of the tackle was concerned there is no ground for saying that the foreman was guilty of negligence or carelessness. I imagine that he was put for the moment in a very perilous emergency whichever way of meeting the danger be adopted. What happened was briefly this—The bogie was intended to be used for carrying out of the foundry a screw-blade propeller, and the pursuer, who was a trusty workman, had been employed in executing operations on it the whole of the previous night. Its weight was two tons. The bogie was 5 feet in length and 2½ in breadth, and its duty, as I have said, was to carry the blade out into the open air. It was placed on the bogie to be so carried out, but the course of the bogie was interrupted by a depression of the floor, which was well known to all concerned, and which had been to a certain extent repaired by slips of wood over which a thin covering of iron was placed as a cover. The blade was attached by a crane and tackle to the roof. Unhappily the filling up of wood gave way under, I suppose, the unusual weight of the blade, and the bogie, when it got beyond the edge of the iron covering, was, owing to this, travelling down an inclined plane, with the result that it travelled from under the blade, which swung back as it was hanging from the roof by the tackle and jammed against the pursuer and injured him severely. Now, the foreman ought, before he ordered the men to heave away, and when he had to exercise his judgment on the matter in hand, to have foreseen two things—first, that the blade might fall off the bogie, and that appeared the most imminent danger; and second, that the bogie might run beyond the swing of the tackle. The question is, whether his employers are liable for his failure in the latter respect? I am of opinion that they are. It is plain that the depression should have been filled up before further operations were carried out, and it seems certain that if the hole had not been there the bogie would have run quite easily and safely. I forbear to go into the general question of the risks which are undertaken in such circumstances by servants in entering on an employment. It is a question about which there is a good deal of controversy. This case in my opinion raises none. If there was fault in not having the depression filled up, I think the reparation asked should be given.

Lord Young—I am of the same opinion.

Lord Craighill—I also concur, but I have reached my decision with great difficulty.

Lord Rutherfurd Clark—I am of the same opinion. The blade was placed on the bogie for removal from the workshop. In order to prevent it from falling the foreman attached it to the chain of the crane with a certain quantity of "slack" to allow the bogie to run forward. But while it might have been a good enough precaution in itself, the foreman ought easily to have seen that another consequence might also happen, that is, that if the accident of the bogie slipping from under the blade did occur, the somewhat slight "slack" of the chain would cause it to swing back on the perpendicular. I think he should have seen both. Therefore I think he should never have placed the pursuer in the position which he ordered him to take behind the bogie, for it was obvious that if an accident did take place, the pursuer must necessarily be injured. If the bogie was to be drawn forward while the chain was attached to the blade, it should have been drawn by strength applied from the front only and not from behind.

The Court pronounced this interlocutor:—

"Find that the pursuer, then in the employment of the defenders, completed the boring of the flange of a propeller-blade, which blade immediately thereafter was, by means of a block and chain tackle, put on a four-wheeled bogie to be conveyed from the defenders' works: Find that the pursuer was placed behind the bogie to assist in setting it in motion with an iron pinch, while several other workmen pulled it forward with a rope: Find that on the ground over which the bogie was thus moved there was a hole or depression which had been filled up with pieces of wood and covered with an iron plate, and that the wood yielded to the pressure of the bogie and so caused the iron plate and the bogie to deflect, in consequence of which the blade which had not been detached from the chain lost the support of the bogie, swung back, and struck the pursuer and injured him severely: Find that all these operations were conducted by order and under the superintendence of William Hornal, the defenders' foreman, and that the injury sustained by the pursuer is attributable to his fault in failing to take sufficient measures to ensure the stability of the iron plate, in allowing the blade to remain attached to the chain, and in placing the pursuer behind the bogie while the blade so attached was being carried thereon; Find in law that the defenders are responsible for the fault of their said foreman, and are liable to the pursuer in damages for the injury sustained by him: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against; assess the damages at £200 sterling; and ordain the defenders to make payment of same."

Counsel for Pursuer—Guthrie Smith—Shaw. Agents—Gill & Pringle, W.S.

Counsel for Defenders — Graham Murray. Agent—Gregor M'Gregor, S.S.C.

Wednesday, June 16.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

MURPHY *v.* SMITH.

Reparation—Negligent Use of Property—Yard-Gate Falling on to Public Street—Trespasser.

