

were the trustees, so far as I can see, in any way precluded from making a contract of this kind with any teacher whom they might engage. I think that the trustees were entitled to dismiss the appellant upon reasonable notice, nor can I see anything in the constitution of this school which supersedes the agreement signed by the appellant. But even supposing that the appellant has been wrongfully dismissed, the retention of this house is not her remedy. She may obtain redress—if she has suffered wrong—in some other way, but she cannot retain possession of these premises against the wishes of the trustees. I hope that she may not be advised to take any further steps, seeing that in my opinion she cannot get over the effects of this agreement.

LORD KINNEAR—I agree with the opinion expressed by your Lordship, and for the reasons stated. The appellant held her appointment under a contract terminable by either party on three months' notice, and her engagement was not affected by article 8 of the deed of mortification, which warranted the trustees in dismissing a teacher for any one of the causes therein specified, because it does not appear that she was made aware of its terms, or that it was imported into her agreement. It is not suggested that this dismissal is for any fault on the part of the appellant, but simply from a desire on the part of the trustees to terminate their engagement with her.

LORD MURE—I agree with the opinion expressed by your Lordships, and have very little to add. By the terms of her agreement with the respondents the appellant's engagement with them was terminable after three months' notice, and the proceedings under which it is now sought to have her removed are just in terms of the conditions of that agreement. The trustees have terminated their engagement with this lady, and have given her three months' notice. They now require her to quit the house which she occupies under her engagement with them, and this demand on their part is quite, I think, within their powers.

The only objection which has been stated is one founded upon some of the older cases, where the appointments of teachers were held to be *ad vitam aut culpam*, and it was urged that an appointment such as that contemplated under this agreement was not one which the parties had the power of making. The law has been materially changed since these decisions, and the principles then laid down are no longer applicable. I therefore agree with the views expressed by the Sheriff-Substitute and your Lordships, while leaving it quite open to the appellant to obtain her remedy in some other form if she is advised that she has been wrongfully dismissed.

The **LORD PRESIDENT** and **LORD DEAS** were absent.

The Court adhered to the interlocutor of the Sheriff-Substitute and dismissed the appeal.

Counsel for Pursuers (Respondents)—Trayner—Strachan. Agents—Liddle & Lawson, S.S.C.

Counsel for Defender (Appellant)—Campbell Smith—Rhind. Agent—Daniel Turner, S.L.

Tuesday, November 18.

SECOND DIVISION.

FULTON v. ANDERSON.

Repairation—Negligence—Damages for Personal Injury—Insecure State of Property—Duty of Proprietor of Tenement having Common Stair to Keep the same in Safe Condition.

A man was ascending a common stair in a tenement with a sack of coals on his back, when the stair suddenly gave way under him and precipitated him to the bottom of the tenement. He sustained severe bodily injuries. The stair was a "hanging" stair of unusual breadth. About three years before the occurrence of the accident, the stair being then in an infirm condition from the wearing away of the steps by use, the proprietor, without consulting any skilled person, employed a slater to repair it by cutting out a portion of each step and piecing it with fresh stone. In an action of damages by the injured man against the proprietor of the tenement, the Court, being of opinion on the facts that the fall of the stair was due to its having been materially weakened by the imperfect way in which it had been repaired, held that the accident was due to the fault of the defender, who had failed in his duty to keep the stair in a safe condition, and that he was liable to the pursuer in damages.

