to the forms herein prescribed;" that as the defender had left his house in Scotland less than forty days before the service of the summons, he must be held to be resident in Scotland, and therefore the provision in the 10th section of the Conjugal Rights Act (24 and 25 Vict. cap. 86), as to the necessity of personal service on all defenders in consistorial actions not resident in Scotland, did not apply in this case.

After consideration LORD KINNEAR held the citation to be ineffectual, and said—"The Conjugal Rights Act prescribes personal service, and the provision in the Judicature Act does not apply in this case. All that that Act does is to create a presumption of law that in certain cases a defender is absent from the country; it does not raise any presumption that when a person is absent he is to be held as present; therefore I think the citation here is bad."

Counsel for Pursuer—Strachan. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, June 6.

FIRST DIVISION.

BLOE *v.* BLOE.

(*Ante*, 13th May 1882, p. 595 *supra.*)

Husband and Wife — Husband's Liability for Wife's Expenses—Failure of Wife to Obey the Order of Court.

In a petition by a husband for access to the child of the marriage between him and the respondent, his wife, the Court granted the prayer of the petition, but found him liable in the wife's expenses in respect that the petition was premature. Thereafter the wife left the country, taking the child with her, and leaving her agents in ignorance of her departure or of where she had gone. In these circumstances the Court refused *hoc statu* a motion for decree for the expenses in name of the wife's agents as agents-disbursers.

The respondent's agents having enrolled the case for approval of the Auditor's report on the respondent's account of expenses, and having moved for decree in their own names as agents-disbursers, the petitioner objected, stating that since the last calling the respondent had failed to obtemper the order of the Court by delivering up the child to him in terms of the interlocutor of 13th May, and had, as he was informed, left the country, taking the child with her. He submitted that in these circumstances the petitioner should not be required to pay the expenses of a litigation with his wife in which he had succeeded, at least until she should obey the order of Court pronounced in his favour. He also maintained that the motion should not be granted because he was entitled to follow up the child and recover the expense of so doing from the wife's separate estate, and then set off the amount against the expenses found due by him—*Portobello Pier Co.* v. *Clift*, 16th Mar. 1877, 4 R. 685.

The respondent's counsel argued—That inasmuch as the wife's agents were in no way to blame for the disappearance of the petitioner's wife and child, the expenses which had been disbursed on her behalf, and to which she had been found entitled, ought to be paid them in accordance with the usual custom.

At advising—

LORD PRESIDENT—I think we ought to refuse this motion *in hoc statu*. Expenses were awarded to the wife on the express ground that the petition was premature, having been presented before the child was weaned, otherwise they would not have been given.

LORD DEAS—I am of opinion that the agent for the respondent has done nothing to disentitle him to a decree for these expenses going out in his name; but in the circumstances I concur with your Lordship in thinking that we should refuse the motion *in hoc statu*.

LORD MURE—I also am for refusing the motion *in hoc statu*. I never heard of the right of the agent-disburser to have decree for the expenses in his name being pushed so far as to override contempt of Court.

LORD SHAND concurred.

The Court refused the motion *in hoc statu*.

Counsel for Petitioner—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—Guthrie. Agents—Henderson & Clark, W.S.

Tuesday, June 6.

SECOND DIVISION.

[Sheriff of Aberdeen and Kincardine.

FRASER *v.* FRASER.

Reparation — Master and Servant — Employers Liability Act 1880—*Master's Duty to Examine Machinery or Plant.*

Circumstances in which it was *held* that an employer had not discharged the *onus* which lay on him of showing that he had provided adequate machinery or plant for use in his business.

A labourer while engaged in putting a lightning-conductor on his employer's chimney-stalk, was killed through the breaking of a rope provided for the purpose. The rope, which had been used some days before for lifting heavy weights, had lain in an open yard from that time till the day of the accident. It had sustained a "nip," which in the opinion of some men of skill might have been discovered by careful examination. The Court *awarded* damages to the father of the deceased.

This was an action of damages laid at £150, and raised by Alexander Fraser, labourer, Aberdeen, under the Employers Liability Act 1880, against William Fraser, baker there, on account of the death of his son Alexander Fraser, who was killed while working in the defender's employment by reason of a defect in the condition of the plant connected with the defender's busi-