A trespasser on a building yard being desirous to open a sliding gate of ordinary construction, the groove of which was somewhat clogged, used force to it without clearing out the groove, and in consequence the gate fell into the street and injured a person

there. *Held* that the owner of the gate was not responsible to the injured person for his injury.

On the evening of 23d January 1886 a labourer named James Miller, who was in the employment of Alexander Smith, mason, entered the building-yard of James Smith, Rutherglen, and left there a wheelbarrow. He had no authority to leave it there. The gate of the yard was of an ordinary construction, and moved on wheels above and in a groove with a running-rod below. Next morning, at eight o'clock, before the work of the yard commenced, Alexander Ferrier, the fireman, came to the yard, and being in a hurry he pushed the gate, which had by that time been unlocked for the day by the man in charge of it, slightly open, and stepped into the yard. The morning was a frosty one, and the lower groove of the gate was clogged by frozen gravel, &c. Soon afterwards Miller arrrived for the purpose of removing his wheelbarrow, and finding the gate had stuck in the groove he applied force to it, and thus raised it above the running-rod, upsetting it, and causing one part of it to fall outwards and injure a scavenger called Thomas Murphy who was sweeping the street.

Murphy raised this action against James Smith, the owner of the yard, for £100 for personal injuries sustained by him in consequence of the fall of the gate. His ground of action was contained in the 4th article of his condescendence, which was in the following terms:—"The falling of said gate was the result of the defective condition of the fastenings, or that the said gate was not securely or safely suspended or supported so as to prevent the falling thereof, or of the negligence of the defender or those entrusted by him with the duty of seeing that said gate, &c., was kept in a proper and safe working condition."

The defence was that the gate was constructed as such gates commonly are at public works, and at the time of the accident was in good working order and condition, and that the accident was due solely to the illegal and unwarrantable intrusion of James Miller, with whom the defender had no dealings of any kind.

The pursuer pleaded—"(1) The pursuer having been injured in manner libelled through the defective condition of the fastenings of said gate is entitled to compensation from the defender for said injuries. (2) The injury sustained by the pursuer having been caused by the fault of the defender, or those for whom he is responsible, the pursuer is entitled to compensation from him."

The defender pleaded—"(2) The pursuer not having been injured through any fault of the defender, or the fault of anyone for whom he is responsible, the defender is entitled to be assoilzied. (3) The pursuer is not entitled to demand compensation from the defender for the injuries he received, seeing that they were due to the fault or delict of a person not in the employment of the defender, and having no right or authority to enter the defender's premises."

The Sheriff-Substitute (Guthrie) pronounced this interlocutor:—"Finds that the pursuer was severely injured while engaged in his usual employment as a scavenger in Glebe Street, by the falling of a large iron gate belonging to the defender: Finds that the gate was at the time being opened by a mason named Miller, not in the defender's employment, who had left a barrow within the defender's ground the night before: Finds that gate would not have fallen if the defender's servants had used the necessary care in keeping clean the groves in which it moved: Therefore finds the defender liable in damages, assesses the damages at £30 sterling."

"*Note.*—This is a narrow case, but when the circumstances are carefully considered I cannot discharge the defender from liability. It is an accident upon a public street by the falling of an iron gate outwards from the defender's gateway on the street. The pursuer has taken his stand upon the defender's admissions as to the manner in which the accident happened, and the defender has accepted the burden of showing that it occurred in such a way that he cannot be held answerable for the consequences. He has clearly enough shown that it fell while a stranger or intruder, for whom he is not in any way liable, was handling the gate for his own purposes. But he has not shown, in my opinion, that he, or his servants for whom he is liable, did take all the precautions that were necessary for the safety of the public, or even of those employed upon his ground. It is proved that the gate was locked at night, and that it had been opened by the defender's men in the morning before the stranger Miller came to remove his barrow, and that the defender's foreman and some workmen had already entered it. It also appeared that, in frosty weather especially, it was necessary to take care to keep the groove in which it ran free from obstruction, and it is admitted that the accident occurred by reason of an obstruction in the groove. It was a very slight negligence, possibly, to leave the gate unlocked and ajar for a few minutes or for half-an-hour in the morning, but so left it was for the access of the defender's workmen and of others. It seems to me that it ought not to have been left without due care for the safety of passengers and others on the public street, and that the defender cannot be exonerated merely when the immediate cause of the accident was a not unnatural or extraordinary action on the part of a stranger."

