of agreement. It has certainly been of inestimable benefit to me.'

As always yours,
JOHN FLEMING.

[This exchange of views, which neither Dr. Morison* nor Dr. Fleming† intended for publication, was intercepted at a late stage by the Chairman of the Editorial Committee. It appealed to him as of such interest to students, including those of the learned writers, that they have been prevailed upon to permit its publication here. It has undergone only formal editing, mainly footnoting, for this purpose.]

THE SUPPRESSED REFERENCE IN THE "VOLENS" PRINCIPLE

The purpose of the present comment is to call attention to one of the principal sources of confusion which continue to affect the doctrine of "*Volenti Non Fit Injuria*" or "Assumption of Risk".[1] Its thesis is that analysis will be clarified if it is more often recognised that both the above modes of stating the doctrine contain relative expressions, that in neither formulation is the entity to which the expression relates made explicit, that there is a conflict of judicial opinion about what this entity is, and that this conflict of opinion is frequently concealed by the false supposition that the main difficulty lies in analysing the nature of the relationship rather than in defining the terms between which the relationship exists.[2]

It is common ground that a person who assumes a risk cannot in general recover damages for what would otherwise be a legal injury. But the principle as thus stated is incomplete, for one cannot speak of a risk in the abstract, and therefore the principle can only be significant if the person stating it has in mind the risk *of something*. And if one expresses one's self instead in the form that no legal injury is done to a consenting party, the problem still arises: To what must the party consent in order to deprive himself of a remedy? The tempting simple solution that it is the *injuria* — legal injury — to which the party must be *volens* has to be rejected as self-contradictory. The principle itself denies that there is any *legal* injury where the party is *volens*.

I. THE ANSWER IN SMITH v BAKER[3]

Prior to the decision of the House of Lords in *Smith v Baker* the authorities appeared to favour the view that the risk which must be voluntarily run by a plaintiff before the defence could be successfully raised was the risk of suffering the harm—physical or economic—for which the defendant would otherwise be bound to compensate the plaintiff. This is almost explicit in the judgment of Bowen L.J. in *Thomas v Quartermaine*:[4] "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the

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[1] As ordinarily understood, the first principle covers a somewhat wider ground than the second: *e.g.*, it applies to a consent to have inflicted upon one what would otherwise be a battery. But the present comment is concerned only with that part of its field of operation which coincides with that of the doctrine of assumption of risk.

[2] It is contended only that this thesis holds good for English law. In the United States it appears that *Smith v Baker infra* is not generally accepted [see A. L. Goodhart, "Rescue and Voluntary Assumption of Risk" (1934) 5 *Cambridge L.J.* 192 at 195-196] and that the general doctrine is differently conceived. But see Fleming James, Jr., "Assumption of Risk" (1952), 61 *Yale L.J.* 141, whose conclusions as to the American law are similar to those reached in the present comment as to English law.

[3] *Smith v Charles Baker & Sons* (1891) A.C. 325.

[4] (1887) 18 Q.B.D. 685.

case of those who are cognisant of the full extent of the danger and voluntarily run the risk. *Volenti Non Fit Injuria.*"[5] But in the present submission this no longer represents the law. The plaintiff must not merely have voluntarily run a risk of physical or economic harm, he must have consented to exempt the defendant from responsibility for compensating the plaintiff for the harm which the plaintiff may suffer.[6] The two attitudes of mind are distinct. It may well happen that a person who voluntarily runs a risk of physical injury or other harm has no intention of abandoning his rights against the person who created the danger. Indeed *Smith v Baker* arose out of just such a situation and the defence failed.

The facts of the case are too well known to merit repetition. The principle is thus stated by Lord Watson:

"In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, *if injury should befall him, the risk was to be his and not his master's.*"[7]

The more often quoted statement[8] of Lord Halsbury in the same case would appear to have exactly the same meaning:

"I am of opinion myself that, in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself."[9] There seems no reason to suppose that in the latter part of this passage Lord Halsbury meant anything different from Lord Watson by the expression "take the risk upon himself." The plaintiff must have consented to bear his own loss, to absolve the defendant from legal liability for it.