ness, which defect had not been discovered, he averred, owing to the negligence of the employer. As ground of action the pursuer made the following averments:—In August 1881 the defender built a brick chimney-stalk at his baking manufactory at Westfield, in the parish of Old Machar, Aberdeen. The chimney was 80 feet high. At this time the deceased Alexander Fraser was in the employment of Calder M. Greig, plumber, Short Loanings, as a journeyman workman to him, and both the deceased and his master were working in the employment of the defender. The defender supplied them with materials and plant. Towards the end of August the deceased got instructions from him to fix a lightning-rod and lightning-conductor to the said chimney-stalk, it being stipulated between the defender and Greig that the former was to supply the necessary tackling for the execution of the job. The arrangement was communicated to the deceased, who agreed to do the work, and the defender thus became responsible to the deceased as well as to his master for the sufficiency of the plant. The apparatus required for the fitting up of the lightning-rod and conductor consisted of a block and pulley attached to a wooden beam that was laid horizontally across the mouth of the chimney-stalk, secured thereto by lashings, and a rope fitted on to the block and pulley, from which rope a seat for the workman was suspended, and by which, with the help of a counterweight, the workman was hoisted up and lowered down the side of the stalk. The said apparatus was fitted on for the fixing of the said lightning-rod and conductor on 25th August 1881. On Saturday the 27th the deceased and another man were ordered to carry out the job. While the deceased was being hauled up the side of the stalk on the seat attached to the rope, having with him the coil of wire-rope and his tools, and when he was within a few feet of the top, the rope broke, and he fell and was killed. The pursuer believed and averred as matter of fact that the breaking of the rope was caused by some defect at the spot where the breakage took place, and that this defect was so gross that it must of necessity have been seen, and could have been seen, by the defender had he, or anyone entrusted by him with the duty, examined the rope before putting any workman to work upon it. The pursuer believed that it was cut by some sharp instrument while lying exposed at the foot of the stalk from Thursday the 25th till Saturday the 27th of August. It was the duty of the defender, both at common law and under the Employers Liability Act 1880, sections 1 and 2, to examine, or to cause some proper person to examine, the rope in question on the day when the deceased was killed, to see that it was in proper condition before using it for the purpose in question, and although he well knew that a breakage would result in loss of life, he neglected and failed to have it so inspected, and it was from the failure and neglect of the defender to examine the rope that its insufficient and dangerous condition at the point where it broke was not discovered.

The pursuer pleaded—"The pursuer's son, while working in the defender's employment, having been killed by reason of defect in the condition of the plant connected with or used in the defender's business, and which defect had not been discovered owing to the negligence of the employer, the pursuer is entitled to reparation at common law, and in terms of sections 1 and 2 of the Employers Liability Act 1880."

The defender in reply made the following averments:—Owing to the failure on the part of the contractor who had undertaken the work, the defender had employed others to finish it, and he procured from James Willox the loan of a snatch block and strong rope, which was used for finishing the building of the stalk and taking up the coping, which consisted of eight cement blocks, each of which weighed two or three cwt. He then contracted with Greig that the latter should put up the lightning-rod and conductor at his own sight. Greig examined the rope and block, and satisfied himself as to their sufficiency. On the 25th August Greig set the deceased to commence the work, though the defender remonstrated with him for not seeing to the matter personally. The work was so badly done that he dismissed the deceased. The next day, however, the deceased came back and insisted on proceeding with the work, and stating that he would finish it, and be responsible for the consequences. On the Saturday, after Greig had been up the rope outside the stalk three or four different times, the deceased made the ascent, and then the accident happened which resulted in his death. The defender further averred that he had contracted with Greig to put up the lightning-rod and conductor personally; that the deceased was no party to the contract; that he was employed and paid by Greig as his journeyman; that the defender agreed to supply the lightning-rod and conductor but nothing else; and that Greig chose the said rope and block on his own responsibility. That as neither the defender nor Greig, nor any other person, saw any defect in the rope, and as the defender himself, as well as others, went up the rope on the outside of the stalk, the defender was not at common law or under the Employers Liability Act 1880, sections 1 and 2, and sub-section 1, liable to the pursuer in damages on account of the death of his son.

He pleaded—"(1) The pursuer's deceased son having been as a journeyman plumber not in the employment of the defender, but that of the said Greig, who superintended the work at the time that the accident happened which caused the deceased's death, the defender is not responsible for the accident either at common law or under the Employers Act 1880. (2) Even although the deceased had been in the defender's employment, as he the defender was not guilty of any negligence or omission in reference to the strength or sufficiency of said rope, which was tested by him, by the said Greig, and by others, he the defender is not at common law or under the said statute responsible for the accident that caused the deceased's death. (3) The deceased having in opposition to the defender's remonstrance persisted in working at fixing said lightning-rod and conductor on his own responsibility, the defender is not responsible for the consequences."

In the proof which was held in the case the following facts appeared:—It was agreed between the defender and Greig that the former was to provide the necessary tackle for raising the lightning conductor. On Monday 22d August the rope was borrowed by the defender from Mr Willox, and used for finishing the building of the stalk, and for taking up the coping, which con-