

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—Rutherford Act (11 and 12 Vict. cap. 36), sec. 4.

In a petition under the 4th section of the Rutherford 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-

house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit," all in terms of the Act 11 and 12 Vict. cap. 36, sec. 4; "to approve of a form of feu-charter for said general feuing purposes as the form to be made use of therefor from time to time as the successive feus shall be granted by the petitioner; to authorise and empower the petitioner to grant said feus in the form or forms so approved of from time to time as he shall think proper, subject to any conditions or stipulations which your Lordships may think proper."

By section 2 of the Rutherford Act an heir of entail born before 1st August 1848, in possession of an estate under a tailzie dated prior to 1st August 1848, may disentail such estate if he obtains the consent of the heir apparent, such heir having been born subsequent to 1st August 1848, and being at the date of granting such consent twenty-five years old, subsequently altered to twenty-one, and subject to no legal incapacity. By section 4 of the same Act it is provided—"That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispense, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided; and such heir of entail shall be entitled to make and execute, at the sight of the Court, all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted."

Robert Maitland Christie granted a deed of consent, the following passage in which referred to the part of the petition above narrated—"And further, I do hereby, subject to the conditions after expressed, consent to the said Robert Christie granting feus of the said entailed lands and estate, so far as not already feued, or of such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as he may think fit, all without any further procedure; and particularly, without the feu-charters, feu-contracts, or other deeds of conveyance as shall be necessary for giving effect to the said feus so made and granted being executed at the sight of the said Court, and without the said Court approving of a form of feu-charter for said feuing, as the form to be made use of therefor, from time to time as the successive feus shall be granted by the said Robert Christie, and without his being authorised or empowered by said Court to grant said feus in the form or forms so approved of, from time to time, as he should think proper, or without the same being subject to any conditions or stipulations which the Court might think proper, and to the said Court pronouncing an interlocutor dispensing with such procedure; but declaring, as it is hereby specially provided and declared and stipulated, as an express condition of this consent being granted by me, that the said Robert Christie shall not grant any such feus,

neither shall he enter into any ninety-nine years' or other building leases of any part of the said entailed lands and estate, excepting as after-mentioned; nor shall he execute and deliver any feu-charter or lease, or other deed requisite and necessary to any feuar or lessee during my lifetime, unless I shall have first signified my consent to the terms of the feu or lease; which consent shall be sufficiently given and proved by a letter of consent under my hand, without my executing such feu-charters, leases, or other deeds themselves; declaring that the above condition shall not apply, nor shall my consent be necessary to feus or long leases of any part of the ground bounded on the east by the road leading to the new railway station at Leven, on the north by the railway, and on the south or south-west by the old station road."

A remit was made by the Lord Ordinary (TRAYNER) to Mr Henry Cook, W.S., who, with reference to the passage above quoted from the deed of consent, reported as follows—"The deed also contains a provision which is novel to the reporter, and to which he therefore calls your Lordship's attention, as it is desired that effect shall be given to it in the interlocutor your Lordship is now asked to pronounce. This provision is to the effect that the grantor consents to your Lordship giving the petitioner power to grant feus from time to time as he may think fit, and that without any application to the Court, or any model charter being previously authorised, the only proviso being that during the lifetime of the grantor his special approval and consent shall be first obtained to any such transaction. The first remark that occurs upon this provision is that if this power is granted, and the present grantor thereafter predeceases the petitioner, the latter will be left free to grant feus of the entailed estate without any consent of the then heir apparent or other heir next entitled to succeed. Assuming therefore that the present grantor does predecease the petitioner, any feu granted by the latter thereafter would seem to the reporter open to challenge upon the ground that it was a feu granted by an heir of entail in a way not sanctioned by the Entail Acts, by which only he can feu out the entailed estate. For by these Acts an entailed proprietor must, generally speaking, (1) either get the sanction of the Court to each bargain of feu, or (2) have previously obtained the approval of the Court to the drafts of the special feu-charters proposed to be granted or to a model form of charter. The present deed of consent is practically providing a third method for obtaining the right to feu, which your reporter cannot see his way to regard as legitimate, and he therefore reports the point for your Lordship's decision."

The Lord Ordinary (TRAYNER) on 23rd May 1886 refused the fifth head of the prayer of the petition.

