

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-

sisted of eight blocks each weighing two to three cwt. It was then left suspended inside the chimney till the Thursday following, when it was used for fixing up the rest of the tackle. It then remained lying on the ground, in the yard, till Saturday, when the ascent was made which resulted fatally to the deceased. No examination was made by the defender, or on his behalf, as to the sufficiency of the rope on the Saturday before the ascent was made. James Taylor, a rope-maker, deponed that if a hand-over-hand examination had been made of the rope, the nip in the rope, to which he attributed its failure, might soon have been discovered. There was some corroborative evidence by skilled persons that the rope must have been nipped, and that that might have been discovered by examination; but, on the other hand, other witnesses were of opinion that the condition of the rope rather indicated that it had been cut, while one witness of skill said the cause of the breakage was a mystery. Those that were of opinion that it had been nipped were not at all clear that such an injury would have been discovered by examination.

The Sheriff-Substitute (DOVE WILSON) found in fact "that the deceased Alexander Fraser was at the time of his death engaged as a workman in the employment of the defender; that his death was caused by a defect in a rope provided by the defender, and used in his business; that this defect was not discovered owing to the negligence of the defender; and that it was not proved that the deceased took upon himself responsibility for the condition of the rope: Found in law, that in terms of the Employers Liability Act 1880, section one, sub-section one, and section two, sub-section one, the defender was liable in damages: Modified the same at £150 sterling, and decerned against defender for that sum," &c.

On appeal the Sheriff-Principal (ГУТНІКЕ СМІТН) dismissed the appeal, affirmed the interlocutor appealed against, and decerned.

He added this note:—"The defender was engaged last summer in erecting a bakery near Westfield, and the deceased was killed while putting a lightning-conductor on a lofty chimney-stalk, through the breaking of the rope to which he was suspended. The defender was his own architect, and was also his own superintendent of works. He took the entire charge of the operations. It is sworn, and is not disputed, that the deceased was bound to take his orders from the defender, who furnished the plant and material, and paid the plumber work at the rate of 7d. per hour. The relation so constituted was not that of contractor and employer, but master and workman, and one of the duties devolving on the defender in virtue of that relation was to take care that the rope used for hoisting the deceased was, so far as could be seen, good and sufficient. This obligation is not affected by the recent Act further than this. The duty of examining the rope to see that it was free from defect might have been performed either by the defender himself or someone for him. In the latter event, prior to the Act, any failure in the performance of his duty by the person to whom it was entrusted would have been the fault of a fellow-workman, for which the master is not responsible. Now, returning to the earlier and sounder view expressed by the Judges in Scotland, a master cannot get rid of the responsibility of attending

to the duty of 'seeing that the ways, works, machinery or plant are in proper condition' by entrusting it to another. He may still, as before, hand it over to a deputy, but he is answerable for the deputy's negligence. In the present case there is no question as to anyone's negligence but that of the defender himself. We have not to deal with some subordinate who failed to discover the defect by making a hasty and insufficient examination. The negligence consists in there having been no examination at all. The rope was borrowed from Mr Willox, a mason. In appearance it is a stout, strong rope, about the thickness of the wrist. At the point where it snapped under the deceased's weight it looks as if it had been cut as clean as with a knife, and how it should have sustained an injury of this sort is a mystery. No one can account for it. It is quite clear that if it had been examined hand-over-hand by a man skilled in the handling of ropes, such a palpable flaw would have revealed itself, and a young life full of hope and strength would have been saved. It is desirable that no doubt should exist as to the ground of this judgment. It is because no such examination was made that the defender is condemned. He has much to say by way of excuse. To the eye it was strong, and it had been used for lifting the copestones a few days before. But as between master and workman it is a sound rule which requires all proper precautions to be taken by the master, or someone for him, to ensure the safety of a man sent aloft on a dangerous work of this kind. It is for the welfare of both parties that no doubt should exist as to what is proper to be done under circumstances similar to the present, and the consequences which will follow on the event of the duty being overlooked or forgotten."

The defender appealed to the Second Division of Court of Session, and argued.—In cases such as this, where an accident happened which ordinary care could have prevented, the *onus* is thrown on the employer and provider of what has proved defective machinery, and of showing that he took all possible precautions to guard against accident by previous examination of said machinery—*Scott v. London Dock Company*, Feb. 7, 1865, 34 L.J., Exch. 220; *The Great Western Ry. Coy. of Canada v. Braid and The Great Western Ry. Coy. of Canada v. Fawcett*, Feb. 6, 1863, 1 Moore's Privy Council Reports, N.S. 101; *Murphy v. Phillips*, April 28, 1876, 35 Law Times, Exch Div. 477; *Macaulay v. Buist & Coy.*, Dec. 9, 1846, 9 D. 245. Then it was proved in point of fact that no such examination had been made—an examination all the more necessary in that the rope was left lying for several days on the ground in an open yard, where it might easily have sustained damage.

