note as to expenses be correct, and if we are to adhere to these, then the wife has no good ground for asking to be reponed. But I am not prepared to agree with the Lord Ordinary in the view which he takes as to the effect of the Married Women's Property Acts, or to hold that the principle upon which expenses were given to a wife in such cases was in any way affected by these Acts. The Lord Ordinary says that the practice of allowing a married woman expenses rested upon this principle, that by the operation of the husband's *jus mariti* the wife had no personal estate. Now, that is quite true, and it is the foundation of the rule which has hitherto been acted upon. But it must be kept in mind that these Acts had not the effect of bestowing upon any married woman separate estate. All that they did was to protect any estate of which she might be possessed. While therefore the effect of these Acts is to extinguish the *jus mariti* as regards the wife's estate, the question will always remain whether the wife has any separate estate to be protected.

The rule is just as it was before these Acts were passed If she has separate estate she is bound to conduct a litigation with her husband at her own private expense, while if she has no separate estate then she is exactly in the position a wife was in prior to the passing of these Acts, and she is entitled to an award of expenses.

The question then comes to be, whether there is here any allegation that the wife here has separate estate? I do not think that there is. She may by her industry earn wages sufficient to feed and clothe herself, but that is not separate estate in the sense of these Acts. The rule remains as it was before this Act was passed.

The Lord Ordinary then ought not, I think, to have refused the wife an award of expenses, unless he came to be of opinion that the husband had not the money wherewith to give her it, in which case he should have ordained the husband to provide the small sum sufficient to let both himself and his wife get put upon the poor's roll; and that is the course which I should suggest to your Lordships that we ought now to adopt. I think, then, that we ought to repone the defender, recal the interlocutor of the Lord Ordinary, and sist process *in hoc statu* in order to allow the husband to make such an application.

Lord Mure concurred.

Lord Shand—I am of the same opinion, and for the reasons stated by your Lordship. I think that this case ought to be disposed of without reference to the Married Women's Property Act at all. I cannot read the letter by the wife's agent of 19th November 1885 [*quoted supra*] as an abandonment of the action by the wife, and in so treating it I think the Lord Ordinary went too far. The same rule, I think, prevails now as existed prior to the passing of these Acts, namely, that if the wife has separate estate she must litigate with her husband at her own expense. In the present case it would appear that the husband has no money wherewith to pay even if the wife did get a decree, and the wife does not aver that the husband has the means to pay for her defence. I think, therefore, that the course suggested by your Lordship ought in the circumstances to be adopted.

Lord Adam—When first I read the judgment of the Lord Ordinary it struck me that it was of a very sweeping character. Usually the wife has no separate estate, and except among the working classes she has not the aptitude to earn a livelihood.

The effect of such a decision as this would be that a husband might bring an action such as this against his wife, and then turn her out of doors and let her defend herself as best she could. That certainly was not the intention of these statutes, which were to aid married women and to protect their separate estate.

I think that all actions of divorce should be defended so as to supply the Court with as much information as possible before decree is pronounced, and as I do not think that the effect of these Acts was to make any change as to awarding expenses in actions of this kind, I concur in the opinion expressed by your Lordship.

The Court recalled the interlocutor of the Lord Ordinary, and sisted procedure *in hoc statu* to allow the parties an opportunity of applying for the admission to the poor's roll.

Counsel for Milne—Lang—G. W. Burnet. Agent—Thomas Carmichael, S.S.C.

Counsel for Mrs Milne—Rhind. Agent—J. D. Macaulay, S.S.C.

Wednesday, December 9.

SECOND DIVISION.

[Sheriff of Perthshire.

MITCHELL *v.* PATULLO.

Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Negligence—Condition of Employer's Premises—Misadventure.*

A master is not bound to have the most new and excellent appliances, but only to use reasonable precautions. Therefore where a farm-servant claimed damages in respect that he had been injured by the blowing to of a shed door, and that this would not have happened if it had been of a different construction or fastened with a sneck instead of having something put against it to hold it—*held* that the master was not liable.

John Mitchell, labourer, Blairgowrie, raised this action of damages for £150 as damages at common law and under the Employers Liability Act 1880 against James Patullo, Esquire, of Persey, in respect of personal injuries sustained by him while in the latter's service, under the following circumstances:—On 28th October 1884 the pursuer, who was "orraman" on the defender's farm, was assisting to unload a cart of turnips in a turnip shed. He took the tail-board off a cart which was backed into the shed. The defender's grieve was present at the time. The door of the shed was a folding one, and was not supplied with catches and staples to fasten it back when opened. The custom was, on a windy day such as that of the accident, to put something, such as a stone, against it to hold it, and on this occasion it was fastened back with a shovel by the driver of the cart, William Gall, who was also in the

employment of the defender. A gust of wind knocked over the shovel and blew one of the folding-doors against the horse's head, causing it to back and crush and seriously injure the pursuer between the cart and the wall of the shed. The door had been put on the shed three years before the accident, when alterations were being made on the steading.