This was an action of damages for personal injury raised by Edward Fulton, labourer, against James Anderson, tea and coffee merchant, both in Glasgow. The facts which led to the action are given in the Sheriff-Substitute's findings in fact, as follows:—"Finds that the defender is, and for the last five or six years has been, proprietor of the tenement in which No. 90 Maxwell Street is situated: Finds that the said tenement was erected about twenty-eight years ago, and that the stair by which access is had to the business premises in the tenement, having gradually got worn away, and frequent complaints thereof being made, the defender, about three years ago, employed a slater to renew the surfaces of the steps by indenting or cutting out a portion of the worn stone and replacing it with fresh Caithness flagstone: Finds that the said stair is a hanging stair of unusual breadth, and consisting of three flights, and that the indenting by the defender was done to every step of these three flights: Finds that the stair, in consequence of the cutting to which it was subjected, was much weakened, and that on various occasions the indentations became loose, and that the stair was unfit to stand the strain to which, in the ordinary course of traffic, or accidentally, it might be exposed: Finds that on the 3d October the pursuer was engaged, along with another man, in carrying coals to the premises occupied by Allan & Orr on said stair: Finds that while pursuer was carrying up a bagful of said coals, weighing about one cwt., the stair suddenly gave way with him, and he was precipitated, along with two flights of the stair, to the bottom of the tenement, and was so seriously injured that he required to remain for a period of fourteen weeks in the infirmary, and

had eventually to have his left leg amputated below the knee."

The pursuer averred that the accident was caused by the defective condition of the stair, the steps not being of sufficient strength for the breadth of the stair, it being a hanging one; or from the failure of the defender to keep it in an efficient state of repair, or from improper workmanship in the alterations made on it, from the cutting of the stone to admit the facings of new stone, having so reduced the thickness of the steps as to make them insecure.

The defender averred (but failed to prove) contributory negligence on the part of the pursuer by resting or letting fall his sack of coals on the railing or stair. He stated further that he and his authors and predecessors were not aware of any defect whatever in the construction of said stair; that the said stair was occupied or used by several tenants, and that he received no intimation from any of them of any defect in its construction or condition which could cause the accident.

The pursuer pleaded fault of the defender in having his property in a defective condition.

The defender pleaded, *inter alia*, "The accident having happened from circumstances unknown to and beyond the control of the defender and his authors and predecessors, the defender should be assoilzied with expenses."

Some evidence was given as to the danger of piecing hanging stairs in the way in which this one was done. Two witnesses, John White, assistant-master of works in Glasgow, and Alexander Matheson, inspector of buildings in the office of the master of works, gave opinions of the injudiciousness and consequent danger of repairing hanging stairs in this way. But it appeared that there were several other hanging stairs in Glasgow, and one in particular at the Stirling Library, which was as broad as the stair in question, and which had been pieced in this way, and in the case of which a greater length of the step had been cut out than in the stair in question.

It appeared from the evidence of Meikle, the slater who pieced defender's stair, that from a foot to eighteen inches of the step was left at each end of the piecing. After having finished the piecing of the stair he was back at it again on eight different occasions, putting in again pieces which had been knocked out or loosened. The witness White stated that he found in his inspection that most of the steps had broken at the part where the indentation had taken place.

Evidence was led as to the competency of slaters to do such work, and the practice of employing them to do so. There was a conflict of evidence as to the point, some witnesses considering that slaters were not, others that they were, competent for such work, and in the practice of doing it.

The defender's own account of his instructions to Meikle, the slater who did the work, as to repairing the stair was as follows:—"I employed William Meikle, plasterer and slater, to do the work. It was to be done in a certain specified style. I asked him to give me an estimate. I told him I wanted the stair put in thorough order, and in what way I wanted it put in order. . . . (A) I told him to do the whole steps, as it is very dangerous to leave one step with a little slope on it and have another one

square. My instructions to him were that I wanted an estimate from him to do the whole steps from top to bottom. (Q) Did you tell him of what length and breadth the indents were to be?—(A) I told him to do it thoroughly and properly, and I ascertained beforehand that he was able to do it. I consulted no architect at that time. It is not an architect's job."

The Sheriff-Substitute (LEES) pronounced this interlocutor—(After the findings above quoted)—"Finds that the defender has failed to establish . . . that the pursuer contributed to his injuries by his own rashness: Finds that the pursuer, having been injured through the fault of the defender, in neglecting to have his stair, when repaired, made of sufficient strength to stand the strains to which it might in ordinary use be exposed, is entitled to compensation from the defender for said injuries: Assesses the amount of such compensation at the sum of one hundred and fifty pounds: Repels the defences, and decerns against the defender for payment of said sum to the pursuer, with the legal interest thereon from the date hereof till payment: Finds the defender liable to the pursuer in his expenses, &c.

