Thursday, October 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'MURRAY *v.* GLASGOW SCHOOL BOARD.

Reparation — Negligence — Property — Precautions for the Safety of the Public — Boy Passing along Public Street Injured by Fall of a Gate belonging to School Board—Relevancy.

Pursuer's pupil son was walking along a public street and passing a school and playground belonging to the defenders, when part of the gate of the playground fell on him and injured him. The pursuer averred "the cause of said half of said gate falling was that at the time some boys were swinging or playing upon it, and in consequence of its defective condition, as after condescended on, the bolt used in its fastening gave way, and said half was wrenched therefrom." Pursuer averred in detail that the gate was defective and dangerous, that its defective condition was known to the defenders, that the defenders were at fault in failing to keep the gate in proper repair, and that their fault was the cause of the accident to the pursuer's son.

Held that the pursuer's averments were irrelevant.

Cormack v. *School Board of Wick and Pulteneytown*, 1889, 16 R. 812, 26 S.L.R. 599, *distinguished.*

John M'Murray, 36 Burnhouse Street, Maryhill, Glasgow, *pursuer*, raised in the Sheriff Court at Glasgow an action of damages against the School Board of Glasgow, *defenders*, for injuries sustained by his pupil son Peter M'Murray.

The pursuer averred—"(Cond. 2) The defenders, the School Board of Glasgow, are the authority constituted under and for the purposes of the Education (Scotland) Act 1872, and subsequent Acts, in and over a certain district of the City and Royal Burgh of Glasgow. They are bound to supply school accommodation within said district, and for this purpose they own, use, and control a large number of schools therein. (Cond. 3) One of said schools is situated in and bounded by Gairbraid Avenue, Burnhouse Street, and Balfour Street, Maryhill, Glasgow. Said school is known as Gairbraid Avenue Public School, and it and the playgrounds attached thereto are owned, used, and controlled by defenders. Said school and said playgrounds are surrounded by walls, surmounted by an iron railing, in which there are several gates, one of them being in Burnhouse Street. (Cond. 4) On Monday, 19th October 1914, pursuer's said pupil child Peter M'Murray was walking along the pavement in Burnhouse Street aforesaid, adjacent to said school, when, as he was passing said gate, which, as after mentioned is in two halves, one of said halves (the north or right-hand one) fell upon him and injured him severely as after mentioned. The cause of said half of said gate falling was that at the time some boys were swinging or playing upon it, and in consequence of its defective condition, as after condescended on, the bolt used in its fastenings gave way, and said half was wrenched therefrom. (Cond. 5) Said gate is of iron, of ornamental design, and made of two halves, each half weighing about one-and-a-half hundredweights. Said gate was on said date fastened and supported and hung by the upright main standard of each half being caught at a height of 5 feet 3 inches or thereby from the ground by iron bands which encircled said standards, and were then bolted through, to, or on to iron dooks let into stone pillars at the sides of said gate, and by the said standards being socketed into a metal receptacle countersunk at the sides of said gate into the step. The hole in the dook let into the northmost or right-hand one of said pillars, into which hole the bolt was intended to grip, was oblong in shape, and measured ½-inch long by ⅜ of an inch deep, while said bolt was ⅜ of an inch in diameter. The bolt and the part of the gate fastened to it had thus ⅛ of an inch free play, instead of being, as it ought to have been, tight and firm, and were not therefore properly fitted, and were defective. The other half of said gate had one-half of free play at its bolt, instead of being tight and firm, and was thus defective. This half of said gate could be moved to and from its pillar to the extent of ½-inch or thereby. The fastenings of both halves of said gate, including said bolts, were old and much corroded and worn. At some time previous to the said accident to pursuer's said child there had been a cast-iron stand or block let into said step to catch the gate and so prevent it being pushed outwards beyond its proper line. This stand or block had for some considerable time prior to said accident been broken off to within a short distance of the step. As a result it did not catch the gate, and was thus insufficient and unfit for the purpose intended. Through the want of a sufficieut and fit stop both parts of said gate could be swung both inwards and outwards. (Cond. 6) Said accident to and consequent injuring of pursuer's said pupil child were due to the fault of the defenders or of those for whom they are responsible. It was and is the duty of the defenders to have and keep their property, including said gate and its fastenings, in a safe and sufficient and proper state of repair. This they failed to do. Said gate was defective and dangerous, as before condescended on, in respect that the bolts were not properly fitted and were old, corroded, and worn, and the want of a proper and efficient stop. The defective and dangerous condition of said gate, and others, was known to defenders, or to those entrusted by them with the duty of seeing that the property of the defenders, and particularly said gate fastenings and stop, were kept in a proper and safe condition, or at least the condition of said gate fastenings and stop could easily have been discoverable by defenders or said persons had they exercised reasonable inspection. In allowing

said gate fastenings and stop to be and to remain in the foresaid dangerous and defective condition, defenders were at fault, and such fault was the cause of the accident to pursuer's said pupil child."