The pursuer averred—"The said accident arose in consequence of the defender's own negligence in failing to provide, as it was his duty to do, either sliding-doors for said shed, which are well recognised to be the safest and best, and which would have effectually prevented said accident, or snecks, staples, stay-bands, or catches, or other means for fastening the folding-doors, by which failure the shed and doors were in a defective and unsafe condition; and also, and separately, in consequence of the defender's grieve having negligently failed to take some means for keeping the doors open while the unloading was going on under his own superintendence."

The defender denied that it was either usual or necessary to have latches for the doors.

The pursuer pleaded—"(1) The defender having failed to provide catches, snecks, staples, or other means for securing the doors of the turnip-shed when open, so as to prevent the accident libelled, the defender was personally guilty of negligence, and the pursuer having been injured in consequence of such negligence, is entitled to reparation from the defender for the injuries sustained by him, at common law. (2) The pursuer having been injured in consequence of the defective condition of the premises, the defender is liable in compensation to him in terms of the Employers Liability Act 1880 (43 and 44 Vict. cap. 42). (3) The defender's grieve having been in superintendence, and having failed to take precautions for preventing the accident libelled, was guilty of negligence, and the pursuer having been injured in consequence of such negligence he is entitled to compensation from the defender in terms of the said Act."

The defender pleaded—"(1) The pursuer not having been injured through any fault of the defender, or the fault of anyone for whom he is responsible, the defender is not liable in compensation to the pursuer, and is entitled to be assoilzied. (2) The injuries received by the pursuer having been the result of pure accident, and not arising through any defect in the construction or condition of the premises, nor from negligence on the defender's part, the defender is not responsible for the pursuer's injuries."

The Sheriff-Substitute (GRAHAM) found, *inter alia*, as follows:—"That the occasion of the door being driven on the horse was the insufficiency of the means employed to keep it back: Finds that while the use of folding-doors for sheds has in many instances been superseded by the use of sliding-panels, folding-doors similar to those on the defender's shed are still in general use in farm-steadings throughout the country, and are not found unsuitable or dangerous: Finds in point of law that the defender was not bound to provide doors of the most recent or improved description for his turnip-shed, and that the doors in question were such as are in general use, and found suitable for their purpose when used with ordinary precaution." He assoilzied the defender.

On appeal the Sheriff (GLOAG) found "(4) That on said occasion said door was opened by the driver of the cart, William Gall, and was not secured by him sufficiently to resist the force of the wind; (5) That Gall was then in the employment of the defender, and had no superintendence entrusted to him, and no authority over the pursuer; (6) That it was not the duty of the grieve to see that the door was securely fastened; (7) That the defender is not chargeable with fault in respect either that the said door was a folding-door or that it was not provided with catches or staples as aforesaid, or otherwise in respect of the character or condition of said door; (8) That it is not proved that the injury sustained by the pursuer was caused by the fault of the defender or of anyone for whom the defender is responsible: Therefore of new assoilzies the defender from the conclusions of the action.

"*Note.*— . . . The case has been raised under the Employers Liability Act, but I think that the most important ground of action does not receive much aid from that Act, but may be just as well referred to the common law.

"At the debate the defender's liability was rested by the pursuer's agent on three grounds—(1) It was said that the gate was itself a source of danger, which might and should have been avoided; (2) It was maintained that the accident was attributable to the fault of the grieve in failing to see that the gate was sufficiently secured; and (3) That it was also attributable to the fault of Gall in using insufficient means for the security of the gate, and that the defenders are liable for his fault.

"The third ground of action is not, I think, pleaded on record, and naturally, because Gall was a *collaborateur*, with no authority over the pursuer, and the ordinary rule of law in such circumstances is not affected by the Employers Liability Act. It is therefore unnecessary to determine whether Gall was in fault or not, seeing that the defender would not be liable for such fault to the pursuer. The provisions of the Employers Liability Act would be of importance if the second ground of action were warranted by the facts; but I agree with the Sheriff-Substitute in thinking that it is no part of the duty of a grieve to look after a matter of such minute detail and such ordinary occurrence as the fastening of a door. That must be left to the workmen who are engaged in the operations regarding it to be done. There remains, however, the first ground on which the defender's liability is rested—the character and condition of the door; and that raises a more difficult and an important question. It is said that the door should have been a sliding-door, or if a folding-door that there should have been means for securing it when opened. Now it may be admitted that this accident could not have happened had the door been a sliding-door, and might not have happened had it, being a folding-door, been furnished with catches and staples. It may also be admitted that recently it has been more usual to put up sliding-doors to such sheds than folding-doors. The better opinion seems to be, that when there are no architectural objections sliding-doors are preferable, it being remembered that this door was put up within three years. But the liability of the defender does not directly follow. There is not, I think, any rule of law to the effect that a master

