Friday, January 14.

SECOND DIVISION.

[Sheriff of Aberdeen, &c.

ANGUS *v.* FINDLAY.

Reparation—Child—Public Place.

On some waste ground in a town a tradesman had erected a shed which was secured by a heavy door. The place was one to which the public resorted, and where children played. The door of the shed was not fastened in such a mode that it would resist the pressure and interference which might be expected in such a place, and in consequence of its being tampered with by some children it fell upon a child and injured her. *Held* that the owner of the shed was responsible for the accident, because the door ought in such circumstances to have been fastened so as to resist such interference.

In this action the pursuer Joseph Findlay, Wellington Road, Aberdeen, as tutor and administrator-in-law for his infant daughter Rachael Findlay, sued the defender George Angus, merchant and fish dealer, Aberdeen, for damages (laid at £100), in respect of an injury to Rachael Findlay through the defender's alleged fault. The defender had certain sheds built under the arches of a railway viaduct in Aberdeen, which crossed certain reclaimed land belonging to the Harbour Commissioners. These sheds were used for storing peats. The front of one of these sheds was fitted with four doors, three of which were 8 feet 10 inches long by 6 feet 3 inches high, and were composed of louvre boards. These doors were fixed in a frame, and the boards could be turned by a pivot like the spans of a venetian blind; the doors were not hinged, but had to be lifted out of the doorway when admittance for carts, &c., was required. The doors were fastened at the top by an iron drop-bar or pin fastened to the run-plate above. This drop-bar could, when necessary, be moved into a horizontal position, so that the door might be moved out and opened. The ground in front of this shed was not enclosed, and the public resorted to it, and children played there. On 4th August 1885 the pursuer's daughter Rachael was playing with some of the children in front of this shed. While the the children were playing the door fell upon Rachael Findlay, and her thigh was broken.

The pursuer alleged that the proper placing of the drop-bar had been neglected on the occasion in question, or at all events that it was an insufficient fastening for public safety. He maintained that the accident was due to the fault of the defender in these respects, or one of them.

The defender averred that the children in their playing were trying to get into the shed; that in their endeavouring to do so some of them had climbed up the louvre boards, and lifted the iron bar; that thus the door fell, and Rachael Findlay did not escape in time. He also averred that the drop-bar was perfectly sufficient for keeping the door closed, and by its distance from the ground was perfectly safe; that on the night in question the door was properly closed and the drop-bar in its place, and but for the improper interference of the children the accident would not have occurred.

The proof showed the facts already stated, and also that boys were seen climbing up the louvre boards and reaching at the top bar; that the top of the door was slightly bulging out. Two workmen deponed that they had put the door in its place on the afternoon of the accident, and that the drop-bar was in its place securing the door. The top of the door was about six inches thick, and if the door was pulled out at the top the drop-bar would either rest on it or fall behind the door. It also appeared that children were in the habit of playing there; that the children who were with Rachel Finlay were playing at "shoppies" that night, and going up to the door to gather peat dust to play with; that the place was frequented by the public and children, and that the owner of the peat-sheds had no right of property in the ground on which his sheds were built.

The Sheriff-Substitute (Brown) on 2d April found that the pursuer had failed to prove that his daughter sustained her injuiries through the fault of the defender, and therefore assoilzied him.

"*Note.*—[*After expressing the opinion that it was proved that the children playing at the spot interfered with the door, which had been fastened in the usual way*]—I do not see that there is any room for doubt that it was the action of the boys that proximately caused the door to fall. The pursuer, however, contends that the fastening of the door was an insufficient one, and was not a reasonable precaution for the safety of the public in a place where, if they had no right to be, they were at least tolerated both by the defender and the police authorities. The evidence in my opinion does not sustain the suggestion that the girl and her companions were, in the proper sense of the word, trespassers, for there is nothing to show that access to the open space on the reclaimed ground upon which the defender's premises are erected was restricted. But, on the other hand, I think it cannot be maintained that she met her injuries in a place which can at all accurately be described as a thoroughfare even for foot-passengers, and it seems to me that that is a circumstance to be taken into account in judging of the precautions which the defender used in securing his property so as to prevent accidents. The evidence is conflicting upon the question of the sufficiency of the fastening of the door. The opinions expressed on both sides are entitled to much weight, but while I should be disposed to hold that the balance of testimony is against the security of the door as being a mechanical contrivance absolutely perfect, I am, on the other hand, of opinion that the weight of the evidence proves that it was perfectly sufficient, if not tampered with, for at least the safety of the public; that some of the modes of security suggested by the pursuer are either impracticable or would seriously impede the defender's business, and that there was nothing unusual in the fastening of the door. I myself attach no value to the speculative risks so earnestly pressed by the pursuer said to be involved in the suspension of such a heavy door on the resistance of an inadequate screw. It is time enough to deal with that case when the failure of such a security is the point actually in issue in a *lis pendens*. But

