

Thursday, January 28.

FIRST DIVISION.

[Paisley Sheriff Court.]

M'INULTY v. PRIMROSE.

Reparation—Master and Servant—Negligence—Defective Stair Erected by Another Contractor.

In an action of damages against an employer by a servant who in the course of his work on some unfinished premises, and while going up a stair built by another contractor, sustained injuries owing to a defect in one of the steps—held that the employer having no reason to doubt the sufficiency of the stairs for the purpose for which they were built, had no duty of personal examination, and was accordingly not liable.

Samuel M'Inulty, a labourer, raised an action against George Primrose, contractor, Paisley, at common law and under the Employers Liability Act, concluding alternatively for £150, and for £100, as damages in respect of injuries sustained by him while in the employment of the defender. The pursuer was employed on the 11th March 1896 in working at the building of a tenement of dwelling-houses at Gladstone Terrace, Paisley. While carrying a hodful of bricks from the street to one of the upper stories, the bottom step of the stair broke, causing him to fall to the ground, by which he sustained injuries.

The pursuer averred—“(Cond. 3) The said accident was caused by the defective step, which was made of granolithic, and insufficient for the purpose for which it was used, in respect of its not being of sufficient thickness, was cracked or split, and unsupported in the centre by any ‘butt’ in accordance with the usual custom or practice in dealing with the bottom step of such stairs, the earth being hollowed out underneath the step which rested merely on the sides of the brick partitions. Since the date of the said accident the broken step has been replaced by a step resting in the centre on a 14-inch ‘butt’ built of brick. The said defect arose from, and was not discovered or remedied owing to the negligence of the defender, who, while taking personal charge, in no way inspected or examined as to the condition or sufficiency of the ways over which his workmen were required to travel, and had no proper person in a position of superintendence entrusted with that duty. It is unknown to the pursuer who supplied the step in question, or what the defender's contract consisted of, but explained that defender was engaged in the erection of the stairs; that he also built the brick partitions on which the steps rested, and which partitions gave way by reason of their being of insufficient thickness and contributed to the accident to the pursuer, and that it was also the defender's duty to build the ‘butt’ or support herein referred

to. Explained further, that after the accident defender supported the stairs, which were newly erected, with props, and that the stairs had not been in use.”

The defender averred—“(Ans. 3) Explained that the step in question was part of the permanent stair erected for the purpose of giving access to the upper storeys of the building, and that it was not made nor built in by the defender nor under his supervision. The erection of the stair was not part of his contract. It was supplied and built in by Mr Hugh Barr, mason, who was executing the mason work of the building. Explained further that this stair was the access provided by the said Hugh Barr to the upper storeys of the building during construction for all the different classes of tradesmen working at it; that it had been in use as such for several days prior to the accident, and that the step which broke was apparently sound, and in all respects similar to the other steps of the stair.”

He pleaded—“(2) The pursuer's alleged injuries not having been caused by any fault or negligence of the defender or of anyone for whom he is responsible, the defenders should be assoilzied from the conclusions of the action with expenses.”

The Sheriff-Substitute (COWAN) allowed parties a proof.

On 7th July the Sheriff-Substitute found in favour of the pursuer and assessed the damages at £50.

The defender appealed to the Sheriff (CHEYNE), who on 9th September found “(3) that the said stair was erected two days before the accident by the proprietor of the building, who is a builder to trade, and was doing the mason work himself: Finds (4) that though the defender made no examination of the said stair before permitting his servants to use it, no negligence has been established against him inferring liability for the consequences of the accident, he being entitled to rely on the fact that the stair was constructed by a competent tradesman, and was intended for the use not only of the workmen connected with the building operations, but also of the future occupants of the building, and it not being proved that an examination would have disclosed any defect in the condition of the step which gave way: Therefore assoilzies the defender from the conclusions of the action,” &c.

Note.—“While I am very sorry for the pursuer, and while I think that the defender and Mr Barr might very well have joined in offering him some compensation for his injuries, I cannot after full consideration see my way to decide in his favour. Whether the case be dealt with at common law or as laid upon the statute, the foundation of liability is negligence, and in my judgment the proof has failed to bring home any negligence to the defender. It rather occurs to me that the giving way of the step was due to a latent defect in it, but without expressing a decided opinion upon that point, which may possibly come before me in another form, I think it sufficient to remark that, the stair having been con-

structed by a competent tradesman, I cannot hold that the defender was bound to examine it minutely before allowing his workmen to use it, or look upon the failure to examine it as an act of negligence, more especially seeing it is not proved to my satisfaction that an examination would have disclosed any defect or flaw in it. The case indeed appears to me to be governed by the same considerations which influenced the decision in the case of *Kettlewell v. Paterson & Company*, November 25, 1886, 25 S.L.R. 95.