The petitioner reclaimed, and argued—The interlocutor of the Lord Ordinary should be altered, and the fifth head of the prayer granted. The necessary consent had been obtained, and that was all section 4 of the Entail Amendment Act, 1848, required. The heir apparent might have consented unconditionally according to that section, and so was clearly entitled to give a conditional consent.

At advising—

LORD PRESIDENT—In this petition the Lord Ordinary granted the prayer with an exception under the fifth head thereof. The petition proceeds on section 4 of the Entail Amendment Act, 1848, and it appears to my mind that the Lord Ordinary and the reporter, and probably the petitioner also, have not understood what are the rights of the petitioner under the above-named section. The reporter on this matter says that the deed of consent “contains a provision which is novel to the reporter, and to which he therefore calls your Lordship’s attention, as it is desired that effect shall be given to it in the interlocutor your Lordship is now asked to pronounce. This provision is to the effect that the grantor consents to your Lordship giving the petitioner power to grant feus from time to time as he may think fit, and that without any application to the Court, or any model charter being previously authorised, the only *proviso* being that during the lifetime of the consenter his special approval and consent shall be first obtained to any such transaction. The first remark that occurs upon this provision is that if this power is granted, and the present consenter thereafter predeceases the petitioner, the latter will be left free to grant feus of the entailed estate without any consent of the then heir-apparent or other heir next entitled to succeed. Assuming therefore that the present consenter does predecease the petitioner, any feu granted by the latter thereafter would seem to the reporter open to challenge, upon the ground that it was a feu granted by an heir of entail in a way not sanctioned by the Entail Acts, by which only he can feu out the entailed estate. For by these Acts an entailed proprietor must, generally speaking, (1) either get the sanction of the Court to each bargain of feu; or (2) have previously obtained the approval of the Court to the drafts of the special feu-charters proposed to be granted, or to a model form of charter. The present deed of consent is practically providing a third method for obtaining the right to feu, which your reporter cannot see his way to regard as legitimate, and he therefore reports the point for your Lordship’s decision.” The Lord Ordinary seems to adopt that view, and to hold that the petitioner is not entitled to obtain under the above-named section the powers he asks, because the result would be that he would be able after the liferenter’s death to grant feu rights without further consent. The question is—Is not the meaning of the 4th section just this, that he shall be entitled to go on granting feus unconditionally except under the conditions expressed in the deed of consent?

The deed of consent expounds the mind of the consenter in this way—“And further, I do hereby, subject to the conditions after expressed, consent to the said Robert Christie granting feus of the said entailed lands and estate so far as not already feued, or of such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as he may think fit, all without any further procedure, and particularly, without the feu-charters, feu-contracts, or other deeds of conveyance as shall be necessary for giving effect to the said feus so made and granted being executed at the sight of the said

Court, and without the said Court approving of a form of feu-charter for said feuing, as the form to be made use of therefor, from time to time as the successive feus shall be granted by the said Robert Christie, and without his being authorised and empowered by said Court to grant said feus in the form or forms so approved of, from time to time, as he should think proper, or without the same being subject to any conditions or stipulations which the Court might think proper, and to the said Court pronouncing an interlocutor dispensing with such procedure.” Now, so far the consenter does not give any conditions of his consent—he is rather expounding what will be the legal effect of his consent. But he goes on—“Declaring, as it is hereby specially provided and declared and stipulated, as an express condition of this consent being granted by me, that the said Robert Christie shall not grant any such feus, neither shall he enter into any ninety-nine years’ or other building leases of any part of the said entailed lands and estate, excepting as after-mentioned; nor shall he execute and deliver any feu-charter or lease, or other deed requisite and necessary, to any feuar or lessee during my lifetime, unless I shall have first signified my consent to the terms of the feu or lease; which consent shall be sufficiently given and proved by a letter of consent under my hand, without my executing such feu-charters, leases, or other deeds themselves; declaring that the above condition shall not apply, nor shall my consent be necessary, to feus or long leases of any part of the ground bounded on the east by the road leading to the new railway station at Leven, on the north by the railway, and on the south or south-west by the old station road.” Now, turning from these deeds to the clause of the statute we have this very wide and free power conferred—“That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispone, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided.” That is a very wide power, and the petitioner who answers to the description in the statute of an heir of entail in possession who has obtained such consents as would entitle him to disentail, is entitled under the section to sell his estate unconditionally if no conditions are imposed by the consenter. He does this under the authority of the Court in the usual way, and executes the deeds at the sight of the Court; but his position is just this, that he has a right to deal with the estate respecting this matter, either unconditionally or under conditions if they are imposed by the consenter just as if it belonged to him in fee-simple. No one is entitled to interfere with regard to the price he takes for the subjects; he may charge it with any encumbrances or he may lease or feu the whole of it.

