Friday, June 21.

SECOND DIVISION.

[Sheriff of Caithness, &c.

CORMACK *v.* THE SCHOOL BOARD OF THE BURGH OF WICK AND PULTENEYTOWN.

Reparation—Personal Injury—Boy Injured by Fall of Gate—School Board—Fault—Contributory Negligence.

The entrance to the playground of a board school was closed by a heavy iron gate in two halves. The iron stop in the ground upon which the two halves of the gate should have shut was worn, and permitted the gate to open outwards as well as inwards. While some school children were swinging on one half of the gate, it swung violently outwards, was wrenched from its hinges, and fell upon and injured a schoolboy aged seven years. There was a conflict of evidence as to whether or not he was swinging on the gate at the time of the accident.

In an action for damages by his father against the School Board—*held* that the accident was caused by the want of a proper stop for the gate, that the defenders were to blame for neglecting to renew the stop, and that even if the boy had been swinging upon the gate at the time of the accident, he was not guilty of contributory negligence.

This was an action for damages in the Sheriff Court of Wick by Alexander Cormack, shoemaker in Wick, against the School Board of the Burgh of Wick and Pulteneytown, for injuries sustained by his pupil son Robert Cormack.

It appeared that Cormack, who was seven years of age, was a scholar at Pulteneytown Academy. At the entrance to the playground of this school there was a large iron gate made in two halves, each half weighing about 1½ cwt. Both halves opened inwards, and there was an iron stop in the ground which was intended to prevent them from opening outwards. This stop was worn, and the two halves of the gate could be swung both outwards and inwards. While some school boys were swinging on one of the halves of the gate, it was driven with violence against the pillar supporting it, and wrenched from the hinges. It fell upon Cormack and injured him severely. There was a conflict of evidence as to whether Cormack was swinging on the gate when it fell.

The defenders pleaded that they were not in fault, and that the boy had contributed by his negligence to the accident.

The Sheriff-Substitute (HARPER) found that the accident had occurred by the fault of the defenders, and assessed the damages at £40. The result of the proof before the Sheriff-Substitute appears from the following passage in his note:—"On the evidence of Bruce, Sutherland, and Shepherd—all skilled men—it appears that the gate was not sufficiently hung, that the stop was in a useless condition, and that the accident was caused by the gate swinging outwards, past where a stop would have checked it, and coming against the pillar, which, acting as a fulcrum, so told upon the insufficient hanging as to bring the gate down. The evidence of Mr Brims, too, is of great importance. He is a member of the School Board, and the Board's architect. He does not speak to the gate being insufficiently hung, but he says, 'My opinion is that from the want of the stop the gate was in a dangerous condition;' and further, 'My opinion is that it was the leverage caused by the swinging of the gate against the pillar that broke the hinge.' The evidence of the three Swansons—father and two sons, the sons being examined for the pursuer, and the father for the defenders—is also important, as it was they who last hung the gate before it fell. They admit that the cover was not screwed closely up; and although they all say, as was to be expected, that the gate was in their judgment sufficiently hung, yet the father admits that it would have been better if the bolts had been screwed up tight, as the gate would then have stood more violence."

On appeal the Sheriff (THOMS) recalled the interlocutor of the Sheriff-Substitute, and assoilzied the defenders.

The pursuer appealed and argued—The gate was in a dangerous state, and the defenders were in fault in allowing this. It was no defence that the boy had swung upon it. The defenders should have expected this, and provided against it.

Appellant's authorities—*Beveridge* v. *Kinnear & Company*, December 21, 1883, 11 R. 387; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Lynch* v. *Mudin*, 1841, 1 Adolp. & Ellis, 29; *Marshall* v. *School Board of Ardrossan*, December 10, 1879, 7 R. 359; *Virtue* v. *The Police Commissioners of Alloa*, December 12, 1873, 1 R. 285; *Mersey Dock Trustees* v. *Gibbs and Others*, *Mersey Dock Trustees* v. *Penhallon and Others*, June 5, 1866, 1 L.R. (H. of L.) 93; *Brady* v. *Parker*, June 7, 1887, 14 R. 783; School Board Act; The Education (Scotland) Act 1872, sec. 36 (35 and 36 Vict. cap. 62).

The respondent argued—The School Board could not be responsible in damages for such an accident as this. They were a statutory body appointed for a special purpose. Any damages to the pursuer must be paid out of the rates, and the School Board had only a strictly defined sum out of the rates, which was all applied to strictly defined objects. The gate was safe so long as it was not interfered with. Competent tradesmen had been employed shortly before to put the gate in order, and they had taken what they thought were the proper steps, therefore the School Board were freed from blame—*Fraser* v. *Edinburgh Street Tramway Company*, December 2, 1882, 10 R. 264; *Hughes* v. *Macfie and Others*, December 7, 1863, 2 Hurl. & Colt. 745.