"I may add that while it is of course possible that the accident might not have happened had the step which gave way been supported by a centre butt, the proof does not in my opinion warrant a finding that such a support was required, assuming the step to be in itself free from defect, or that its absence was a defect which ought to have attracted the attention of the defender."

The pursuer appealed, and argued—The accident was of such an extraordinary nature that the *onus* lay upon the defender to explain it and to justify himself—*Scott v. London Dock Company*, February 7, 1865, 34 L.J., Ex. 220; *Walker v. Olsen*, June 15, 1882, 9 R. 946; *Macaulay v. Buist & Company*, December 9, 1846, 9 D. 245. In default of such explanation, the mere fact that the accident had occurred placed liability upon the defender. The pursuer had used this means of access under the defender's orders within two days of the stairs having been built, and that threw on the defender the duty of examination to see whether the stairs were sufficient, and of showing that by no reasonable care he could have detected the danger—*Fraser v. Fraser*, June 6, 1882, 9 R. 986. The case of *Campbell v. A. & O. Morrison*, December 10, 1891, 19 R. 232, showed that the defender would have had no recourse against the actual builder of the steps, and accordingly he must have a title to proceed against the defender, who was responsible to his servant if there was fault on the part of anyone.

Argued for the respondent—He had nothing to do with building the stair except in putting up the brickwork supports, which had stood fast and in no way caused the accident. The fact that the accident was unforeseen and of an extraordinary nature was really contrary to the idea of liability on the part of the defender. The limitation of the rule in *Macaulay, Walker, and Fraser (ante)* was fixed in the case of *Macfarlane v. Thompson*, December 6, 1894, 12 R. 232; the true rule being that where it was proved there was some defect in plant or machinery, it was unnecessary to show the precise nature of that defect, the *onus* thus being thrown upon the master to show that the defect was one for which he was not responsible. Here the defender having been called in to work on another's premises, was entitled to hold, without special examination, that work done by a competent tradesman was sufficient for the purpose for which it was intended, *i.e.*, that the stair was strong enough to give access to the

upper stories—*Nelson v. Scott, Croall, & Son*, January 30, 1890, 19 R. 425; *Robinson v. John Watson*, November 30, 1892, 20 R. 144; *Simpson v. Paton*, March 12, 1896, 23 R. 590; *M'Lachlan v. s.s. "Pevevil" Company, Limited*, May 27, 1896, 23 R. 753.

At advising—

LORD PRESIDENT—Responsibility is sought here to be attached to the respondent on two grounds.

First, it is said that this step, which in the event broke down, was weak on account of deficient support, and it is sought to connect the respondent with it. He did not supply the step, but was ordered by a builder to perform certain brick-work for its support.

Now, if the pursuer is to make anything of this, it is incumbent upon him to show that the respondent had the option to determine what amount of brick-work was necessary to support a given staircase. But his case is deficient in this part of it. As I read the evidence, he was not instructed to consider as to what support was needed, nor informed of the strength or the weight of the step which was to be supported. He was merely bidden to build certain brick-work which his employer considered adequate to support the step. This seems a mere incident in the case, and does not make the respondent responsible for the staircase as a whole. It is not very well made out what was the reason of the breakdown, although I should be disposed to think, as did the Sheriff, that it was due to some internal defect in the substance of the step itself. But inasmuch as it was the stair that gave way, and not the brick-work, which stood till it was pulled down by the fall of the step, there can be no question of liability on that head.

But turning to the second and more important question, I deal with it upon the assumption which I have now made, that the respondent was not in fault in the construction of the fabric. What was his duty in allowing the men to use the stair as an access to the upper storey? We could not support the pursuer without affirming so wide a proposition as to lead to unforeseen and ludicrous consequences. As I read the evidence, there was work to be done upon the upper part of the building, and the staircase was completed. It is clearly proved that all which was ever to be done to build the staircase had been done when the men used it.

