives the right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation. No doubt a defect thus arising in machinery may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that the party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is a well-established rule that a plaintiff who has materially contributed to his own injury by his own negligence cannot recover, although he may show negligence in the opposite party. But the question whether the injury of which the plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one only for the jury. In the present case the jury have determined this question in favor of the plaintiff, and we are bound by their decision. It is, indeed, put to us that, notwithstanding this finding of the jury, the knowledge of the plaintiff that the machinery was unfenced is, in point of law, sufficient to prevent the plaintiff from recovering. But, I

am of opinion, that it is only a fact in the case to be taken into consideration by the jury with all the other facts and circumstances in determining the question, whether the plaintiff has, himself, helped to bring about the accident, in respect of which he seeks to charge the defendants. In this sense, and in this sense only, such knowledge might afford an answer to the action. It does not do so in point of law; and in the present case, on the finding of the jury it does not do so in point of fact: I am therefore of opinion that the Court of Exchequer were right in refusing to disturb the verdict for the plaintiff.

WIGHTMAN, J.—I agree with the conclusion which has been expressed by the Lord Chief Justice that the judgment should be affirmed, but I do not entirely concur in all the reasons he has assigned. The case is divided into two points, the statutory obligation upon the mill-owner to keep the machinery fenced, and the contract said to be existing between the master and the servant. I attribute more importance to the statutory obligation than has been put upon it by my Lord. But I do not think it necessary to say more than that I concur in the general result of the opinion which he has expressed.

CROMPTON, J.—I arrive at the same conclusion. It seems to me the only question really reserved to us in this case is, whether the mere knowledge of the danger by the plaintiff, when he did the act which produced the consequences complained of, is a sufficient bar to his recovering for the injury, which he received from the clearly-established negligence and default of the defendant. Here, I think, we must take it, on the ruling which is not complained of, and on the verdict of the jury, that there was default or negligence on the part of the defendant for which he would be answerable. I do not think it is now necessary for us to consider whether the defendant's liability arises from his disobedience to the statute or from his negligence. There was plenty of evidence of negligence on his part: at all events, the proof was left to the jury. It is not necessary for us now to consider whether the judgment of PARKE,

B., in the case cited with respect to the construction of the statute, and which is almost directly in point, as far as it goes, is correct. We must now take it that there was a cause of action arising from the negligence of the defendant, unless the ground taken by the learned counsel for the defendant can be maintained, that the mere knowledge by the plaintiff of the dangerous nature of the service prevented his having a right of action. I found my judgment principally upon the two following propositions: first, that there is no defence to the action under the rule of law as established in *Priestley* vs. *Fowler* and other cases of that kind; and, secondly, that there is no defence under the notion that the plaintiff has contributed to the injury by his own negligence. The plea alleges that the plaintiff contributed to this injury by his own negligence. That altogether was negatived, but the plea contained an averment that the plaintiff knew of the nature of the danger, and the question is, is that alone a sufficient answer to the action? In *Priestley* vs. *Fowler* and all that class of cases, a limitation was put upon the general rule of law that entitles a party injured to bring an action. It was considered that this rule was subject to an exception, and that as a person entering on a duty or employment must be necessarily supposed to have contemplated the ordinary danger arising from the scope of the employment, and including in it that arising from any misconduct of a fellow-servant, he could not recover from his master if any injury arose to him from such a cause. Some talk of a contract between master and servant: I, however, do not suppose any such contract really to exist. But the workman enters his service with an understanding of what the nature of the employment is; and he cannot expect to be indemnified against the ordinary risks attending it, or against that result from the carelessness of fellow-servants. But when that exception was established, there arose almost necessarily a most sound distinction which one ought never to lose sight of; namely, that where the negligence was brought home to the master, the exception did not apply. I have already said that we need not in this case consider whether it was personal negligence of the master. We must take it that it was assumed that there was personal negligence in him. I should be