In this case the only condition is that so long as the consenter survives, if he predecease his father, or during his father’s whole life, if he survives his father, he shall be con-

sulted as to the granting of feus or leases, and that he shall not be bound by them unless he is so consulted and approves what is done. Subject to that condition the heir in possession is placed in the position of a fee-simple proprietor. Now one part of the prayer which the Lord Ordinary has refused is "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-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit." That is just in terms of the 4th section of the statute, and it seems to me that the petitioner is just as much entitled to choose his time for feuing, and the portions he is to feu, and to fix the feu-duties, as if he were a fee-simple proprietor of the estate. I am therefore for granting that part of the fifth head of the prayer: But the prayer then goes on, "to approve of a form of feu-charter for said general feuing purposes as the form to be made use of therefor from time to time as the successive feus shall be granted by the petitioner; to authorise and empower the petitioner to grant said feus in the form or forms so approved of from time to time as he shall think proper, subject to any conditions or stipulations which your Lordships may think proper." Here it seems to me the petitioner imposes a burden on himself which he is not bound to bear. There is nothing like that part of the prayer in the 4th section of the statute. The petitioner is not bound to have the form of the feu-charter adjusted, and he is not bound to conform to any form of charter. Therefore I am of opinion that the proper course would be to grant that portion of the fifth head which I have specified. It will, however, be necessary that our interlocutor should bear that it is granted subject to the conditions specified in the deed of consent.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent on Circuit.

The fifth head of the prayer was amended at the bar, and made to run as follows:—(*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-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit, all in terms of the said Act 11 and 12 Vict. cap. 36, sec. 4, before specified, but subject always to the condition contained in the deed of consent by the said Robert Maitland Christie, namely that the petitioner shall not grant any feus, neither shall he enter into any ninety-nine years or other building leases of any part of the said entailed lands and estate, excepting as aftermentioned, nor shall he execute and deliver any feu-charter, or lease, or other deed requisite and necessary to any feuar or lessee during the lifetime of the said Robert Maitland Christie, unless he, the said Robert Maitland Christie, shall have first signified his consent to the terms of the feu or lease, which consent shall be sufficiently given and proved by

a letter of consent under his hand without his executing such feu-charters, leases, or other deeds, themselves declaring that the above condition shall not apply, nor shall said consent be necessary to feus or long leases of any part of the ground bounded on the east by the road leading to the new railway station at Leven, on the north by the railway, and on the south or south-west by the old station road."

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming note for the petitioner Robert Christie against Lord Trayner's interlocutor, dated 23d May 1888, and having heard counsel, Allow the prayer of the petition to be amended as regards the fifth head thereof; and this having been done at the bar, Recall the said interlocutor in so far as it refuses the prayer of the petition; *quoad ultra* adhere to the same: Further, grant warrant and authority to the petitioner in terms of the fifth head of the prayer of the petition as amended, and decern."

Counsel for the Petitioner and Reclaimer—Sir C. Pearson—Cosens. Agents—Macrae, Flett, & Rennie, W.S.

Tuesday, July 3.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

ARMISTEAD v. BOWERMAN.

Property—Reparation—Law of Neighbourhood.

A lease was granted to a pisciculturist of a piece of ground for the sole purpose of breeding fish, with liberty to him to form ponds and to divert the water of certain burns for the purpose of supplying the ponds. The tenant thereafter formed fish ponds and a fish hatchery on the ground let. The proprietor under the lease reserved right to himself to remove through the land let timber from the adjoining lands without being liable to the tenant for damages. A quantity of timber which had been blown down in a wood belonging to the landlord was subsequently sold by him to a timber merchant, who proceeded to remove it, in terms of his contract, by dragging it over the ground. In so doing he had to cross one small burn or ditch, and the feeders of another, which led water to the hatchery and fish ponds. This stirred up the mud, fouled the water, and so caused serious damage to the fish and ova. An action of damages was then raised by the pisciculturist against the timber merchant on the ground that he had not taken proper precautions in removing the timber to avoid doing damage, and that he should have constructed log bridges across which he should have taken the timber.

Held (rev. Lord M'Laren) that the defender had exercised no more than his right under the contract in carrying out an ordinary