recipient of this peculiar gift, I do not think the confirmation could have been stronger.

I have thought it right to the parties to express my views.

Your Lordships adhere to the interlocutor.

Lords Young and Rutherfurd Clark were absent.

The Court adhered.

Counsel for Pursuers — Strachan — Rhind. Agent—William Officer, S.S.C.

Counsel for Defender — Mackintosh — Lang. Agents—Drummond & Reid, W.S.

Tuesday, June 16.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

REID *v.* MITCHELL.

Reparation—Personal Injury—Persons Engaged together in a Dangerous Amusement—Liability of Persons so Engaged for Injury to Other Persons.

A man while engaged in his work of building a stack was injured by another who was working with him, and who, in the course of some rough play in which the injured man was not taking part, but without any intention of injuring him, pushed him off the stack. *Held* that the person whose act caused the injury was liable in damages to the injured man.

Observed that a person who is injured in the course of a game in which he takes part by any cause ordinarily occurring in such a game is not entitled to damages therefor, but takes the risks of the game in which he joins.

James Reid, crofter, Graystone, in the parish of Skene and county of Aberdeen, raised the present action against Alexander Mitchell, crofter, Lyne of Skene, in the same parish and county, concluding for £300 for bodily injuries sustained by him. He averred that the injuries were caused by the defender having wilfully, recklessly, and carelessly seized him and pushed him off a stack of straw, which they were then engaged in building, to the ground, whereby he fell on his head and sustained the injuries libelled.

The defender stated in defence that he accidentally knocked against the pursuer and both fell off the stack to the ground. There was no intention on his part to push the pursuer off.

A proof was led at which the following facts appeared—Pursuer, defender, and two other men were engaged in building a round straw stack about twelve feet in diameter with straw from a steam threshing-machine which was being worked beside it at the time. At the time of the accident the stack was about five feet in height, at least a man could look over it. The straw was being forked up by men from the ground in large quantities, so that it occasionally came over the men and covered them. Defender began larking, and the other two men joined him by throwing each other down in the straw. Pursuer, whose duty it was to go continuously round the stack and keep the straw out to the circumference did not join in the fun, but seemed to enjoy it. According to the evidence of one of the other men on the stack, defender just put his hands on pursuer's shoulder and pursuer slipped over the side. Witness thought he did so just to keep up the fun. Pursuer deponed that he heard defender say, just before he ran at him, "I'll ca' James Reid down," but this was not heard by any of the others, and was denied by the defender. Defender said he was rising up from some straw which had been thrown over him by the forkers and could not see for it when he accidentally knocked against the pursuer. Pursuer fell on his head and sustained concussion of the brain and injury to the spinal cord. Defender also fell off the stack. It appears from the evidence of several witnesses that the frolic was no greater than was usual on such occasions.

The Sheriff-Substitute (Dove Wilson) pronounced this interlocutor—"Finds in fact that on the occasion set forth in the petition the pursuer was injured through the fault of the defender: Finds in law that the defender is liable in damages; assesses the same at the sum of fifty pounds sterling, and decerns against the defender for that sum.

"*Note.*—[*After narrating the facts*]—Unless it can be said that the injury was the result of a pure accident, the defender must be held responsible. I do not see how it can fairly be attributed to pure accident. It is undoubted that the defender had no intention to injure the pursuer, and that nobody was sorrier for what happened than he was. His conduct does not show lack of proper feeling on his part. Nevertheless, the injury could easily have been prevented had he exercised ordinary care, for in the exercise of ordinary care the defender would not have interfered with the pursuer. It seems to me, therefore, impossible to absolve the defender from the consequences of his indiscretion. A thing which ordinary care could have prevented cannot be called a pure accident. To take any other view would be to throw the whole consequences of the defender's fault upon the pursuer, and unfortunately, even though the pursuer does get such compensation as the law can award, the consequences upon him will be very serious.

"I have been somewhat reluctant to come to this conclusion, the defender having had no bad motive, and his fault not having been great, but I do not see that any other result would be equitable."

On appeal the Sheriff (Guthrie Smith) pronounced this interlocutor—"Recals the said interlocutor: Finds it proved that on the occasion libelled, while the pursuer was engaged with some others in building a stack of straw, he was unintentionally pushed off the stack and fell and injured himself, but not through the fault of the defender: Therefore assoilzies the defender from the conclusions of the action.