At advising—

LOD JUSTICE-CLERK—This is a narrow case, and certainly the amount of negligence on the defender's part is by no means enormous, and probably he only did what many others would have done placed in similar circumstances. He trusted to the condition of the rope being sufficient to bear the strain put on it. Now, the general rule is, that where a person contracts for a piece of work in which there may be risk to human life, he is bound in duty to neglect no

reasonable precautions that the safety of those engaged with the work may be secured. In the present case what happened appears to be this. Greig, a semi-contractor working on daily wages, contracted to put the lightning-conductor at a dangerous elevation. He was unable to do the work himself, so he employed the deceased to do it for him, and it appears to have been a piece of work to which the deceased was quite accustomed. It was conceded that Greig did not undertake to provide the machinery and tackle for the job. This was to be provided by the defender, and of course he was bound to take precautions that the machinery should be in good and safe condition. If it were to turn out that the defender had neglected no precaution to discover the imperfection of the rope, a question might be raised in defence; but let us see what happened. The deceased prepared to ascend, being elevated by the rope, and when he was nearly at the top of the chimney the rope broke, and he was killed.

Now, on the authority of the cases quoted to us, the fact of such an occurrence as this throws the *onus* of proving the cause of the accident on the person who provided the insufficient machinery, and this is the only difficult matter of fact in the case. What was the cause of the breakage of the rope? It is clear it was insufficient, and on this point there are two theories advanced—one that it was cut, and the other that it was “nipped” or bruised. As I have already said, the *onus* lies on the defender of showing how the accident occurred, inasmuch as he provided the insufficient machinery. The evidence of the ropemaker James Taylor seems to me most worthy of reliance. He says that the “nip” in the rope might have been discovered if it had been examined. No examination, however, did take place, and I am therefore not prepared to differ from the judgments of the Sheriffs below. The case is, I repeat, a narrow one, and the amount of negligence not extreme, but I cannot throw the duty of the employer on to the employed. On the whole matter, then, I agree with the Sheriffs.

LORD YOUNG—The pursuer here asks damages for the death of his son, 24 years of age, while engaged in doing the work of the defender, and caused by the insufficiency of a rope which the defender furnished for the carrying out of the work. The Sheriffs have found that the defender is responsible for the insufficiency of the rope. The case is a narrow one, but I am not prepared to differ from their judgment. Stated generally, the case may be put like this:—That a rope quite sufficient to carry a plumber or steeple-jack with safety for such a purpose as this can be easily provided if sufficient care be taken.

The defender undertook to furnish such a rope. It proved insufficient, and he is responsible for the consequences, unless it is established that no care on his part could have ascertained the insufficiency.

Now, though I think this statement of the law requires modification in some cases, I am not prepared to say the Sheriffs are wrong in applying it here. The rope proved insufficient for the purpose for which it was used, and I am not satisfied that the defender has established that it was not discoverable by any care on his part.

The case is exceedingly narrow, because if the rope was cut no amount of care on the part of the defender could have averted the accident.

But it is proved that the rope lay on the ground in a yard from Thursday to Saturday, and it is certainly possible that something may have befallen it while lying there—at least, it is reasonably suggested by the pursuer that a man who was very careful of the safety of those depending on the sufficiency of the rope might have had a special examination made before it was used for the particular purpose. It is there that the strength of the pursuer's case lies. If the Sheriffs had thought that they could not impute blame to the defender for his not having examined the rope after it had been so lately used with success, I think the case would have been just so narrow that I should have had hesitation in differing from their judgment, just as here I have hesitation in coming to a different conclusion.

LORD CRAIGHILL—I concur in the judgment appealed against, and I think it right to say that I do so without hesitation. It appears to me that the burden of providing sufficient machinery lay on the defender; he ought therefore to have satisfied himself that the rope was sufficient for the purpose for which it was to be employed. The defender had borrowed tackle to raise the copestones of the chimney. The work was finished on the Monday; the rope was then taken down and left lying exposed till the Thursday. On the Saturday after it was used for the elevation of the lightning-conductor, and this without any prior examination. It was taken for granted that the rope which was sufficient for the work on the Monday would be equally so for the Saturday's work. There was no warrant whatever for this assumption, for many things might have happened to it during the interval. There was no examination made hand-over-hand or otherwise. It was clearly the defender's duty to have made such an examination, and therefore I agree that we must affirm the judgments of the Sheriffs.

LORD RUTHERFURD CLARK concurred.

The Lords dismissed the appeal and affirmed the judgment.

Counsel for Appellant—Keir. Agent—R. C. Gray, S.S.C.

Counsel for Respondent—R. Johnstone—Kennedy. Agent—John Macpherson, W.S.

Tuesday, June 6.

OUTER HOUSE.

[Lords Curriehill and M'Laren.

STEUART v. MURDOCH & RODGER.

Superior and Vassal—Casualty—Year's Rent—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 4.

The rent of the feu as at the date of the death of the last entered vassal, and not as at the date of the action of declarator and payment, is the measure of the casualty due