inclined to hold, if it were necessary in accordance with what has fallen from my Lord, that it is negligence in the master, if he does not take care that the machines are properly fenced; and that where the duty is delegated to a manager the master would be equally liable. In this case we must take it that the defendant had committed conduct for which he was responsible, unless the second defence arises. What is that defence? It is said that the mere knowledge of the danger by the plaintiff is a sufficient defence to the action. I certainly cannot think so. It is urged that the plaintiff cannot recover, if he has contributed to the accident, that is, it would not have happened to him, though the defendant was negligent, if he had used ordinary care. I quite agree with the last observations of my Lord, that the knowledge of the danger is only a part of the question of negligence; one part perhaps out of a hundred that must be considered. It is very often a question of degree whether there is negligence or not. It occurred to me during the argument—suppose a man knows very well that there is great danger in going to open a trap in a coal-mine, but that the lives of a hundred men depend on its being opened, and he knows that the duty of opening the trap has devolved on him, and he goes and does it and incurs injury, is he guilty of negligence? You must always balance one consideration against another, and the jury must say whether on looking at all the matters there is negligence. Take the case of a man crossing the street if an omnibus is very near; it may be negligence in him to do so; if he is an active young man and likely to get over, it may be otherwise. I am much strengthened in this view by the observation of Lord CAMPBELL in *Senior* vs. *Ward*. Upon these grounds, I think the judgment of the Court below ought to be affirmed.

WILLES, J.—I am of the same opinion. I entirely agree with what has been already stated by my learned brother WIGHTMAN, and I need not say more.

BYLES, J.—I am of opinion that the judgment of the Court of Exchequer must be affirmed. This is a case of very great import-

ance, and I am anxious that this decision should repose on what seems to me the true ground. I do not rest the right of the plaintiff to recover on the statutable obligation incumbent on the master to fence the machinery, nor yet on the personal knowledge of the master that the machinery was improperly left unfenced, though I do not intend to insinuate any disagreement with the Court of Exchequer. But I think the master liable on the broad ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. The case of *Priestley* vs. *Fowler* introduced a new chapter to the law, but that case has since been recognised by all the Courts, including the Courts of error and the House of Lords. So that the doctrine laid down, with all the consequences fairly deducible from it, is part of the law of the land. But the principles laid down in *Priestley* vs. *Fowler*, and all the examples given of their application, relate to the circumstances and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery. It is, in such cases, impossible that a workman can judge of the condition of a complex and dangerous machine wielding irresistible mechanical power: and if he could, he is quite incapable of estimating the degree of risk involved in reference to the condition of the machine; but the master may be able, and generably is able, to estimate both. The master, again, is a volunteer; a workman ordinarily has no choice. To hold that the master is responsible to his workmen for no absence of care however flagrant, seems to me in the highest degree both unjust and inconvenient. On the other hand, to hold that the master warrants the safety and proper condition of the machinery is equally unjust to the master, for no degree of care can insure perfect safety; and it is equally inconvenient, for who would employ such machines, if he were an insurer? It seems to me that the true rule lies midway between these extremes, and I therefore agree in the conclusion arrived at by the Lord Chief Justice. The master is neither on the one hand at liberty to neglect all care, nor on the other is he to insure safety, but he is to use due and reasonable care. The degree and nature of that care are to be estimated on a consideration of the facts of each par-

ticular case; I do not say that the degree of care is in all cases the same as the master must observe towards strangers. This rule seems to me the only rule consistent with justice and public convenience, but I do not rest it on those considerations alone. It reposes on very high authority. Lord CRANWORTH, in delivering the judgment of the House of Lords, in the *Barton's Hill Coal Company* vs. *Reid*, states that in the case of dangerous machinery the master is bound to exercise due care. It is true that this was a Scotch case; but in that very case the law of Scotland and the law of England were held to be the same in this branch of the law of master and servant. It may be true that some of the cases cited at the bar are not quite consistent with this rule, particularly those which seem to make the personal misconduct or personal knowledge of the master a necessary ingredient in his responsibility. But we are, in a Court of error, at liberty to decide on principle and fortified by higher authority. Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow-servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more the master neglects his business and abandons it to others, the less will he be liable. It is said that the verdict exempting the servant from the charge of negligence is inconsistent with the fact that he knew the machinery to be unfenced. But knowledge is only an ingredient in negligence. It may be that the knowledge of the servant induced him to use extra care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risk. Lastly, the original contract of the servant was to work with fenced machinery, and it was his master and not he that violated the condition, and in so doing exercised a species of compulsion over the servant. For these reasons, I think the plaintiff entitled to our judgment.

KEATING, J.—I concur in the judgment that the judgment of the Court below should be affirmed. I do so for the reasons already expressed by the Lord Chief Justice. Judgment affirmed.