II. AUTHORITIES SUPPORTING THIS INTERPRETATION

In master and servant cases the principle has repeatedly been asserted and acted upon since *Smith v Baker* that it is insufficient to evoke the maxim that the servant encountered the risk of an accident when he might have declined it. He must have taken the risk of the accident "upon himself".[10] In *Bowater v Rowley Regis Corporation*[11] Goddard L.J. could scarcely have adopted more explicit language:

"It is not enough that whether under protest or not he (the plaintiff) obeyed an order or complied with a request which he might have declined as one which he was not bound either to obey or to comply with. It must be shown that he agreed that what risk there was should lie on him. I do not mean that it must necessarily be shown that he contracted to take the risk, as that would involve consideration, though a simple way of showing that a servant did undertake a risk on himself would be that he was paid extra for so doing." And he concluded: "For this maxim to apply it must be shown that a servant who is asked or required to use dangerous plant is a volunteer in the fullest sense, that, knowing of the danger, he expressly or impliedly said that he would do the job

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[5] *Id.* at 695.

[6] Cf. Salmond, *The Law of Torts* (10 ed.) 34.

[7] Case cited *supra* n. 3 at 355. Italics supplied.

[8] See, *e.g.*, its selection for quotation as summing up the general principle by Finlay J. in *Haynes v Harwood* (1934) 2 K.B. 240 at 246.

[9] Case cited *supra* n. 3 at 338.

[10] See, *e.g.*, *Williams v Birmingham Battery and Metal Co.* (1899) 2 Q.B. 338, esp. per Romer L.J. at 345; *Broughton v Fidding* 10 S.R. (N.S.W.) 367, esp. per Cullen C.J. at 370-371; and *Bowater v Rowley Regis Corporation* (1944) K.B. 476.

[11] Cited last note.

at his own risk and not at that of his master."[12]

Nor is support for this principle confined to cases involving accidents to workmen. In holding a drunken driver's estate liable for injuries suffered by a passenger who knew of his intoxicated condition, Asquith J.[13] in *Dann v Hamilton*[14] thus summarised his reasoning:

"The plaintiff, by embarking in the car, or re-entering it, with the knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to, or[15] absolve the driver from liability for any subsequent negligence on his part whereby she might suffer harm."[16]

III. JUDICIAL DEPARTURES FROM THIS INTERPRETATION

It is believed that there is no case to be found in which the actual decision reached necessarily depended upon rejection of our interpretation of *Smith v Baker*. But it cannot be denied that the reasoning in some subsequent cases is more in accord with that of Bowen L.J. in *Thomas v Quartermaine*[17] than it is with that of Lord Halsbury and Lord Watson. Among the English authorities the "rescue cases" in particular exhibit this tendency. In *Cutler v United Dairies (London) Ltd.*[18] the Court of Appeal was unanimously of the opinion that the plaintiff had to be regarded as *volens* because he acted with full knowledge of the risk *of bodily injury* which he ran when he tried to restrain a bolting horse. The decision was, however, based also upon the principle that the plaintiff's intervention rendered the subsequent damage too remote. And if the present submission is correct this must be regarded as the true ground.[19]

By contrast, in *Haynes v Harwood*,[20] the leading "rescue case", it was held that the plaintiff in endeavouring to stop bolting horses acted reasonably, hence *Volenti Non Fit Injuria* did not apply and the damage was not too remote. With so much the present writers respectfully agree. But the reasoning whereby the conclusion that *Volenti Non Fit Injuria* did not apply was reached varies from judge to judge, and it is submitted that only that of Roche L.J. accords with *Smith v Baker*. His view was that "there was no evidence on which it could properly be held that the plaintiff *assented or agreed to bear*[21] the risk in question. All the plaintiff knew was that two heavy cart-horses attached to a large van were running away in a crowded street, and that at any rate one woman and a number of children were in great peril; moved, as I think, by a duty both legal and moral—and not from any choice involving a consent *to take any risk upon himself*[22]—the plaintiff acted and sustained his injuries. He knew nothing of what had been done or by whom, and there was no material for choice such as is contemplated and required by the maxim in question."[23]

The above remarks emphasise the aptness of the facts of *Haynes v Harwood* to expose the divergence between the two main views of the nature of the *volens* principle. If all that the doctrine requires is that the plaintiff voluntarily encountered a risk, then the plaintiff had all the materials necessary for a voluntary

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[12] *Id.* at 481.