On appeal the Sheriff (Clark) pronounced this interlocutor:—"For the reasons assigned in the subjoined note, finds that the gate, from the fall of which the pursuer suffered the injuries complained of, was of the usual construction for gates of that description, and was quite safe unless subjected to violence or attempted to be opened by a person ignorant of its construction or of how it should be worked . . . Finds that the fall of the said gate was not due to any fault on the part of the defender, or of his servants, or of anyone for whom he is responsible; therefore recals the interlocutor appealed against, and assoilzies the defender from the conclusions of the action.

"*Note.*—The important facts of the present case seem to be as follows. Defender had a yard used for hewing purposes, entrance to which was obtained by a gate with wheels above and guides below, a very generally used kind of gate for such works, the present one being exceptionally strong and well constructed. It was perfectly safe, unless subjected to violence or attempted to be used by a person ignorant of its nature and use. The night before the accident, a man, Miller, not in the service of, and in no way connected with, the

defender, drew his barrow inside the foresaid yard to which the gate led, and left it there till he should return for it in the morning. He had no authority for doing this. He himself admits that he had none from the defender or his foreman, and though he says he got leave from some of the workmen he has failed to support this by any confirmatory evidence. I have no doubt on the proof that, finding the gate somewhat open, he put in the barrow without having obtained leave from anyone and without the knowledge of anyone. In the morning the foreman caused the gate to be opened partially so that he could get in, and soon after Miller, coming up for his barrow, pushed the gate back and got it out, but in doing this he threw one side off the perpendicular with the result of its falling upon and injuring the pursuer.

"Now, it is difficult to see in all this anything for which the defender, or anyone for whom he is responsible, can be blamed. The gate was a good specimen of the kind to which it belonged, and that is a common and recognised kind. If it is said the groove in which the gate worked was stopped up or affected by the frost, the answer is, its owner did not guarantee its being safe when attempted to be used by a person who had no right to enter the defender's yard, and still less when used by a person committing a trespass, and who in the course of that trespass subjected the gate to considerable violence. The pursuer may have an action against Miller, the barrowman, but none, it seems to me, against the present defender."

The defender appealed, and argued that the owner of property adjoining a street was bound to keep it in such a condition that damage should not be caused to passers-by through the interference of idle or mischievous persons with it—Addison on Torts, 5th ed., 456; *Beveridge* v. *Kinnear*, Dec. 21, 1883, 11 R. 387.

The pursuer was not called upon.

At advising—

Lord Justice-Clerk—I think the pursuer has failed to make out a case of liability for the fall of this gate, which took place in somewhat extraordinary circumstances.

It is proved that the construction of the gate was the ordinary and usual one in Glasgow, and there is no evidence that such a fall had ever taken place before. But it seems on the morning in question, a scavenger, who was at his work near the gate, was injured by the falling of one of its leaves, and on investigating the history of the gate in the morning in question, it turns out that a man had left his wheelbarrow the night before in the yard, and went there early before anyone was there, and finding the gate not wide enough open to let him out, he began to push it back, and the effect of his operations was to bring down the gate. It is admitted he had no right there. The question is, whether the proprietor of the gate is responsible? It is said he is, because the groove in which the gate runs was not cleaned out. It was a frosty morning, and I suppose the gravel had become hardened and the gate stuck. It is said it ought to have been cleaned out. But I cannot see that there was any obligation to do this until the gate required to be used for working purposes. Therefore, on the whole matter, I think the Sheriff was right in holding that no facts importing liability against the defender had been proved.

Lord Young—I also am of that opinion, and that without questioning the law as stated in the passage which was cited to us from Addison's work on Torts. The action is laid upon fault, and is summarised in the first plea-in-law of the pursuer—"The pursuer having been injured in manner libelled, through the defective condition of the fastenings of said gate, is entitled to compensation from the defender for said injuries."

