

intends to give it the character of beneficial enjoyment. To the same word used in the undated deed I am of opinion the testator meant the same meaning to apply. Now, if it be the case that Mrs Agnes Gilmour or Clark was universal legatee, there can be no room for the plea of negative prescription here.

But I think we must go farther, and consider whether, apart from this, even assuming that Mrs Clark was not universal legatory, but only executrix, the plea of negative prescription can be maintained. I do not wish to touch the question as to what might be the law were the attempt made to plead negative prescription by an executor acting in a really fiduciary character in relation to the residue of an estate, and who wrongfully appropriated that residue to his own use. No such case as that is before us. Here, in every view of the case, it is a question whether Mrs Clark was residuary legatee or only executrix. It was a fair question to raise, and might have been raised at the time. Mrs Clark made her claim to the character she assumed openly and unreservedly. I can see no possible ground for throwing any doubt upon the uprightness of her conduct and intentions, and I think that the exclusion of this action at the present date by the operation of the negative prescription is one of the very best uses to which that exception of our law can be put. Though I hold that Mrs Clark was clearly under the deeds universal or residuary legatee, still I should have no doubt that, on the other view, the plea of negative prescription would be properly sustained.

Lord Kinloch concurred.

Agents for Pursuer—A. & A. Campbell, W.S.  
Agents for Defenders—Campbell & Espie, W.S.

Wednesday, January 24.

## SECOND DIVISION.

M<sup>c</sup>MARTIN v. HANNAH.

*Reparation—Negligence—Property.*

A girl of seven years of age who had been calling on an errand at a house in a common stair, fell through a gap in the railings at the outside of the house and was killed.—*Held* that it was the duty of the proprietor of the house to repair the railing, and not having done so, he was liable in damages to the father of the girl.

This was an action of damages in the Sheriff-Court of Lanarkshire by Peter M<sup>c</sup>Martin against A. Hannah, for the death of his child. The Sheriff-Substitute (MURRAY) found for the petitioner, and gave £20 as solatium. The Sheriff (BELL) adhered, and added the following Note to his interlocutor, from which the facts and questions of law sufficiently appear:—"The first question to be disposed of in this case is whether the child Christina M<sup>c</sup>Martin met her death by accidentally falling through the gap in the stair railing, occasioned by the absence of one of the bannisters. Although no one actually saw the occurrence, the circumstantial coincidence, including the facts of some of her hair being found on the gas bracket immediately adjoining the gap, and of her being physically incapable of climbing over the cope of the railing, is such as to leave no rational doubt that the above question must be answered in the affirmative. The next is, whether there was such

culpable or undue negligence on the part of the defender in permitting the existence of so dangerous a state of disrepair in his property as to subject him in damages? This question must also be answered in the affirmative, in respect it is proved that the state of disrepair had continued for at least six months; that the gap was quite large enough to admit of a child falling through; that the stone of the step in which the bannister had been fixed was itself worn away, which would the more readily lead to a child missing its foot; that the defender's factor and overseer had been warned of the state of matters, and that nothing was done till the fatal occurrence took place. It is true that if either a child or a grown person wilfully or carelessly expose themselves to danger, and injury ensues, no claim for compensation will lie against a party making a lawful use of his property, as was found in the recent case of *Grant*, Dec. 10, 1870, referred to by the defender. But, on the other hand, the law requires an owner to keep his property in an ordinarily safe condition; and if he does not, and some one suffers in consequence, carelessness is not to be presumed on the part of the sufferer, the fault of the proprietor being apparent. The last consideration in the case is, what is the fair sum of 'damages and solatium' to be awarded to the pursuer. He did not suffer any pecuniary loss by the death of his child, she being, on the contrary, a burden on him, and likely to have continued so, as she was weakly and decrepit. A father, however, may in certain circumstances be entitled to large compensation for the distress of mind occasioned to him by such a death. But in the present instance it is proved that the pursuer deserted his wife before the deceased was born; and although he afterwards contributed to the support of his family, and occasionally came to see them, he did not live with them in the ordinary domestic relationship, and cannot therefore be supposed to have felt the ties of parental affection very strongly. On the whole, therefore, the Sheriff is of opinion that the sum fixed on by the Sheriff-Substitute is sufficient in name of solatium."

The defender appealed.

R. V. CAMPBELL for him.

MACKINTOSH for the respondent.

The following authorities were referred to—*Begbie v. Fraser*, 20 D. 81; *Allison on Torts*, 582; *Robertson v. Adamson*, 24 D. 1231.

At advising—

LORD COWAN—There is some nicety in the case, and at first sight it appeared to me hard that the landlord, who was not personally a delinquent, and who, as soon as he knew the defective state of the railing, got it put in order, should be found liable in damages. But on examining into the grounds of the Sheriff's judgments, I am satisfied that the result at which they have arrived is consistent with the facts and legal principles applicable to the facts. The defender is proprietor of a tenement of houses occupied by twelve different families. It may be that the tenants undertook to repair the insides of these houses, and so may have taken any risk arising from defects there. But the accident arose from the defect in the stair railing outside, which it was the landlord's duty to repair, and he cannot shake himself free from the responsibility—(*His Lordship here read the first part of the Sheriff's note quoted above*). I think these facts have been established. Although the proprietor himself was not aware of the state of the railing, the person who acted for him was.

