Alexander, Holborn Street, Aberdeen, her son-in-law, praying that he should be ordained to pay her aliment at the rate of two shillings per week from 28th September 1887. She stated that she could earn two or three shillings per week, but that she had two young children entirely dependent upon her.

The defender stated that he was married on 15th December 1882 to the pursuer's daughter, that he was not *lucratus* by the marriage, that he had a wife and three children to support, and that his wages were nineteen shillings per week.

These statements were admitted by the pursuer.

She pleaded that the defender being her son-in-law was bound to contribute to her maintenance as she was in indigent circumstances.

The defender pleaded, that as he was married subsequent to the passing of the Married Women's Property Acts, 1877 and 1881, and was not *lucratus* by the marriage, he was not bound to aliment his mother-in-law.

On 31st December 1887 the Sheriff-Substitute (Brown) sustained the 1st plea-in-law for the defender, and assoilzied him from the conclusions of the action.

The pursuer appealed, and on 9th March 1888 the Sheriff (Guthrie Smith) dismissed the appeal, and affirmed the interlocutor of the Sheriff-Substitute.

The pursuer appealed to the Court of Session, and argued that the Married Women's Property Act, 1877, did not relieve the defender of the liability he was under at common law—*Moir* v. *Reid*, July 13, 1868, 4 Macph. 1060; *Foulis* v. *Fairbairn*, July 20, 1887, 14 R. 1088; 40 and 41 Vict. cap. 29, sec. 4; 44 and 45 Vict. cap. 21, sec. 1, sub-sec. 3; Stair, i. iii., 5.

Counsel for the respondent was not called upon, but reference was made to the case of *Wishart & Dalziel* v. *City of Glasgow Bank*, March 14, 1879, 6 R. 823.

At advising—

Lord President—I agree with the Sheriff-Substitute and the Sheriff that this clause of the statute is conclusive of the present question.

By the judgment of this Court in the cases of *Moir* and *Foulis* we held that the husband of a woman who is in law liable to support her parents became liable for this burden, and for this reason, that he became responsible for his wife's antenuptial debts of all kinds, and among these antenuptial debts was the obligation to support her parents.

The liability to contribute arose not from contract but from natural obligation. It was, as Lord Shand pointed out, very much the same as if the wife had prior to her marriage undertaken a cautionary obligation upon which, however, she had not been sued till after her marriage. The debt nevertheless remained an antenuptial one.

This case in some respects resembles the case of *Wishart*, 8 R. 74, which we decided some time ago, where a party held certain shares in a bank upon which during his lifetime no calls were made. His executors were, however, called upon to make heavy payments, and we held that the debt was one which was due and resting-owing from the deceased although it was not enforced till after his death.

The clause of the statute upon which the judgment of the Sheriffs is founded is this—[*His Lordship here read the clause of the statute above quoted.*] For the reasons I have stated, namely, that this is an antenuptial debt of the wife's, and that the respondent got nothing at or by his marriage, I am for adhering to the Sheriff's interlocutor.

Lord Shand and Lord Adam concurred.

Lord Mure was absent.

The Court refused the appeal.

Counsel for the Appellant—J. P. Grant. Agent—J. D. Turnbull, S.S.C.

Counsel for the Respondent—Craigie. Agents—Lyle & Wallace, Solicitors.

Saturday, July 7.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

NICOLSON *v.* MACANDREW & COMPANY.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Statutory and Common Law Liability.*

In an action of damages for personal injuries at common law, and also under the Employers Liability Act 1880, the pursuer averred that he was in the employment of a firm of masons, and that the defenders were the principal contractors for the work; that in order to get a tool which a fellow-workman had, he ascended a ladder, and that in returning he stepped on to a scaffolding erected for the joiners' use, which gave way and caused the accident.

Held that the action was irrelevant (1) under the Employers Liability Act, because the relation of master and servant in the sense of the statute did not exist between the pursuer and defender; and (2) at common law, because the pursuer had not relevantly averred either that he required to go upon the scaffolding for the purpose of his work; or that its use by workmen, other than the joiners, was either known to or approved of by the defenders.

This was an action of damages for personal injuries, brought in the Sheriff Court at Aberdeen, at common law and under the Employers Liability Act, 1880, by John Nicolson against D. Macandrew & Company, builders, Aberdeen.