"*Note.*—This is a lamentable accident, arising out of the rough play which sometimes goes on in the farmyard in the building of a straw stack, but much as everyone must sympathise with the victim of the occurrence, there was plainly no

wish to do him any injury, and I cannot, on a review of all the facts, agree with the Sheriff-Substitute that the defender is liable in damages. The distressing feature in the case is that the injuries sustained by the pursuer are so serious, that even if the defender were liable, any adequate compensation would be wholly beyond his income, for like the pursuer he is but a farm labourer. The Sheriff-Substitute has decided against the defender on the ground that 'a thing which ordinary care could have prevented cannot be called an accident.' But it seems to me that this way of stating the question is in the circumstances not wholly accurate. When an injury is done in the course of play, we say in popular speech that it was accidental, because unintended. But the legal meaning is, that although the party sought to be charged has been guilty of what in other circumstances, would *prima facie* be an assault or trespass to the person, his excuse lies in the fact, that as both consented to the frolic, each of them must be taken to have assumed the risk of such chances and misadventures as might occur in the course of it, unless the other was guilty of some excess which increased the risk so undertaken beyond what fairly and reasonably might have been expected. If, for instance, he gave way to temper, or took an unfair advantage, or used undue force, or conducted himself with a reckless disregard of consequences, he will be responsible, but not otherwise. As was said in the case of *Rylands* v. *Fletcher*, L.R., 1 Ex. 287—'All the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass can be explained on the principle that the circumstances show that the plaintiff had taken the risk upon himself.' So far as I am aware there is no case directly applicable in our own law, and none was cited in the argument. But in an American case there is, I conceive, much good sense in the way in which the question was presented to the jury. It was an action for an assault, to which the defence was that it was done in play. The Judge ruled, 'That if the defendant intended to do no bodily harm, and the parties were lawfully playing by mutual consent, and the act was no other than the plaintiff had reason to suppose would be done in such play, the defendant was not liable; that whether the force used was reasonable was not to be determined by the results, but from the evidence of the force, and the circumstances and nature of the act; and that if the defendant intended to do the act, and the act was unlawful and unjustifiable, and caused bodily harm, the plaintiff could recover. Held that the defendant had no ground of exception.' —*Fitzgerald* v. *Cavin*, 110 Mass. 153, cited in the American edition of Underhill on Torts, p. 207.

"There is some reason for saying that as the pursuer, being busy with keeping the stack in shape, was not taking an active part with the other men who were pushing and tumbling each other about, a distinction may be made between him and the rest. The effect of this would be to make them all liable in the claim which is now preferred. With some difficulty I have come to think that in the circumstances any such distinction cannot fairly be taken. They were all engaged in a common work; the pursuer did nothing to stop the larking, and showed no objection to it. In fact they were all consenting parties, no one apprehending for a moment that any harm was likely to arise. In the next place, I can find nothing in the proof to show that 'the defender ran at the pursuer,' as the Sheriff-Substitute infers, or that the pursuer is right in his impression that he purposely knocked him off the stack, saying at the time, 'I'll ca' James Reid down.' These words were not heard by any of the other witnesses, and the defender denies that he said so. He admits he came against him, how he cannot tell, but when the pursuer slid off the stack the defender slid with him, which shows, I think, that this, which was the primary cause of the injury sustained, was neither intended nor anticipated. So standing the evidence, I am of opinion that the defender must be acquitted of blame or responsibility."

The pursuer appealed to the Court of Session, and argued—If he had engaged in the play, then he took the risk of an accident, and had no case; but it was proved that he took no part in it. He was therefore in the position of a passer-by on the street who was hurt by a person engaged in a game or a frolic there, and who became legally liable for the injury caused by him—*James* v. *Campbell*, 5 Carrington & Payne, 372.

The defender replied—The pursuer had failed to prove any intention on the part of the defender to push him off the stack. The occurrence was either a pure accident or an accident caused by one player to another.

At advising—

Lord Justice-Clerk — This case discloses a very unhappy affair, all the more that the party against whom the charge is made had not the slightest intention of injuring anyone. There was a foolish and ridiculous romp in which four or five men were engaged on a stack of straw of 12 feet in diameter. The consequence was, that the pursuer, who was not taking any share in the romping, fell off the stack to the ground, and was very seriously hurt. I think it is clearly proved that the defender caused him to fall. The defender says he was pushed against him, or that he accidentally knocked against him. I do not think that is proved. I think he meant to make him join in the play, and that from the momentum he acquired on the elastic footing of the straw he went against him with considerable force. The Sheriff-Substitute has found in favour of the pursuer, and I am of the same opinion. The Sheriff, on the contrary, thinks that as no *animus injuriandi* on the part of the defender against the pursuer is shown, and as they were all engaged in a frolic together, there is no liability on the part of the pursuer. I am unable to concur in that view. I think it is proved that the pursuer, though amused at his companions, was working, not larking. But I do not think that is an important matter in the case. I think that what the defender did was so manifestly a dangerous proceeding that he must be held to have taken the risk of it. I therefore think the Sheriff-Substitute's view is the right one, and that we should revert to it.