The child was not making use of the stair as a playground, but had come to do an errand, and was in the same position as an agent who had been sent for to do some business, or a porter who had come to carry something. She had a legitimate reason for being there. There is no room for the distinction which was attempted to be made between guests and others who voluntarily come, and others who come on business. I do not think that in our law any such distinction exists. The case of *Robertson* did not lay down any such rule. What the Judges then decided was that a sufficient allegation of negligence had not been made.

The other Judges concurred.

LORD NEAVES said that if in a common stair there was a defect which caused injury to anyone who had a right to be there, such as a postman or tax gatherer, the landlord would be answerable.

The Court adhered.

Agents for Pursuer—Maitland & Lyon, W.S.  
Agents for Defender—J. & R. D. Ross, W.S.

Wednesday, January 24.

MACFIE V. SHAW STEWART.

*Jury Trial—Public Right of Way—Servitude Road.*

Held that an action concluding for a public right of way, or alternatively for a servitude road, was of too complex a nature to be sent to trial by jury.

LORD ORMDALE reported to the Second Division the question as to procedure raised by the defender in the action of right of way at the instance of Mr R. Macfie of Airds and Langhouse, against Sir M. S. Stewart, Bart. The Lord Ordinary, in reporting the case, mentioned, without approving of, the following as the grounds on which the defender wished that it should be tried without a jury:—(1) It was a special case, as there was an alternative issue that the road was a public road for all purposes, or that it was a servitude road, to which the pursuer, as proprietor of Langhouse, was entitled. (2) It was denied by the defender that one of the termini of the road was a public place; and that question also would require to be settled by the jury. (3) Recent experience had shown that juries were not good judges in cases of right of way, being prejudiced in such questions. His Lordship observed, in conclusion, that this was rather a startling proposition, for, according to the contention of the defender, it came to this, that such cases should not in future be sent for trial by jury. He confessed that, for his part, he would shrink from coming to such a conclusion.

MR SHAND (with him the LORD ADVOCATE and Mr H. J. MONCREIFF) for the pursuer, stated that his desire was that the usual course should be adopted in this case—a course which up to the present time had been almost invariably followed in right of way cases. He knew of only one case—the *Loch Katrine* case—in which this course had not been taken, and then it was by consent of parties. And it might be mentioned, by the way, in regard to that case, that their Lordships, on appeal, overturned the decision of the Lord Ordinary. He contended also that there was nothing unusual in the course here taken of sending two issues to the jury—an issue, first, of right of way; and,

secondly, of servitude. He was not aware, either, of any recent substantial reason in favour of the course asked by the defender. The *St Andrews* case had been referred to, but the reason why in that case there had been more than one trial was simply that the pursuer had brought forward only part of his evidence on the occasion of the first trial. And in the *Dunoon* case a similar thing had occurred. Unless it was to be held that in future no right of way cases should be sent to a jury, he saw no reason for adopting any but the usual course of jury trial in this case.

THE SOLICITOR-GENERAL (Mr ASHER with him) for the defender, cited four cases of right of way in which double trials had been necessary; and in regard to the last of these cases—the *Dunoon* case—he said that many of the Judges had expressed their dissatisfaction with the verdict. Taking these cases as a sort of standard, he was not surprised that the Court had suggested for consideration whether it was proper to try questions of this kind by jury. Juries, he said, had great difficulty in distinguishing between use as of mere toleration, and use as of right; and yet it was upon this very distinction that the whole case must necessarily turn.

Answered by the LORD ADVOCATE for the pursuer—There was no speciality in this case to distinguish it from others of the same class. It was a case of quite common occurrence, and they were quite familiar with the alternative issue which was presented in the present instance. If trial by jury should be abandoned in these cases, he thought the prospect of arguments on the evidence (1) before the Lord Ordinary; (2) before their Lordships; and (3)—a thing which had not hitherto occurred in the experience of anyone—before the House of Lords, was a prospect not very agreeable. He thought that House would be apt to ask—Why has the Court of Session now, in 1872, departed from what has been the inveterate practice of the Court since 1815, when trial by jury was first introduced into Scotland? He hardly thought the Court would venture to pronounce an opinion that trial by jury had become discredited in Scotland. Such an expression of opinion would have the probable effect of a change of the law, so as to make that form of trial less optional. Reference was made by defender to the peculiarity of the road in this case as distinguished from others; but it did not seem to his Lordship that there was any such peculiarity as to call for the adoption of any but the ordinary course of trial by jury in these cases. He concluded by saying that it appeared to him that there was not much matter for argument in the case, but that it was rather matter for judgment by the Court on consideration whether they should now, in 1872, depart from the course adopted in such cases since jury trial was introduced into Scotland.

At advising—

THE LORD JUSTICE-CLERK—We have to consider the way in which the case should be tried. It is an action of declarator which has two alternative objects—1st, to have the road marked on the plan as A to F declared to be a public road; and 2d, to have a part of that road from a point A to D declared to be a servitude road. In order to decide whether the matters raised would be more properly tried by the Court or a jury it is not necessary to consider the general qualifications of juries to try right of way cases. I am not prepared to lay down any general rule or to alter the ordinary