[13] Now Lord Asquith.

[14] (1939) 1 K.B. 509.

[15] The words following "or" seem here to be explanatory of the sense in which the words "consent to" are used.

[16] Case cited at 518.

[17] Cited *supra* n. 4.

[18] (1933) 2 K.B. 297.

[19] In *Hyett v Great Western Railway Co.* (1948) 1 K.B. 345, a typical rescue case, the Court of Appeal found it possible to decide the case solely by reference to the principles of remoteness of damage, no mention being made of *Volenti Non Fit Injuria.*

[20] (1935) 1 K.B. 146.

[21] Italics supplied.

[22] Italics supplied.

[23] Case cited at 166-167.

choice before his mind. Whose horses they were and how they came to run away were matters irrelevant to this issue, for they could not affect the character of the present danger. But if the question was rather whether the policeman had agreed to absolve the defendant from liability, the relevance of these matters immediately becomes obvious. Since he lacked knowledge of them the *volens* principle could only apply if it could be established that the plaintiff said to himself as he ran forward: "If someone, whoever he was, was negligent, in whatever way, by allowing these horses to bolt, I absolve him from liability for any injury I suffer." It is scarcely surprising that Roche L.J. refused to draw this inference.

What seems unfortunate, however, is that His Lordship should have referred in passing to the fact that the plaintiff was acting under a duty. This was irrelevant to his argument, as the writers understand it, and has probably helped to obscure the sharp distinction between the approach of Roche L.J. and those of the other members of the Court. For both Maugham L.J. and Greer L.J. it was the existence of the moral duty which excluded the application of the *volens* principle. Maugham L.J.'s reasoning was that a person acting under such a duty is not strictly *volens*.[24] In other words, he accepted the view that the risk of physical injury is all that the plaintiff must be shown to have assumed, but escaped from the consequences of this acceptance in the instant case by recourse to torture of the meaning of the word "voluntary".

Greer L.J. shared Maugham L.J.'s view of the nature of the *volens* principle, but he escaped the consequences of this view in the present case by the more direct method of propounding an exception to it. The supposed exception applies where "the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty".[25] On the present submission, the circumstances of *Haynes v Harwood* did not call for the creation of such an exception. Nor does it represent the law, for presumably there is nothing to prevent a rescuer, even in these circumstances, from deliberately excusing the defendant if he so chooses.

The view of the general nature of the *volens* principle accepted by these judges is supported by the reasoning in two more recent decisions of the High Court of Australia. Both *Insurance Commissioner v Joyce*[26] and *Roggenkamp v Bennett*[27] were cases in which the plaintiff accepted a gratuitous ride in a motor vehicle either knowing or being in a position to know that the driver was drunk. In both cases the plaintiff failed, in both cases the defence of *Volenti Non Fit Injuria* was canvassed by at least a majority of the judges, and in both cases all the judges who discussed it considered that the principle required only that the plaintiff voluntarily encountered a risk of harm. It is believed that the actual decisions in these cases are to be preferred to that in *Dann v Hamilton*,[28] which has been justly criticised on the ground that the learned judge failed to take account of the possibility of a defence of contributory negligence.[29] But it had already been suggested[30] that on the "assumption of risk" question *Dann v Hamilton* appears to be a correct application of *Smith v Baker*. And there would appear to have been some misunderstanding of Asquith J.'s reasoning among the

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[24] *Id.* at 161-162.
[25] *Id.* at 157, quoting A. L. Goodhart in article cited *supra* n. 2 at 196.
[26] (1948) 77 C.L.R. 39.
[27] (1950) 80 C.L.R. 292.
[28] Cited *supra* n. 14.
[29] See A. L. Goodhart, "Contributory Negligence and *Volenti Non Fit Injuria*" (1939) 55 *Law Q. Rev.* 184.
[30] Section II, *supra*.

