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,

and (2) that delivery of a cheque which was subsequently dishonoured was not payment of the price.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—Section 17—"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. . . ." Section 18—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:— . . . . Rule 4—When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer—(*a*) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; (*b*) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

George M'Culloch, accountant, 183 West George Street, Glasgow, trustee on the sequestrated estates of Peter M'Intyre M'Laren, clerk, sometime residing at 3 Windsor Terrace, Linthouse, Glasgow, *pursuer*, brought an action against Argylls Limited, motor car manufacturers, Alexandria, Dumbartonshire, *defenders*, for delivery of a motor car, or failing delivery for payment of £750, and in any event for payment of £500 as damages for wrongful detention of the car.

The pursuer pleaded, *inter alia*—"(1) The said motor car having been sold by the defenders to the said Peter M'Intyre M'Laren, and the property therein having passed to him and remained with him at the date of his sequestration, the pursuer as the trustee on his sequestrated estate is entitled to delivery thereof as concluded for."

The defenders pleaded, *inter alia*—"(3) The said Peter M'Intyre M'Laren having failed to pay the price of the said car, the defenders were entitled to withhold delivery thereof, and should be assoilzied."

The action arose out of the following *agreement*—"(1) The first party [the defenders] agrees to let on hire to the second party [M'Laren], and the second party agrees to hire from the first party, one motor car, which is built or is to be built to specification agreed between the parties. (2) For the option of purchase hereinafter contained, the second party agrees to pay to the first party or their authorised representatives the sum of £100 (One hundred pounds) on delivery of the said car.

"(3) The second party agrees to pay to Argylls, Limited, at Argyll Works, Alexandria, or at their Glasgow showrooms, 92-94 Mitchell Street, Glasgow, on behalf of the first party, without demand, for the hire of the said car, the sum of £612, 10s. (Six hundred and twelve pounds, ten shillings) within six weeks, the hire of the motor car to commence from the date of the same being delivered to the second party, and if at any time the payments of the said hire are in arrear the first party shall be entitled to interest at 5 per cent. per annum on the said arrears until they are paid.

"(4) The first party shall be at liberty to place their name-plates or any words, marks or numbers, on the said car to mark the same as their property, and the second party shall not alter or remove such plates, words, marks or numbers, or permit the same to be altered or removed.

"(5) The second party shall keep the said motor car in his own possession, and shall not assign, let, or hire, charge or part with, or attempt to part with, the possession or control thereof except with the previous written consent of the first party, and the second party shall keep the said motor car in good repair, reasonable wear and tear only excepted, and shall at all times permit the first party or their authorised agents to inspect same.

"(6) The second party will fully insure and keep insured the motor car for the benefit of the first party, so long as it remains the property of the first party, against breakdown, accidental damage, or loss by fire or burglary.

"(7) The second party may terminate the hiring by delivering up the said motor car to the first party or their authorised representatives at the risk and cost of the second party. If the second party sees fit to purchase the said motor car he shall have the option to do so at any time within six weeks from the date of receiving delivery thereof by paying to the first party or their authorised representatives a sum which, together with the amount paid for the said option and for the hire previously paid, will equal the sum of £712, 10s. (Seven hundred and twelve pounds, ten shillings).

"(8) If at any time the second party sees fit to terminate the hiring under the first part of the immediately preceding clause, he shall first pay in full to the first party or their authorised representatives all such hire as shall be due up to the date of the delivery up of the said car, which together with the amount of the sum paid for the said option shall become forfeited, and the second party shall also pay such further sum as the first party shall consider necessary to compensate them for the depreciation in the value of the said motor car.

"(9) The second party shall keep the said motor car free and exempt from all legal process, and will on demand produce the last receipts for the rent and taxes relating to the premises on which the said motor car is kept.

"(10) Any time or indulgence which the first party may grant to the second party shall not in any way prejudice their strict rights or remedies under this contract.