The pursuer averred—(Cond. 1) "The pursuer is a crofter and labourer presently residing in Skye. For about two months prior to Monday the 10th day of October 1887 he was in the employment of Messrs Gauld & M'Kenzie, masons, as a labourer at the Government Prison Works, Peterhead. The defenders were the principal contractors for the work in which the pursuer then laboured, and themselves executed part thereof. The pursuer was subject to the control of the defenders, and his labour was in their service. His wages were paid by one in

the defenders' employment, who paid the wages of all the workmen in common." (Cond. 2) "In the forenoon of the said 10th day of October 1887, the pursuer, in order to perform his duty of mixing lime, had to fetch his shovel, which was the only one available for the purpose, and was then with a mason named Clark. To reach Clark, who was working at a considerable height from the ground on the inside of a wall, forming one of the sides of a gateway, it was necessary to ascend a ladder which leant against the outside of the said wall, and which also adjoined and gave access to a joiner's scaffolding erected on that side of the wall, about 15 feet from the ground. The pursuer had formerly obtained his shovel from Clark by passing up the said ladder and along the said scaffolding. On the present occasion, with the like purpose, he was on the ladder, when a joiner in the defenders' employment, who was returning to work on the said scaffolding, came up behind the pursuer and told him to stand aside. The pursuer accordingly stepped on to the scaffolding where two joiners were already working, and allowed the third joiner to pass him. Immediately thereafter, when the pursuer was returning to the ladder, the said scaffolding suddenly gave way and fell to the ground with the three joiners and the pursuer. With reference to the statement in answer, it is averred that the pursuer had a right to make use of the said ladder, and to be on said scaffolding." (Cond. 4) "The said scaffolding which was used by the defenders as part of the ways, works, and machinery necessary for the said prison works, fell as aforesaid by reason of a defect in its construction and condition, which defect arose from, or had not been discovered or remedied owing to the negligence of the defenders, or of those for whom they are responsible. The said scaffolding was constructed and used by the defenders. The pursuer is unable to condescend on the precise nature of the said defect, but he believes it to have been caused by the insufficiency of the nailing together of the deals and the cross-battens which together formed the said scaffolding."

The defenders admitted that they were the principal contractors for the Government Prison Works, and that on 10th October 1887 the pursuer and Clark were working as described by the pursuer, and explained that Clark was also a workman in the service of Gauld & M'Kenzie. They further averred "that the scaffolding referred to was erected, and the ladder placed in the position stated, by the defenders' own workmen, for their own sole and exclusive use, and that the pursuer had no right to make use of the said ladder, or to be on said scaffolding."

The pursuer pleaded that as he had been injured in the defenders' service by their negligence, and through the defective condition of a scaffolding in use by them, he was entitled to compensation from them for his injuries.

The defenders pleaded, *inter alia*—"(1) The relationship of master and servant in the sense of the Employers Liability Act, 1880, did not exist between the pursuer and defender. (4) The accident having been caused by the pursuer's own fault in going upon said scaffolding, where he had no right to be, he is barred, *personali exceptione*, from insisting in any claim for compensation for the injuries alleged."

On 1st June 1888 the Sheriff-Substitute (Brown) allowed both parties a proof of their averments.

The pursuer appealed to the Court of Session for jury trial.

The defenders maintained that the action was irrelevant. (1) That no right of action lay against the defenders under the Employers Liability Act, 1880. To obtain the benefit of the Act the parties must hold to each other the respective relations of employer and employee. That was not the case with the pursuer and the defenders here. The pursuer was a servant of Gauld & M'Kenzie, and the allegation that he was "subject to the control of the defenders" was much too vague. There was no relevant averment of employment. (2) As to the action at common law, the defenders' position was that the pursuer had no business to be on this scaffolding; he was a trespasser, and took the risk upon himself; he was not invited to go on this scaffolding, nor had he any right to be there—*Stephen* v. *Thurso Police Commissioners*, March 3, 1876, 3 R. 535; *Morrison* v. *Baird*, December 2, 1882, 10 R. 271; *Robertson* v. *Russel*, February 6, 1885, 12 R. 634; Employers and Workmen Act, 1875 (38 and 39 Vict. cap. 90), sec. 10.

Argued for the pursuer—The averments in Cond. 1 sufficiently disclosed the relation of the parties, and showed that the pursuer was really a servant of the defenders. He could be ordered about by them, and his wages were paid by them. The pursuer and the defenders must either stand to each other in the relation of master and servant, or of strangers; and looking to the admission of the defenders, it could not be said the parties were strangers. The pursuer was therefore entitled to an issue under the Employers Liability Act. Further, at common law, the pursuer was entitled to an issue, because he was entitled to be on this scaffolding, and it should have been sufficient for all reasonable purposes. The defenders were liable through their failure to supply proper plant—*Brady* v. *Parker*, June 7, 1887, 14 R. 783.

At advising—

Lord President—In so far as this action is laid upon the Employers Liability Act it cannot be maintained. An action under that statute must be brought by a servant or employee, and it must be directed against the master or employer. It is perfectly plain that unless this is averred an action cannot be brought under that statute. Now, in the first article of the condescendence we have this averment—"For about two months prior to Monday the 10th of October 1887 the pursuer was in the employment of Messrs Gauld & M'Kenzie as a labourer at the Government Prison Works, Peterhead. The defenders were the principal contractors for the work, and themselves executed part of it. The pursuer was subject to the control of the defenders and his labour was in their service. His wages were paid by one in the defenders' employment who paid the wages of all the workmen in common." Now, as regards the latter part of this article, it is not very explicit or intelligible, but I take it to mean that the defenders, who were the principal contractors, had the control of the workmen of the sub-contractors in the way of directing where their labour was for the time being to be expended,

and that by arrangement the wages of the employees of the sub-contractor were paid by the principal contractor.