"*Note.*—The mere fact of the stair giving way does not in itself constitute a ground on which the pursuer can demand compensation. He must do more; he must prove that there was negligence on the part of the defender. But it appears to me that such negligence is pretty clearly proved. The stair was, at the time when it was repaired, twenty-five years old. It was exposed to many risks; and from the great number of working people that had to use it every day, it was essential that the stair should be kept up to a level of strength adequate to the strain it might be expected to have to bear. It was the access for business purposes to two or three establishments. Heavy goods had to be carried up it, and also coals. It appears to me that it was therefore incumbent on the defender to act with much care in the repair of this stair. A good deal of evidence was led to show that it was improper to employ, as he did, a slater at such a job. But about as much evidence was led to show that a slater is quite suited for such a purpose, and that it is matter of common practice to employ such a tradesman for indenting a stair. I do not think, therefore, that there is any negligence proved on this point. But it is very plain that the job required to be executed with much care, and was at the time the source of a good deal of anxiety to the workman who was doing the work. Now, the point for the pursuer here is that the defender, knowing the strain the stair required to bear, and knowing that the cutting away of the stone was certain to weaken it, was bound, for the safety of the lieges who used it, to see that it was made of proper strength. It is clearly proved that the indenting of even a few steps on a hanging stair is a ticklish job. But where every step of three flights had to be indented, the risk became the greater. From top to bottom there was thus not a single step which retained its original strength; and it is shown that this stair was of unusual breadth.

"The question then is, did the defender take proper precautions in regard to his stair? Now, what he did was—he resolved to have every step indented, and he asked a slater how much he

would charge for doing this. No further investigation was made; but the defender appears to have acted on his own judgment, that the course he intended to take could be taken with safety. He was thus on his guard as to the risk his stair might cause. If, therefore, it gave way with the weight of a man carrying a cwt. of coals—the *res ipsa loquitur*—a stair which gives way under such conditions is certainly not what it ought to be. I have already pointed out that this stair had often a number of workpeople on it at the same time, and this shows the danger they ran. But the defender seeks to show that the cause of the stair giving way was that the pursuer let his bag of coals fall. Well, even if that were proved, I am not sure that it could be said with propriety that a stair which had to carry the traffic this stair had to do was adequately fitted for the purpose if it could not stand the strain of a bag of coals sliding off a man's back on to it. But as matter of fact it is not only not proved that this occurred, but it is, I think, sufficiently proved that it did not occur. The three Allans, who were the only witnesses that favoured the defender's view, say they heard a long rumbling noise which they thought might be the pursuer's coals falling, and that then they heard the stair giving way. But as I have said, none of them saw this; and as it is proved that, as matter of fact, the first thing that gave way and went over was the railings of the stair, it is possible enough that it was this rattling of the railings that the Allans heard, and mistook for the fall of the coals. On the other hand, the pursuer says the coals did not fall off his back. The man, Clark, who was in front of him, says the same; and the two girls, Agnes Carmichael and Amelia Sinclair, who were on the stair at the time, and fell with it, are able to speak to the matter. The former says that the stair broke at her feet when the pursuer was just a few steps in front of her, and that none of his coals fell. Now, if they had fallen, I do not see how she could have failed to know. Then the girl Sinclair says she had just passed the pursuer, and thus could not see whether his coals fell, but she entertained no doubt that if they had fallen she must have heard them, and is positive that they did not fall.

“Thus the slender reed on which the defender leans for his defence fails him, and nothing remains to meet the case that the pursuer has established, viz., that, without fault on his part, he has been injured through a stair giving way which the defender had had operated on in a way that, as the result shows, left it of insufficient strength for the purposes for which it was required.