At advising—

LORD JUSTICE-CLERK—In this case the pursuer sues for damages for injuries done to his son, a boy of 7 or 8 years old, who was hurt by the fall of the outer gate of the school-yard. The boy was either close to the gate when it fell, or he was swinging upon it, but in my opinion it does not matter whether he was swinging upon it or not as regards the result of this case.

The gate was certainly not a very satisfactory gate, and the fact appears to be that for sometime previous to the accident there had been no stop to catch the gate when it was pushed out-

wards, but it could be swung round so as to act as a lever having as its fulcrum the corner of the gate-post. Thus when it was swung outwards with the weight of several boys upon it, it had a strong tendency to wrench the bolt out of its fastening. That indeed was what happened. It was said that the fastening of the gate was defective owing to the screws which held it to the gate-post not being sufficiently tightly screwed up, and that may have been so, but the really important fact is that the bolts could be taken off by being wrenched out when the gate swung round, and that was what was done here.

In my opinion the defenders are responsible for this deficiency. If the gate had been kept reasonably safe then the accident would not have happened. It is no answer to say that if the children had not swung upon it the gate was safe. It is so natural for children to swing on a gate that I think the School Board should have anticipated it. I think that we must reverse the Sheriff's judgment, and revert to that of the Sheriff-Substitute.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court pronounced this judgment:—

"Find in fact (1) that the pursuer's son, while a pupil at the Pulteneytown Academy, a school belonging to the defenders, was injured by the falling of part of the gate at the entrance to the school; (2) find that the gate was insufficiently hung, was not provided with a stop, and consequently on the occasion libelled swung outwards against a pillar, thereby breaking the hinge and causing part of the gate to fall on the boy; (3) find he did not by negligence on his part contribute to the accident: Find in law that it was the duty of the defenders to keep the gate in a safe condition, and that they are liable in damages to the pursuer as guardian of his son for the injury done to him: Therefore sustain the appeal: Recal the judgment of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new assess the damages at forty pounds sterling," &c.

Counsel for the Appellant—Low—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Respondents—Comrie Thomson—Watt. Agent—William Gunn, S.S.C.

Wednesday, June 26.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

ROSS *v.* MACKENZIE.

Process—Jury Trial—Abandonment of Action—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 10—*Act of Sederunt*, 16*th Feb.* 1841, *sec.* 46.

The Judicature Act 1825, sec. 10, provides, *inter alia*—". . . The pursuer has it in his power to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." . . .

The Act of Sederunt, 16th February 1841, sec. 46, provides—"If it shall be made to appear to the Court that a party has abandoned his suit, . . . the Court shall proceed therein as in cases in which parties are held as confessed." . . .

The pursuer of an action lodged a minute in process abandoning "the cause in terms of the statute," but he failed from poverty to pay the taxed amount of the defender's account of expenses. On the motion of the defender, and on the pursuer's consent, the Court *assoilzied* the defender from the conclusions of the action.

In an action of damages by Hugh Ross, Balchaggan, Ross-shire, against John Mackenzie, innkeeper, Milltown, Ross-shire, an issue was settled by Lord Wellwood on 25th January 1889, and the case was set down for trial at the jury sittings in March 1889. Shortly before the date of the trial the pursuer lodged a minute in the following terms:—"FORSYTH, for the pursuer, hereby abandons the cause in terms of the statute." Thereafter the Court, on the motion of the defender, allowed the defender to lodge an account of his expenses, and remitted the account to the Auditor for taxation. It was not stated that the pursuer had failed to pay the defender's expenses as taxed, and that his agent had advised the defender's agent by letter that the pursuer was unable to pay the expenses, and did not object to decree passing therefor, and to the defender being assoilzied. The defender moved for the amount of the expenses, and for absolvitor.

Reference was made to the Judicature Act (6 Geo. IV. cap. 120), sec. 10; the Court of Session Act 1868, sec. 39; the Act of Sederunt, 16th February 1841; and to *Lawson* v. *Low*, July 1, 1845, 7 D. 960.

The Court assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer—Forsyth. Agent—David Barclay, Solicitor.

Counsel for the Defender—Wilson. Agent—Robert Cunningham, S.S.C.

Friday, June 28.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TENNENT *v.* WELCH.

Husband and Wife—Foreign—Wife's Heritable Estate—Effect of Sale—Surrogatum—Donation.

The wife of a domiciled Scotsman after her marriage, with concurrence of her husband, sold a heritable estate belonging to her in England. She duly acknowledged the conveyance thereof before two of the commissioners appointed under the Act for the Abolition of Fines and Recoveries (3 and 4 Will. c. 74), and "declared that she did intend to give up her interest in the said estate without having any provision made for her in lieu thereof." Part of the price