The defenders pleaded, *inter alia* — "(1) The action is irrelevant."

On 1st June 1915 the Sheriff-Substitute (FYFE) repelled the defenders' first plea and allowed a proof.

The cause having, on the motion of the pursuer, been remitted to the Court of Session for jury trial, and an issue having been lodged, the defenders moved that the action be dismissed as irrelevant.

The defenders argued—The pursuer's averments were irrelevant, as they disclosed that the gate was defective not as a gate but as a swing. The defenders had no duty towards the pursuer to ensure that the gate was safe when misused as a swing—*Johnstone* v. *James Stewart & Sons*, 1897, 25 R. 103, 35 S.L.R. 75. *Cormack* v. *School Board of Wick and Pulteneytoun*, 1889, 16 R. 812, 26 S.L.R. 599, was distinguishable, as there the injured boy attended the defenders' school, and was injured by swinging on the gate during school hours, and the practice of swinging on the gate was known to the defenders.

The pursuer argued—The present case was ruled by *Cormack* v. *School Board of Wick and Pulteneytown* (*cit.*). Further, the pursuer had relevantly averred that the gate was defective as a gate, and that (cond. 5) it was liable to fall at any time. The defenders also must be held to have known the ways of school children, and it was their duty to keep their premises safe under the usage to which children would subject them —*Findlay* v. *Angus*, 1887, 14 R. 312, 24 S.L.R. 237; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, 46 S.L.R. 1027.

LORD PRESIDENT—We are bound at this stage in this case to assume that the offending gate had the many defects which are set out in minute detail in the fifth article of the condescendence. But I do not gather from that article that if the gate had been put to the ordinary and proper use to which a gate is, as we know, put it would have been a source of danger to any human being. At all events it is not said that it would. But the pursuer quite frankly alleges that the immediate cause of the accident which befell his child was that one-half of this gate tumbled over in consequence of other boys swinging upon it. It is not said that these other boys were school children. It is not said that the accident happened during school hours. It is not even suggested that the accident would have happened if the boys had not been swinging upon the gate. Accordingly what we are asked to say is that it is incumbent upon the School Board to provide gates which are not only suitable for the ordinary purposes to which gates are put, but also are suitable as swings for passing boys. I decline to make any such assumption.

The case would have been different, I freely allow, if there had been an averment to the effect that the gate was commonly used by the children as a swing, and that this was well known to the School Board or their servants. In that case I should have held—reluctantly I admit—that the case of *Cormack* was in point and that we ought to follow it. But I observe that the case of *Cormack* differs materially from the present in this, that, as I gather, the defenders there allowed the children to use the gate as a swing, and that they had control of the boys during school hours, and were under an obligation to see to the sufficiency of their gate, from which I gather that it was school children during school hours who, to the knowledge of the defenders, swung upon the gate. If that were so here, then perhaps this action would be relevant; but in the circumstances I have figured I am clearly of opinion that this action is irrelevant, and that we ought to disapprove of the issue and dismiss the action.

LORD MACKENZIE—I concur.

LORD CULLEN — I also concur. The defenders are not liable *ex dominio*, and I am unable to find on the record any averments relevant to infer liability on their part in respect of the misuse of their gate which is alleged to have taken place.

LORD JOHNSTON was absent.

LORD SKERRINGTON was presiding at a Circuit Court of Justiciary in Glasgow.

The Court recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

Counsel for Pursuer—Sandeman, K.C. — Duffes. Agent—James G. Bryson, Solicitor.

Counsel for Defenders — Horne, K.C. — Wark. Agents—Laing & Motherwell, W.S.

Thursday, October 28.

FIRST DIVISION.

[Lord Dewar, Ordinary.

M'LAREN'S TRUSTEE *v.* ARGYLLS LIMITED.

Sale—Payment—Cheque—Hire Purchase—Option to Purchase—Passing of Property —Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 17 *and* 18.

A and B entered into an agreement for the purchase of a motor car on the hire-purchase system. A agreed to pay £100 on delivery of the car, and for the hire of the car £612, 10s. within six weeks of the date of delivery. By the agreement A had the option to purchase the car at any time within the six weeks by payment of the foresaid sum of £712, 10s, but until the purchase was effected the car was to remain the property of B. A paid two sums of £100 each, and gave B a cheque for the remainder of the price. The cheque was dishonoured.

Held (1) that on the construction of the agreement the property in the car did not pass until the price was paid,