is bound to provide against every possible danger, or to supply in all cases the safest and most approved appliances. I think it may be conceded as a sound legal proposition that a master is bound to use all reasonable precautions for the safety of his workmen, and that he will generally be liable if injury occurs from the want of such reasonable precautions. That rule was, I think, stated either expressly or impliedly by Lord Young in the case of *Murdoch* v. *M'Kinnon*, 7th March 1885, 11 R. 810, and by the Lord President in *Johnson* v. *Mitchell & Co.*, 5th June 1885, 22 S.L.R. 698; but from its very expression it is not an absolute or unqualified rule, but must suffer modification in various circumstances; and with reference in particular to the former of these cases I may say that there may be some difficulty in applying remarks which related to the working of a mine—that is, to work dangerous in its nature, and necessarily calling for special precautions—to the ordinary work of a farm, which cannot in any proper sense be held to be dangerous at all except in very special and accidental circumstances such as occurred in the present case. So also in the case of *Johnson* v. *Mitchell* it was only because of the exceptional purposes for which the door then in question was intended, that the defect of it, which caused the accident, was held to infer liability against the defender. It was a door to be used in order to prevent the spread of fire, and therefore likely to be shut very hastily; but had it been an ordinary door, requiring no such haste in the use of it, I do not understand that the defenders would have been held liable for a similar accident. To hold that every farmer whose farm buildings have been recently built or repaired is bound to have sliding-doors—doors that will not be affected by the wind—on his turnip sheds, or other buildings and outhouses, on the pain of being held responsible if some untoward and totally unexpected accident should happen, would be to impose an obligation of a very startling kind, and I do not consider that these cases would necessitate or warrant it. I think it enough if his farm buildings are such as to be the cause of no special danger, having reference to ordinary circumstances and to their ordinary uses.

"Whether the want of catches or staples implied the failure to use ordinary precautions may be a nicer question, but I do not think it did. It would be difficult to see where the obligation to use such precautions could stop if the pursuer's contention were sustained. It is not the doors of turnip-sheds alone that are liable to be suddenly shut by a blast of wind, and which might in exceptional circumstances be the occasion of similar danger. It appears from the evidence, and everybody knows, that it is common in farm-houses and farm-buildings and farms to have gates and doors without any special means of fastening them; and it is by no means clear that greater safety would be attained by catches and staples, for very probably the use of them would be neglected, and they might in time become insecure and be a positive source of danger. On the whole I think it cannot be affirmed that the defender was in fault because no special means of that kind for fastening the gate was provided. The cases of *Robertson* v. *Adamson*, 3rd July 1862, 24 D. 1231, and *Thomson* v. *The North British Railway Company*, 16th November 1876, 4 R. 115, may be referred to as cases in which the mere absence of certain precautions, which if used would have prevented the accident which happened, were held not of itself to infer liability. The cases proceeded on the ground that there is a limit to the precautions against danger which masters and others were bound to use. The following additional authorities was referred to at the debate—*Macaulay* v. *Buist & Co.*, 9th December 1846, 9 D. 245; *Fraser* v. *Fraser*, 6th June 1882, 9 R. 896; *Walker* v. *Olsen*, 15th June 1882, 9 R. 946; *Beveridge* v. *Kinnear & Co.*, 21st December 1883, 11 R. 387; *Wingate* v. *Monkland Iron Co.*, 8th November 1884, 12 R. 91; *Fulton* v. *Anderson*, 18th November 1884, 22 S.L.R. 100; *Irwin* v. *Dennystoun Forge Co.*, 3rd February 1885, 22 S.L.R. 379; *Dolan* v. *Anderson & Lyell*, 9th March, 1885, 12 R. 804—but they do not appear to me to have so close a bearing on the present case as the cases previously quoted."

The pursuer appealed, and argued—No good master having his servant's interests at heart would have such a door to a shed like this. There was gross negligence, then, sufficient to entitle the pursuer to reparation for his injuries.

The defender's counsel was not called on.

At advising—

Lord Justice-Clerk—This is an example of an attempt to create liability for damages arising out of an accident which was a pure misadventure. It seems the man was engaged in unloading a cartful of turnips. The cart was backed into the shed, the man being behind it, in order to unload. Something frightened the horse. It backed, and crushed the man against the wall. It was the flapping of the folding-doors in the horse's face which caused it to back, and it is said that it happened because there were no snecks or stays to fasten the doors, and that they were not properly constructed, because they should have been sliding-doors. That is a subtlety and refinement which does not give any cause for a claim of this kind. It is one of misadventure only. The horse might have been frightened by a hundred things, and each of them might have been prevented by precautions if such had been thought of. But we have no materials here for a claim of damages, and I am sorry to see an action of this kind running the gauntlet of the Courts.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Find that it is not proved that the injury sustained by the pursuer was caused by the fault of the defender, or of anyone for whom the defender is responsible: Therefore dismiss the appeal: Affirm the judgment of the Sheriff appealed against."

Counsel for Pursuer (Appellant)—Rhind. Agents—Begg & Bruce Low, S.S.C.

Counsel for Defender (Respondent)—J. A. Reid. Agents—Henderson & Clark, W.S.