“As regards the amount of damages, it is somewhat difficult to decide what is proper in the circumstances. The pursuer had in a previous accident got his right hand injured. Now he has lost half of his left leg. He is thirty-two years of age; and it is unfortunately beyond doubt that he will have much difficulty in getting any means of livelihood. Under all the circumstances, if I have erred as to the amount of compensation he should get, I rather think the error is towards giving him too little.”

The defender appealed to the Sheriff, who, for the reasons stated by the Sheriff-Substitute, adhered to the latter's interlocutor.

The defender appealed to the Court of Session, and argued—There was no fault in having a hanging-stair, since such were common, nor in indenting the steps, since other instances were shown of such an operation, even in hanging-stairs, nor in having the work done by a slater, since such was shown to be a not unusual practice in Glasgow. The evidence failed to show that the stair gave way in consequence of the indentation. The cause of the fall was unexplained. Before the pursuer could recover he must bring home the accident to something improperly done or left undone by the defender, and in this he had failed.

The pursuer replied—The defender was bound to keep the stair in a safe condition; if he failed to do so he was responsible. He did fail in not employing, or at least in not consulting, a properly qualified person in the repairing of the stair. He thus took on himself the risk of accident, and could not escape liability by appealing to an unknown cause. Besides, there was evidence enough to show that the steps broke off at the indentations.

Authorities—*Martin v. Hannay*, January 24, 1872, 10 Macph. 411; *Campbell v. Kennedy*, November 25, 1864, 3 Macph. 121 (*per Lord Neaves*); *Cleghorn v. Taylor*, February 27, 1856, 18 D. 664.

At advising—

LORD YOUNG—This is a case in which the parties are really agreed on the law, and so is a pure question of fact. The facts of the case are few and simple. The defender is proprietor of a tenement which has a common stair—common to his tenants on the different flats. It is not an old tenement—it was built some twenty-eight years ago—but it is so much used that the stair is subject to a great amount of heavy traffic, and it was the duty of the proprietor to uphold it in a condition safe to those using it. About three years ago it was reported to him to be unsafe, and it certainly was so. He is a tea-merchant, and professionally unacquainted with the structure of stairs, and he had a slater to repair it by cutting out a part of each step and patching them with Caithness stone. If this was a proper mode of repairing the stair, and the work was properly executed, it would not have come down when subjected to no greater pressure than the weight of a porter with a sack of coals. But the fact is, that it came down under that pressure and no more, for there was not even the fall of the bag to cause a shock. That signifies either that the mode adopted was not a proper mode of making the stair safe, or that the thing was not well done. If it were a proper mode, and were well done, the accident could not possibly have happened. It did, however, happen, and the Sheriff who heard all the evidence is of opinion that it was not a proper mode and was not well done, and that that accounts for the accident. No other account has been suggested. I asked the defender's counsel whether he had any theory to suggest, and he had none, and no one else has any other suggestion to offer. The defender's case was that the fall of the stair was due to some occult cause which he could not explain, and that if we would affirm that occult cause we could not impute blame to him. I agree with the Sheriff that the landlord did not do his duty by going to

a slater, and describing the state of the stair, and being satisfied with the man's recommendations as to the repairs necessary to make it safe, and that, doing so, he did it on his own responsibility. The action is founded on his failure to make it safe, and I agree with the Sheriff that the failure is established, and consequently his responsibility for the accident.