"(11) If the second party makes any default in punctually paying any sum due for hire or in the performance or observance of any

part of this agreement agreed by him to be performed or observed, or shall have any distress or execution levied upon his goods or become insolvent or sell or dispose of his business, the first party may without any formal notice terminate the hiring, and thereupon be entitled to the immediate return of the said motor car without prejudice to their claim for arrears of hire and damages, if any, for breach of this agreement, and for that purpose may enter any premises and re-take the same: Provided always that if the first party see fit to take possession of the said motor car by virtue of this clause the second party may, within twenty-eight days after the date of such re-possession, tender to the first party a sum which, together with the sum paid for the said option, and any payments for hire already made, equals the said sum of £712, 10s. (Seven hundred and twelve pounds, ten shillings), provided that he at the same time tenders such reasonable sum for expenses as the first party may demand for re-taking possession of the motor car, and thereupon the said car shall become the absolute property of the second party, and shall be re-delivered to him at his risk and cost.

"(12) In the event of the hiring being determined by seizure by the first party or by the car being returned by the second party, the second party shall not be entitled to any payment, credit allowance, or set off for or on account of any payment whatever previously made by him.

"(*Lastly*) The said motor car shall be and continue to be the sole property of the first party, and the second party shall remain and be a bailee only of the said motor car unless and until a purchase be effected subject to the terms of this contract."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 17th November 1914 assoilzied the defenders.

Opinion.—[*After narrating the terms of the agreement*]—"The motor car was delivered to M'Laren on 15th October 1913, and on that date he paid £100 in terms of the agreement, but he did not within six weeks exercise his option. On 1st December, however, he paid another £100, and on 15th December he sent a cheque for £527, 3s. 3d. in payment of the balance of the purchase price, but this cheque was dishonoured. On 26th December he granted a bill of exchange for £429, 14s. 6d., and on the same date, the trustee avers, paid another £100 in cash. The bill was dishonoured by non-payment on its due date—29th January 1914. The defenders paid it, and it is now in their hands. On 21st February 1914 the motor car was returned to the defenders' garage, and a few days afterwards M'Laren was apprehended and subsequently convicted of embezzlement, and is still in custody. These, I think, are the material facts set forth on record, which parties appear to be agreed upon."

"The pursuer maintained that he was entitled to delivery in respect that the property in the motor car passed to M'Laren on 15th December 1913, the date when he sent the cheque for £527, 3s. 3d. in exercise of the option to purchase conferred upon him by the agreement. He argued that the fact that the cheque was dishonoured was immaterial, as the delivery of it to the defenders must be regarded as payment in the commercial sense sufficient to transfer the property in the car from the defenders to M'Laren, and I was referred to the Sale of of Goods Act, section 18, Rule (1), and to *Leggat Brothers* v. *Gray*, 1908 S.C. 67. I am of opinion that this argument is not well founded.

"The 18th section of the Sale of Goods Act provides that 'unless a different intention appears' the passing of the property does not depend upon the time of payment or delivery. But where, as here, there is a contract, the passing of the property depends upon the intention of the contracting parties. Section 17 (1) provides that 'Where there is a contract for the sale of specified or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred.' There can be no doubt as to the intention of parties in this case. It is absurd to suggest that they intended the property to pass when M'Laren delivered a worthless cheque to the defenders; their obvious intention was that the property should pass when the stipulated price was paid, and not till then. The price has admittedly not been paid, and I do not think that the delivery of a dishonoured cheque can be regarded as payment in a commercial or any other sense. In *Leggat's* case the question under the consideration of the Court was whether funds had been validly attached by arrestments used to found jurisdiction in the hands of a debtor after he had delivered a cheque to his creditor but before the cheque had been cashed. It was held that they had not, on the ground that when a debtor delivers a cheque in payment of his debt—and has funds in the bank to meet it—payment according to ordinary commercial practice is held to have been made at the time the cheque was delivered. But that does not appear to me to be any authority for the proposition that when a debtor, having no funds in the bank, delivers a cheque to his creditor, payment must be held to have been made at the time the cheque was delivered. The commercial value and importance of a cheque depends entirely upon whether there are funds or sufficient credit at the bank on which it is drawn to meet it. If there are, it is regarded in mercantile dealings as equivalent to payment, although it is really only an order to pay. Similarly a bank-note, although not strictly legal tender, is accepted as payment every day. But when there are no funds to meet the cheque, it is of no value at all, and has never been recognised as equivalent to payment. It is of no use to business. On the contrary, it is a positive disadvantage, because like a forged bank-note or a spurious coin it may deceive the debtor for a time. I think it would be unfortunate if it were regarded as of any importance in connection with commercial transactions.