it does appear to me to be very pertinent to consider in this question of sufficient fastening, first, that it was a precaution for safety, adapted to the defender's business carried on in a locality which was at least not a resort for the public; and secondly, that the security of the door was so far removed from the ordinary access of the public that interference with it would be properly described not only as deliberate but an act of sheer wantonness. In many respects the case bears a strong resemblance to that of *Balfour* v. *Baird*, December 5, 1857, 20 D. 238, and looking to the grounds of judgment, especially those adopted by Lord Young in *M'Gregor* v. *Ross*, March 2, 1883, 10 R. 725, I feel myself unable to arrive at any other result than one adverse to the pursuer's claim. Contributory negligence on the part of the injured girl is not pleaded, the case of the pursuer being that there was no fault of any kind on the part of the defender, and that the pursuer had herself to blame, in which is necessarily included the fault of her companions. In these circumstances I do not feel myself justified in finding contributory negligence, but the facts speak for themselves."

The pursuer appealed to the Sheriff (GUTHRIE SMITH), who recalled the Sheriff-Substitute's judgment and found that the injury sustained was attributable to the faulty condition of the door, and that defender was liable in damages. He assessed the damages at £50 sterling, and decerned for that sum.

"*Note.*—The defender is sued as owner and occupant of a lean-to wooden building standing against the railway viaduct on the reclaimed land. It is fitted with doors 8 feet 10 inches by 6 feet 3 inches, which do not move on a hinge but are lifted bodily out, and when replaced are held by a pin at the top 3¾ inches long, and turning on a screw driven into the run-plate above. I do not consider that any fastening at all. The waste ground is known to be the favourite resort of children, and no objection has ever been taken to there going and playing there. What happened is just what might have been expected. From about the building which was used as a peat-shed the children were gathering sawdust and peat dross, and whether some of them had been interfering with the door or not, the pin shifted from the vertical, and the door fell on the pursuer's daughter and fractured her thigh. I have no difficulty in holding the defender answerable for the occurrence. The owner or occupier of a building adjoining a public street or highway, or as in this case a place of public resort, and known to be so, is under a legal obligation to take reasonable care that it shall be so framed and maintained as to do no injury to passers-by. He is therefore answerable for the fall of a signboard unsecurely fastened (Moak's Torts, 247), the fall of a lamp suspended over a door in consequence of inherent decay—*Tarry* v. *Ashton*, L.R., 1 Q.B.D., or the fall of a broken-down door in one flat caused by the swinging against it of a bale of goods which was being lowered from an upper flat—*Beveridge* v. *Kinnear & Co.*, Dec. 23, 1883, 11 R. 387. In this last case Lord Young said the defenders were bound 'to have the door in such a condition as to resist all the ordinary pressure to which it was likely to be exposed,'—a principle which entirely disposes of the defender's plea that but for the meddlesomeness of the children, and if the door had been let alone, the accident would not have happened. He knew or ought to have known that children were in the habit of playing about the premises, and he should have provided against their giving way to their natural instincts by making his door strong enough to be proof against every form of juvenile assault. What may be contributory negligence in a grown-up person is excusable as mere thoughtlessness on the part of a child, and a man ill performs his duties to the public who contents himself with so securing a heavy door like this as to be safe 'if let alone.' The case of *Balfour* v. *Baird* which was relied on by the defender, and referred to by the Sheriff-Substitute, was the case of an accident which befell some boys when clambering over a pile of battens. The battens being properly piled in a place where the boys had no right to be, the owner of the timber was rightly found to be free from blame, but the decision has no bearing on the present question."

The defender appealed to the Court of Session, and argued — The door was quite securely fastened by the drop-bar. So long as that was left undisturbed the door would not fall. It was proved that the child injured and her companions were climbing up on the door, and it was almost certain that some of them had pushed aside the drop-bar, the raising of which caused the accident. The case nearest to this was *M'Gregor* v. *Ross and Marshall*, March 2, 1883, 10 R. 725. The principle acted on in that case was, if the source of danger was made reasonably safe against accidents, if injury resulted through malicious mischief of a third party the owners were not liable. The case of *Beveridge* v. *Kinnear & Company*, Dec. 21, 1883, 11 R. 387, was quite different, as in that case the accident happened while the door which fell was being exposed to the ordinary usage which might have been expected in the course of business. Supposing the door was not sufficiently protected, the pursuer's child had been guilty of contributory negligence. It was proved that she saw her danger and appreciated it, which was the test as to whether there was contributory negligence or not. In Scotland a child of six years old had been found guilty of contributory negligence — *Grant* v. *Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258.

The respondent argued—The chance of the door being interfered with was a serious matter of interest in the question of the sufficiency of the fastening of the door. This shed was in a public place where children came to play, and the mere fact that the louvre boards of the door could be turned so as to form a ladder was a great temptation to children to climb up and turn round the drop bar, which they could easily do. The proprietor of the shed ought to have foreseen this circumstance and provided against it. The preponderance of the evidence was that the drop-bar was not a sufficient fastening.