Lord Young—I am of the same opinion. I think the principle which governs the case is quite an obvious one, and that we do not require to borrow from the law of England or any other

source in order to find it. When people engage in a game which is dangerous, or in which accidents may happen, every player taking part in it takes on himself the risks incident to being a player, and will have no remedy against anyone from whom he may receive injury in the course of it unless violence or unfairness has been used towards him. He takes the risks incident to the game, and the results must remain where they fall. And I should say the same principle would govern where romping suddenly arises amongst workmen. The rompers take the risks incident to their romping, and unless there is foul play there will be no liability for accidental injury by one workman to another. I should go the length of saying that if two men engage in a pugilistic combat each must take the black eyes or the bloody noses which the other gives him; and the same with a bout at single-stick, if both voluntarily engage in it each must take the raps he gets, and if there be no foul play there can be no accident giving rise to liability of the one to the other. We are familiar in the criminal courts with the law where death to one of the parties is the result of a fair fight. The surviving combatant will be responsible for culpable homicide, because he has committed a breach of the peace, but if the fight has been perfectly fair the punishment is generally almost nominal. Here there was a romp going on. I think it is according to the evidence that the pursuer took no part in it, and therefore that he did not take the risks incident to it, and without any fault on his part nearly lost his life. I think that was attributable to the fault of the defender, who I think attacked the pursuer, and technically assaulted him, though he did it playfully and with no bad intention, for if a man playfully attacks another to make him engage in sport, I think that is an assault, and if injury results that constitutes an actionable wrong. I have therefore arrived at the same conclusion as the Sheriff-Substitute.

Lord Rutherfurd Clark—I am of the same opinion. I think it is clear that the pursuer took no part in this frolic, and that he was knocked over by the fault of the defender, and therefore that the judgment of the Sheriff-Substitute should be reverted to.

Lord Craighill was absent on Circuit.

The Court pronounced the following interlocutor:—

> "Find in fact that the injury sustained by the pursuer on the occasion set forth in the petition was caused by the fault of the defender: Find in law that the defender is liable to the pursuer in damages: Therefore sustain the appeal; recal the judgment of the Sheriff appealed against; affirm the judgment of the Sheriff-Substitute, and of new ordain the defender to make payment to the pursuer of the sum of £50 thereby found due in name of damages, with interest," &c.

Counsel for Pursuer (Appellant)—Strachan—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for Defender (Respondent)—Guthrie. Agent—John Macpherson, W.S.

Wednesday, June 17.

FIRST DIVISION.

[Exchequer Cause.

CLERK (SURVEYOR OF TAXES) *v.* THE BRITISH LINEN COMPANY BANK.

Revenue—Inhabited-House-Duty—Separate Tenements—Customs and Inland Revenue Act 1878 (41 *and* 42 *Vict. cap.* 15), *sec.* 13, *sub-secs.* 1 *and* 2.

A banking company were proprietors of a building of which the front portion of the ground floor was occupied as bank premises, while the back portion was used by their agent as an office for the sale of stamps and the collection of taxes in the course of his duty as sub-collector for the district. The first floor was entirely occupied by the bank agent as writing chambers in connection with his business as a law-agent. The second or attic floor was used by the accountant of the bank as a dwelling-house. Access to the tenement was obtained by two doors, one of which was a public access from the street to the bank premises only. The other was a side door opening into a lobby, whence there was a stair to the first floor, and thence by another passage and stair to the dwelling-house on the second floor. A person in the dwelling-house had thus access into any part of the whole building without going outside. *Held* (following *Russell* v. *Coutts*, 9 R. 261) that there being thus internal communication from the dwelling-house throughout the whole building, the bank and other business premises were not "separate tenements" exempt from inhabited-house-duty as being "occupied solely for the purposes of any trade or business," and therefore exempt from duty in respect of 41 Vict. c. 15, sec. 13.

This was an appeal by the Surveyor of Taxes from the decision of the Commissioners for executing the Acts relating to the inhabited-house-duties for the county of Selkirk. The Commissioners, sustaining an appeal against the assessment laid on under the Inhabited-House-Duty Acts by the Surveyor, had relieved the respondents the British Linen Company of assessment upon certain premises as far as occupied for business purposes. The following facts were set forth in the case for appeal:—The property charged with assessment (which belonged to the British Linen Company) consisted of a building of three floors fronting Market Place of Selkirk. The front portion of the ground floor, valued at a rental of £45, was occupied exclusively as bank premises by the British Linen Company, while the back portion was occupied as an office for the sale of stamps and the collection of taxes by Mr John Steedman, solicitor, who was the bank's local agent at Selkirk, and also sub-distributor of stamps and sub-collector of taxes for the district.

The first floor consisted of four rooms and a lavatory. They were not enclosed by themselves, but each room entered from a passage running along the side of the building. They were all occupied by Messrs Lang & Steedman, solicitors, of which firm Mr Steedman was sole partner, in