Now, these circumstances as alleged, even if averred separately, would not constitute the relation of employer and employee in the sense of the Employers Liability Act. But we are not left in doubt, nor are we obliged to draw an inference from the facts, because we have it distinctly averred by the pursuer himself that he was in the employment of Gauld & M'Kenzie. Yet he sues the defenders as his employers. These things are entirely inconsistent, and therefore I have no doubt that the action is irrelevant under the Employers Liability Act.

But a different case is attempted to be made at common law; and it seems as far as the record goes to amount to this, that the pursuer had lent a tool to a fellow-mason, that he found it necessary to get back his tool, and that for that purpose he proceeded to climb a ladder which was leaning against one of the walls of the building in course of construction, and then to pass along a scaffolding which had been erected for the use not of the masons but of the joiners. It is not averred that he had any right to use that scaffold, or that in the performance of his labour he had any occasion to use it. Nor is it averred that the workmen generally, including masons and labourers, were in use to pass along the scaffolding with the permission or implied permission of the defenders. All that the record states upon this matter is that once before he had done the same thing for the purpose of recovering possession of a tool which he had lent to one of his fellow-workmen. I do not see any common law ground of liability arising from this at all. It was not necessary for him to use this scaffolding in the course of his work, as it had been erected not for the use of the masons but of the joiners. If it had been averred that this scaffolding, intended primarily for the use of the joiners, was in fact used by all the workmen about the premises with the authority or implied authority of the defenders, and that it was left in a dangerous condition, that would have been a very different state of matters. But the record does not show any case of that kind, and accordingly I am of opinion that this action is also bad at common law.

LORD SHAND—I agree with your Lordship upon both points. In order to come under the statute it is necessary that there be on record a distinct averment that the parties occupied towards each other the relative positions of employee and employer; that is made quite clear by looking at the preamble of the Act. In the present case we do not require to go beyond the pursuer's own averments to see that this action cannot be laid upon the statute, because he most distinctly states in the first article of his condescendence that he was in the employment, not of the defenders, but of Messrs Gauld & M'Kenzie. In coming to this conclusion we are not in any way derogating from the authority of the case of *Morrison* v. *Baird* to which we were referred, because in that case there was a distinct averment of employment as between the deceased Morrison (who was represented by his widow) and the defenders.

On the question as to whether this action can be maintained at common law I also agree with your Lordship. The pursuer has not alleged as between him and the defenders that he had any right to use this scaffolding, which had, as a matter of fact and on his own showing, been erected for the use of the joiners. His position as regards this scaffolding was very much that of a stranger who went on to it at his own risk, and in such a case it could not possibly have been maintained that he had a right of action.

The present case must also be distinguished from that of *Brady* v. *Parker*, where the defender had in the course of business invited the public to come upon his premises. Brady, as one of the public, responded to the invitation, and was injured by the premises being left in an insecure condition, and accordingly Parker was found liable. That element is entirely wanting in the present case, and accordingly I agree with your Lordship that on the averments now before us neither under the statute nor at common law does any action lie at the instance of the pursuer against the defenders.

LORD ADAM—I concur on both points.

The Court sustained the first plea-in-law for the defenders, dismissed the action, and decerned.

Counsel for the Pursuer—Shaw—G. W. Burnet. Agent—T. Carmichael, S.S.C.

Counsel for the Defenders—Comrie Thomson—Sym. Agents—Auld & Macdonald, W.S.

Wednesday, June 27.

FIRST DIVISION.

CHRISTIE, PETITIONER.

Entail—Authority to Feu—Conditions in Deed of Consent—Rutherfurd Act (11 *and* 12 *Vict. cap.* 36), *sec.* 4.

In a petition under the 4th section of the Rutherfurd Act for authority to feu an entailed estate, except the mansion-house, offices, and policies, at such times, in such portions, and for such feu-duties as the petitioner should think fit, the next heir lodged a deed of consent by which he consented to the petitioner granting feus as proposed without application to the Court, on condition that he first signified his consent to the terms of the deeds. Petition *granted.*

Robert Christie was heir of entail in possession of the estate of Durie and others, in the county of Fife, under deeds of entail dated prior to 1st August 1848. He was born on 24th July 1848. His eldest surviving son, Robert Maitland Christie, who was the heir apparent under the entails, was born on 11th April 1857.

On October 27th 1886 Robert Christie presented a petition for authority to sell and feu parts of the said entailed lands, and, *inter alia*, craved the Court "(*Fifth*) to grant warrant and authority to the petitioner to feu the said entailed lands and estate of Durie, so far as not already feued, or such portions thereof as he may think proper, but excepting therefrom the mansion-