Authorities — *Campbell* v. *Ord and Madison*, November 5, 1873, 1 R. 149; *M'Feat* v. *Rankine, &c.*, June 17, 1879, 6 R. 1043; *Clark* v. *Chambers*, April 15, 1878, L.R., 3 Q.B.D. 327.

At advising—

LORD JUSTICE-CLERK—These cases are always distressing; this case is certainly a narrow one; and if the Sheriff-Principal had decided the case

otherwise I do not think that I would have been inclined to alter it, but as the case stands the tendency of my opinion is with the judgment of the Sheriff and against the appellant. The case would have been different if the accident had happened upon private property. But here the owner puts his building in a place where he knows that the public are admitted by the same kind of tolerance that is extended to himself, and that there was a chance of tampering with the door, and the defender was in these circumstances bound to take that into consideration when arranging as to the kind of fastening to be used. The doors are heavy and the fastening bad. One of the witnesses said that the fastening was safe enough if left alone, but I think that the fastening was not safe, if tampered with in a way that might have been expected. The defender must have known that if the fastening was tampered with the result might happen which did unfortunately happen. I think that the whole matter turns upon the fact that the ground upon which the building was placed was public or *quasi* public, and not private property. Many dangerous things are safe if left to themselves, such as spring-guns and dynamite, but then the question is, are these things safe in the position they occupy. Upon the whole matter I am of opinion that the judgment of the Sheriff is right.

Lord Young—That is my opinion also. I regret that this trifling case did not cease in the Sheriff Court. I agree with your Lordship's judgment, which I think is substantially this, that the door was insufficient with respect to the fastening, having regard to the risks to which it was exposed. The place where this shed was was public ground, and it was explained that the magistrates tolerate sheds there as well as allow the children to play. Well, the construction of the shed and the fastening of the door ought to be enough for the risks to which it is exposed. The test, on the whole, is whether the defender has done his duty by others, and here I think he has not.

Lord Craighill—This is a narrow case, but in the end I have come to the same conclusion as your Lordships. Fault must be established against the defender if the pursuer is to prevail, and the question is, did he do all in his power to prevent a probable accident? Children were in the habit of playing at that place, and there was a temptation to aspiring youth in the construction of the door itself. If the defender was bound to take that into consideration I do not think he did so, and therefore he did not do all that was necessary.

Lord Rutherfurd Clark—I agree

The Court pronounced this interlocutor:—

"Find (1) that the defender's building mentioned in the record is placed on ground not belonging to him, and in a locality open to the public, and to which the public resort; (2) that having regard to the risks to which it was thus exposed, the fastening of the door of the said building was insufficient: Find in law that in these circumstances the defender is responsible for the injuries sustained by the pursuer's daughter, and is liable in damages accordingly: Therefore dismiss the appeal and affirm the judgment of the Sheriff appealed against: Of new assess the damages at fifty pounds sterling, and ordain the defender to make payment of that sum to the pursuer: Find the pursuer entitled to expenses in this Court."

Counsel for Pursuer—Jameson—G. W. Burnet. Agents—Henry & Scott, S.S.C.

Counsel for Defender—Gillespie. Agents—Macpherson & Mackay, W.S.

Friday, January 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GRACIE *v.* THE PULSOMETER ENGINEERING COMPANY (LIMITED).

Lease—Landlord and Tenant—Hypothec—Articles in Premises for Sale on Commission.

Held that the landlord's hypothec did not extend to articles which were in the tenant's possession only as samples of goods belonging to a person for whom he acted as agent, and from whom he received assistance with his rent in respect of the accommodation they required.

Gilbert Bogle & Company rented an office at No. 6 Waterloo Street, Glasgow, from Robert Gracie, No. 11 Bothwell Street, factor for and as representing the proprietors of the subjects, for three years from the term of Whitsunday 1884. Gilbert Bogle & Company described themselves as yachting agents, and had upon their premises certain pulsometers, a kind of steam-pump used on board yachts, made by the Pulsometer Engineering Company (Limited) of London. That company's name was on these steam-pumps. On 7th November 1885 Gracie raised an action of sequestration for rent against Gilbert Bogle & Company, and attached the pulsometer steam-pumps which were upon the premises. The Pulsometer Engineering Company claimed delivery of these pumps, but Gracie refused to give them up on the ground that they were liable to the landlord's hypothec. This process of interdict was then brought against Gracie in the Sheriff Court of Lanarkshire by the Pulsometer Engineering Company to interdict the defender from selling them or otherwise interfering with them.

The Pulsometer Engineering Company pleaded —"The defender having attached and threatened to sell goods belonging to pursuers, and not having any right over same, the latter are entitled to warrant and decree as craved."

The defender pleaded—"(3) The goods sequestrated and claimed by the pursuers being the sole stock and plenishing (excepting a writing-desk) of the premises in question, are subject to the landlord's right of hypothec, and have been lawfully secured under the sequestration action. (4) Even should the pursuers' allegation of ownership be proved, the goods would still, under the circumstances above set forth, be liable to the landlord's right of hypothec."

Interim interdict was granted, and a proof allowed, from which it appeared that Gilbert Bogle