"The pursuer argued alternatively that the cheque having been granted after the term for option had expired, the sale was outside

the agreement altogether, and the property accordingly passed when the purchase was made. But although M'Laren did not exercise his option to purchase until the six weeks from delivery had expired, the defenders permitted him to exercise it at a later date, as they were entitled to do by clause 10, without prejudice to their rights under the contract. This, indeed, appears to be the case which the pursuer presents on record, because he avers in condescendence II. that 'The said payment was made by M'Laren in exercise of the option to purchase conferred upon him by the agreement.' And I do not think that this averment is inconsistent with the defenders' answer, viz.—'That said sum was not paid by the said Peter M'Intyre M'Laren in terms of the said minute of agreement, and the option to purchase under the said agreement was not exercised by the said Peter M'Intyre M'Laren.' I think that means that M'Laren, having failed to pay the price, failed to exercise the option, and did not therefore purchase the car at all. I do not think that it can fairly be construed into an admission on the part of the defenders that the purchase was made without any reference to the hiring agreement, as the pursuer suggests.

"On the whole matter I am of opinion that the defenders are entitled to be assoilzied from the conclusion of the summons with expenses."

The pursuer reclaimed, and argued — Delivery of a cheque was payment in the commercial sense and in the sense of the agreement—*Glasgow Pavilion, Limited* v. *Motherwell*, 1903, 6 F. 116, 41 S.L.R. 73; *Leggat Brothers* v. *Gray*, 1908 S.C. 67, *per* Lord President Dunedin at p. 73 and Lord Kinnear at p. 76, 45 S.L.R. 67, at p. 70 and p. 72. On the passing of the cheque the property in the car was transferred from the defenders to M'Laren—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 18. The property had been finally transferred before the cheque was dishonoured, and the dishonouring of the cheque gave the defenders a right to sue for the price, but did not operate as a re-transfer of the property. The Court should therefore grant decree for the delivery of the car, or in any event allow proof of the intention of the parties to the agreement.

Counsel for the defenders (respondents) were not called on.

LORD PRESIDENT—The question at issue in this case is whether the bankrupt purchased a certain motor car which is described in the summons. If it was his property at the date of the sequestration it passed to his trustee in bankruptcy. He was the owner of the motor car if he paid a sum of money as the purchase price. He was not the owner of the car if he did not pay the sum of money as the purchase price, because, under the agreement on which both parties found, it is expressly provided that this motor car was to continue to be the property of the defenders unless and until the purchase be effected subject to the terms of this contract. When we turn to the contract to ascertain *quo modo* the purchase of the car can be effected, we find it explicitly stated that the purchase of the car is to be effected by paying a sum of money.

Now the pursuer distinctly avers that the bankrupt did not pay a sum of money. On the contrary, he says that the bankrupt handed to the defenders an order upon the bank to pay them a sum of money, and that when they went to the bank, the bank said he had no money to pay. Accordingly the pursuer himself, on his own showing, has clearly set out that an effective purchase of this car was not made by the bankrupt, because he gave a cheque which was subsequently dishonoured in place of the sum of money which alone would entitle him to the possession and ownership of the car.

In my opinion this action therefore fails on relevancy, and I am for adhering to the interlocutor of the Lord Ordinary.

LORD MACKENZIE—I am of the same opinion. I think the decision in this case turns upon the construction of the minute of agreement.

LORD SKERRINGTON—I agree with your Lordships that the case is one of relevancy, and that the pursuer's averments are irrelevant. It was not maintained to us that on this view the Lord Ordinary's interlocutor, granting absolvitor, was not in proper form. The primary ground of action is the agreement, and in regard to that I have nothing to add to what your Lordship has said. The pursuer has shown clearly enough that the bankrupt did not perform the terms of the agreement. The pursuer seems to have some sort of alternative case, but his averments are entirely vague and irrelevant.

LORD CULLEN—I agree. I think the actings of the parties were all controlled by the agreement by which they had recorded beforehand their intention as to when the property in the motor car should pass, that being when M'Laren actually paid over the sum of money mentioned in the deed; and as he never did so, I do not think the property in the car passed to him.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for Pursuer and Reclaimer — Constable, K.C.—King Murray. Agents—Hume M'Gregor & Co., S.S.C.

Counsel for Defenders and Respondents—Macmillan, K.C.—Hamilton. Agents—Robson & M'Lean, W.S.