LORD CRAIGHILL—I am of the same opinion. The pursuer seeks here to recover a sum of money in name of damages for injuries sustained by him by the fall of a stair in a tenement belonging to the defender while he was ascending it with a sack of coals. The question is, is there anything in the facts of the case to support his claim? I think there is. The defender came into possession of these premises about six years before the date of the accident, and one of the first things to which his attention was called was the safety of the stair leading to the successive flats of the tenement. It was clear that things could not remain in the state in which they were, and what he set about was to do that which was necessary to put the stair in a condition of safety to those using it. The steps were much worn. The defender did not apply for advice to anyone skilled in the making or repairing of stairs, but employed a slater to make the repairs by indenting every step of the stair and patching them with Caithness stone. He did not inquire whether the indentation of all the steps would endanger the safety of the stair, but ordered it to be done in that way. Now, it is quite true that such work may be done—and be done efficiently—by a slater, but it is equally true that it is not the usual work of a slater but of a mason. I think it is proved that the operation of piecing a stair of this kind, which was a hanging-stair of great breadth, is attended with greater risk than it would be on stairs of a different description, and I think it is proved further that the steps of this stair were weakened by the indentations. I therefore think the defender took on himself the risk of his repairs proving dangerous to the safety of the stair. He can suggest no reason why the stair gave way as it did, and none has been suggested except that of the pursuer—that it was owing to the weakening of the steps by the indentations—and I think this is shown to be the only tenable explanation by the fact that the greater number of steps were broken off at the edge. On the whole matter I agree with your Lordship that the defender having repaired the stair in this way at his own risk is responsible for the injuries caused to the pursuer by its having given way.

LORD RUTHERFURD CLARK—I think this is a very narrow case indeed, but on the whole I am not disposed to differ from the judgment your Lordships have pronounced.

The **LORD JUSTICE-CLERK** was absent.

The Court pronounced this interlocutor:—

“The Lords . . . Find that the pursuer sustained the injuries libelled by the fall of a stair forming part of the subjects in Maxwell Street, Glasgow, belonging to the defender, and acquired by him five or six years ago: Find that at that time the said stair was in an inferior condition, and that three years ago complaints of its insecurity were

made to the defender: Find that the defender, without consulting anyone skilled in building operations, thereupon instructed a slater and plasterer to cut out a portion of each of the steps of the stair worn by use, and replace it with Caithness flagstone, and that this was done accordingly, but imperfectly, inasmuch as the new stones inserted as aforesaid from time to time became loose and required to be replaced: Find that by the said operation the stair was materially weakened, and rendered unfit to bear the strain of ordinary use, and that it gave way while the pursuer was ascending it with a load of moderate weight: Find in law that the defender failed in the duty incumbent on him as proprietor of the said subjects by dealing with the stair as aforesaid whereby it was weakened, and by so doing without previously ascertaining from a skilled person that the course proposed could be followed with safety: Therefore dismiss the appeal, affirm the judgment of the Sheriff-Substitute and of the Sheriff appealed against, of new find the defender liable in damages to the pursuer, and assess the same at one hundred and fifty pounds sterling, and ordain the defender to make payment to the pursuer of that sum,”
&c.

Counsel for Pursuer (Respondent)—R. Johnstone—Shaw. Agent—John Macpherson, W.S.

Counsel for Defender (Appellant)—Mackintosh—G. Wardlaw Burnet. Agents—Cumming & Duff, S.S.C.

Wednesday, November 19.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

BIRRELL v. TAYLOR.

Process—Competency—Value of Cause—Act 50 Geo. III. cap. 112, sec. 28—Community of Interest.

An underwriter of a policy of insurance on a ship sued the owner for repetition of the sum of £38, 8s. 9d. alleged to have been overpaid in respect of damage sustained by the ship. The sum sued for was made up of £23, 1s. 3d. said to be due to the pursuer, his own right, and of the claims of two other underwriters under the same policy, each of whom had assigned his interest to the pursuer in consideration of the sum of £7, 13s. 9d. *Held* that as the assignments were for value, the sum sued for exceeded £25, and that the action was competent in the Court of Session.

Question—Whether if the assignments had been gratuitous the claims were sufficiently connected to entitle the pursuer to sue?

This was an action at the instance of Walter Birrell, underwriter, Glasgow, for himself, and as assignee of James A. Birrell and John Hardie, underwriters there, against Robert Taylor, ship-owner, Dundee, for the sum of £38, 8s. 9d.

On 4th December 1879, the defender, through his brokers, Messrs Joseph Gibson & Company,