Accordingly, the case is substantially in the same position as it would be where a contractor had agreed to do certain work in the upper part of a dwelling-house. Could it be said that he was to go and test the staircase which had been used by the inhabitants of the house? Good sense revolts against the idea, and yet upon the facts in question it appears that the construction of the staircase was complete. It is a mere circumstance perhaps, but it had been already used by workmen carrying loads up it; it is enough that the staircase of the house had been built, and that it was the stair of a dwelling-house, and

that he had no reason to suspect its stability. In these circumstances I cannot lay it down that a prudent man would either test the staircase, or resort to the absurd superfluity of building a scaffolding for gaining access to the upper storey of a house which had already a staircase. I am for adhering to the Sheriff's interlocutor.

LORD ADAM—I am of the same opinion. The defender was under a contract to execute the brick-work, and the pursuer was employed by him to carry out that work, and in the course of the work he met with an accident resulting in injuries, in consequence of which he is raising the present action. I agree that it has not been proved that the defender had anything to do with that part of the brick-work erected to support the step after the accident happened, or that he was responsible for its absence under the broken step. Accordingly, if the alleged injury was caused by a defect in the broken step, the defender has not been connected with such defect, and the accident was not due to his direct negligence.

But what happened was, that after the brick-work had been finished, and the staircase had been completed, forming a permanent access to the upper stories of the house, the defender sent the pursuer to execute some work in the upper stories, and while he was using the staircase in the ordinary course it so happened that a step broke. Now, there was no fault on the part of the defender unless it can be shown that he ought not to have allowed his workmen to go on the stair before he had personally examined it. There is no rule of law of that sort upon which the pursuer can rely. In a case like this one tradesman is entitled to assume that material supplied by another tradesman is sufficient for the purpose for which it is supplied. There may be exceptions to this rule; it is difficult to figure circumstances which would give rise to them; but this case falls under the general rule that there is no duty of personal inspection.

LORD M'LAREN—I think that there is no reason to doubt the generality of the rule that an employer of labour engaging men to work for him on property which he hires or purchases for the purposes of his business, is responsible at common law for the sufficiency of what are termed in the statute the "ways, works, machinery, or plant." The liability is a common law one, but the words are specifically used for the first time in the statute. That statute intended only to displace the objection that might be raised of "common employment," and thus to give to the workman the same remedy as he would have had if he had not been employed at the time of meeting with an accident. Now, a great part of the trade of this country is done by employers in property which is not their own, nor subject to their control. That is very commonly the case in the building trade, where work is constantly done by employers on the property of others.

There is no doubt that as to the sufficiency of scaffolding, ropes, or other plant which he brings to the ground, an employer is just as responsible as when he is carrying on work on his own property. It is only fair that the rule should be so, for as he purchases scaffolding and ropes, it is his duty either to get them from a dealer who will give him reliable materials, or to subject them to the usual tests for ascertaining their strength and sufficiency. But when it is a case of the liability of an employer for injury sustained by a workman arising from the insufficiency of appliances on the ground, whether part of the original structure existing there, or the work of an independent contractor engaged in contract work, the responsibility must be defined by some working test or rule which will not break down when we come to apply it to the business of life. In the absence of any special rule suggested by experience or by the peculiarities of the work, it seems to me that we should apply the general criterion as to responsibility for fault which is found in the Roman law and in the works of our institutional writers, viz., whether the employer has exercised that measure of skill and care which a prudent man would show in the management of his own affairs. I cannot think that if in a case of this kind the defender had probable grounds for believing in the sufficiency of the staircase for his own purposes when going about the premises at which he was at work, he would be compelled to use greater precautions for the safety of his employees. The defender, when examined on this point, stated explicitly that as the step in question was part of the permanent stair erected for giving access to the upper stories, he naturally supposed that it would support the burdens put upon it. That being the defender's explanation, the question is, has he discharged the responsibility which the law has laid upon him? Was he entitled as a prudent man to trust to the sufficiency of the stair? In my judgment he was, and to make him responsible it must be shown that something brought prominently before him the question of the sufficiency of the stair, that he had grounds for believing that it was or might be unsafe, and that he had allowed his workmen to take the risk without warning them. I agree with the Lord President that this case is the same in all respects as if the work were being done on finished premises, and accordingly I see no grounds for holding the defender responsible.

LORD KINNEAR concurred.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for the Pursuer—Baxter—Hunter. Agent—John Baird, Solicitor.

Counsel for the Defender—Sym. Agent—Walter C. Christie, W.S.