High Court judges. Thus Dixon J. said: "No doubt the issue His Lordship propounded for decision was one of fact but, with all respect, I cannot but think that the plaintiff should have been precluded. Every element was present to form a conscious and intentional assumption of the very risk for which she suffered."[31] The only risk for which the plaintiff had suffered before the action was the risk of bodily harm, and this must therefore be the risk to which Dixon J. was referring. But the risk to which Asquith J. was referring was the risk of being unable to take action against the defendant in the event of injury. It is respectfully submitted that what appeared to Dixon J. to be a disagreement about facts was in reality a concealed conflict of opinion about legal principles.

IV. THE NOTION OF THE IMPLIED CONSENT

Summarising our submissions at this point, we have argued that the relative character of the formulae used to denote the *volens* principle has enabled two main views of its nature to persist side by side in the authorities, despite the authoritative pronouncement in favour of one of those views in *Smith v Baker*. We have further seen, however, that no actual decision depends upon a rejection of this view in favour of the competing one. There remain for consideration certain authorities which are satisfactorily explained by neither view. These authorities fall within a few stereotyped classes. They establish, principally, that a spectator at games consents to risks ordinarily incidental to the game being played as well as to the risk of unforeseeable accidents,[32] that a person who goes upon a highway consents to risks arising out of its use as a highway which reasonable care and skill on the part of other road users cannot avoid,[33] and that employees undertake risks incidental to their employment which cannot be avoided by reasonable care by the employer or those for whom he is responsible.[34] These are situations in which the law implies a consent by the plaintiff to absolve the defendant from liability. And the implication in these cases is not an inference of fact from the circumstances. It is an inference which the law insists upon drawing from the kind of situation, an unvarying legal concomitant to that situation, in short, a fiction. By recourse to this fiction the law has itself created certain circumstances of excuse where justice requires them, while at the same time attributing their creation to the plaintiff himself. *Murray v Harringay Arena Ltd.*[35] is a recent striking illustration of the fictional character of the implication. The plaintiff was a six-year-old boy who had been taken by his father to see an ice-hockey match. He was injured by the puck, which had been accidentally knocked from the rink by the player. He failed in his action because "there are some (dangers) which every reasonable spectator foresees and of which he takes the risk. It may strike one as a little hard that this should apply in the case of a six-year-old boy, but in considering liability under an implied term in this contract it would not be right to introduce a wider term because one of the parties is a youth."[36] The Court's approach to the question in terms of finding an implied term in the contract between the parties serves to emphasise the artificiality of the finding of a consent. It is submitted that the Court's language and all the circumstances of the case indicate that what the Court was

[31] Case cited *supra* n. 26 at 59.

[32] Salmond *op. cit. supra* n. 6 at 32.

[33] *Id.* at 32-33.

[34] See, *e.g.*, *Key v Commissioner for Railways (N.S.W.)* (1941) 64 C.L.R. 619, esp. per Starke J. at 627.

[35] (1951) 2 K.B. 529.

[36] *Id.* at 536.

[37] Comparison with American law helps to bring out the point. There it appears that the possibility of drawing a factual inference as to consent is insisted on at least to the extent that an inexperienced hockey spectator is generally not held, as a matter of law, to assume the risk of flying pucks. See Fleming James' article cited *supra* n. 2 at 148-149, and esp. p. 149, n. 47.

concerned to find was a just term rather than a natural implication from the circumstances.[37] It would surely be unreasonable to suppose either that the plaintiff in fact voluntarily encountered the risk of physical harm or that he consented to absolve the defendant from liability. And it would be equally unreasonable to suppose that the defendant supposed that the plaintiff did either of these things when he was making the contract.

Consideration of the position of a six-year-old boy may also serve to shed light upon the legal considerations underlying another of the situations where we have claimed that the resort to the *volens* principle is the invocation of a fiction. The rule that one who goes upon the highway consents to bear the risks incidental thereto applies to children as well as adults. Yet who can suppose that children have the mental capacity to appreciate these risks in a sufficient degree to base an inference either that the child voluntarily encounters these risks or that he consents to absolve other road users from liability?

The fictional character of the inference that an employee undertakes the risks incidental to his employment is not perhaps open to this method of exposure. An employee could rarely, if ever, be a six-year-old boy. But here the fictional character of the term implied in the contract may, it is submitted, be demonstrated otherwise. The long and involved history of the doctrine of common employment, now abolished by legislation,[38] would seem to show that the nature of the term to be implied depends rather on current notions of justice as applied between employer and employee than on any factual inference as to what the employee could reasonably be supposed to have intended.

V. ONE BIG FICTION OR A LOT OF LITTLE FICTIONS?

In the present view, therefore, the doctrine of assumption of risk comprehends, firstly, a general principle that the defendant is not liable if the plaintiff has consented to relieve the defendant from liability, and secondly, certain particular rules fictionally implying such a consent in certain kinds of situations though none exists in fact. This view conflicts with that of Professor A. L. Goodhart, who, in an article[39] which influenced the development of the law, contended for a different method of organisation of the authorities. As the writers understand it, Professor Goodhart's view is that wherever the plaintiff voluntarily encounters danger the law, by a fiction, implies an agreement by the plaintiff that he will bear the consequences himself.[40] On this view the distinction which has been stressed in the present comment is in general unimportant, for the consent to absolve from liability automatically attaches to the voluntary incurring of the risk. But Professor Goodhart adds: "To this general rule there are, however, a number of important exceptions in which it has been held that the voluntary encountering of an obvious and appreciated danger does not involve an assumption of the risk of the resultant injury."[41] And he regards the circumstances of *Smith v Baker* as constituting one such exception.[42] For Professor Goodhart, what we have treated as exceptional cases involving a fictional consent are instances of the main rule, and the cases in which the courts refuse to imply a consent fictionally are exceptions.

To this we may reply in the first place that the language in *Smith v Baker* does not suggest to the writers that the House conceived that it was laying down an exception to the rule.[43] Rather the Court appears to have re-interpreted the main rule. Secondly, the writers have sought to show that those cases where the

[38] Workers' Compensation Act (N.S.W.), 1926-1951 (No. 15 of 1926 as amended), s. 65.

[39] Cited *supra* n. 2.

[40] *Id.* at 194.

[41] *Ibid.*

[42] *Id.* at 195.

[43] See, however, Professor Goodhart's suggested limitations on the scope of the decision in article cited *supra* n. 29 at 187.

courts do employ a fiction to raise a consent cannot satisfactorily be subsumed under a general rule that where the plaintiff voluntarily encounters a risk he consents to bear the loss himself. It is almost as difficult in these types of cases to draw a general factual inference that the plaintiff voluntarily encountered the risk as it is to draw a factual inference that the plaintiff consented to bear his own loss.[44] Thirdly, there are no advantages in the shape of elegance or simplicity of exposition in supposing a general fiction of the kind which Professor Goodhart puts forward. For it involves positing so great a multiplicity of exceptions that the general rule becomes a legal weapon of doubtful usefulness. "In every case," says Professor Goodhart, "the real question is whether or not one of the many exceptions to the rule applies."[45] Indeed, experience has shown that there are so many alternative legal devices enabling a decision in favour of the defendant in cases where Professor Goodhart's supposed main rule might be applied that the necessity for its positive application does not seem to arise. The main effect of its acceptance would therefore be to present the courts with the unnecessary task of formulating an exception in every case where its application would lead to injustice.

VI. CONCLUSION

These last considerations indicate what may be the correct approach to the often pressed contention that the doctrine of assumption of risk ought to be abolished. There is no occasion to abolish the general rule, for its interpretation in *Smith v Baker* has rendered it innocuous. Apart possibly from the well-known ticket cases,[46] there seems to be scarcely one genuine instance in the reports where the defendant in an action of tort has successfully brought himself within this rule since the date of that case. As for the situations where the consent is implied, the courts have developed so many alternative weapons for doing justice in these situations, and have so often applied them to just these situations, that resort to the *volens* doctrine has become superfluous. Its continued use here merely creates the confusion attendant upon its uncertain character, and the amputation from the body of the law of these atrophied limbs would be a merely verbal operation.

W. L. MORISON * *assisted by*
G. KOLTS†

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[44] See Section IV *supra.*

[45] Article cited *supra* n. 2 at 200.

[46] For a recent short summary of the rules relative to these cases see *Olley v Marlborough Court Ltd.* (1949) 1 K.B. 532 per Denning L.J. at 548.

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