I am quite of opinion that no proprietor is at liberty to have a gate in such a position with defective fastenings, so that without anyone touching it, or when meddled with by anyone even who has no right, it will expose the lives of passers-by to danger; and I do not think that it will be an answer that the immediate cause of the accident was an idle boy giving it a shove. A gate in such a position must be fitted to withstand the ordinary consequences which are likely to happen to it. But I do not think there was anything defective in the fastening of the gate. I think the evidence is to the effect that the gate was in a good and safe condition for a gate of such construction. But we are informed—and indeed it has been proved by the witness Ferrier—that neither this nor any other similar gate can be opened unless the groove is clean and clear, and another witness gives us the same account. It appears that the morning before the work began, and before there was any reason for opening the gate, the foreman arrived, and being pressed for time to clean the groove, he pushed the gate open to allow him to get through edgeways. Then a trespasser came to get out of the yard his wheelbarrow, which he had without authority placed there over-night. He did not clean out the groove, but used force to overcome the obstruction, and then the gate was lifted off the rails by the force used, and fell, just as Miller tells us it would do if it was treated so. That is the explanation of the accident, and involves no fault or ground of action on behalf of the defender, and without questioning the law relied on by the pursuer, I think the facts here do not establish any ground of liability.

Lord Craighill—I am of the same opinion.

Lord Rutherfurd Clark—I concur, and will only say that if it were true when Rodger opened the gate for Ferrier that he had left it in an unsafe condition, there might have been a good deal to say for the pursuer. But that is not proved. I think it was left in a safe condition, and only thrown off its fastenings by the force used when the pursuer opened it for his own purposes.

The Court pronounced this interlocutor—

"Find that on the night of 23d January 1885 James Miller, without the defender's permission or knowledge, deposited a barrow in the defender's yard, the gate of which was thereafter closed, and the next morning and before work had commenced in the yard he returned to take the barrow away: Find that the said gate was such as is generally used in public works, and moved on wheels above and in a groove with a running-rod below: Find that on the morning aforesaid it could

not be removed without difficulty, the lower part and groove being clogged by gravel and frost, and that Miller without cleaning the groove attempted to move the gate by force, and by doing so raised it above the running-rod, thereby upsetting the gate and causing one part of it to fall outwards on the pursuer on the street: Find that Miller was not known to or in any way connected with the defender, and that the fall of the gate is not attributable to the fault or negligence of the defender nor of anyone for whom he is responsible: Therefore dismiss the appeal and affirm the judgment of the Sheriff appealed against; of new assoilzie the defender from the conclusions of the action, with expenses in both Courts."

Counsel for Pursuer (Appellant)—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for Defender (Respondent)—J. A. Reid. Agents—W. & F. C. MacIvor, S.S.C.

Tuesday, June 1.

OUTER HOUSE.

[Lord M'Laren.

CAMPBELL *v.* HENDERSON.

Sale—Warranty—Horse.

Horses were bought with a written warranty that they were "quiet in all harness and saddle, and sound to the best of my knowledge." The purcheser claimed right to return them as not conform to warranty, and alleged that there was an oral warranty in addition to the written one. *Held* (1) that the alleged oral warranty was nothing more than a representation of belief not intended as a warranty, and that the oral warranty was the only one given; (2) that the words "to the best of my knowledge" qualified the whole of the written warranty, and not only the warranty of soundness; (3) that it was not proved in fact that the warranty was broken.

On 10th December 1885, Dr Campbell, Duns, bought from Robert Henderson, horse dealer, Dalkeith, a pair of bay carriage geldings at £100. It was known to both parties that one horse had stringhalt. The receipt bore that the defender warranted the horses "in all harness and saddle and sound to the best of my knowledge." It was admitted in this action that the word "quiet" was intended to be placed before "in all harness," but was *per incuriam* omitted. The horses were delivered immediately. On 16th December, after trial, Dr Campbell returned them on the ground that one of them when tried shied repeatedly, and was a "determined and dangerous shier," and unsafe, and not sound. Henderson refused to receive them, and the carrier through whom they were returned put them at livery.

Dr Campbell brought this action for recovery of the price, and for reimbursement of the charges for returning them, and for relief of the expense of keep while at livery. They were sold by auction pending this action, and the price consigned.

The pursuer averred that besides the warranty in the receipt the defender had at the sale given a verbal warranty that the horses were sound and free from all vice and disease of any kind except stringhalt, and that neither of them shied.

He pleaded—"(1) The said horses being disconform to warranty, written and verbal, the pursuer is entitled to repetition of the price paid by him therefor, and to decree for relief, or failing relief, for payment all as concluded for, with expenses. (2) The said dark bay horse having been, in the knowledge of the defender, unsound or faulty in the respect condescended on, and that contrary to the representations and warranty under which the transaction of sale took place, the pursuer is entitled to decree as concluded for."

The defender pleaded that he should be assoilzied because the horses were not disconform to warranty and because the pursuer's statements were unfounded in fact.

A proof was led.

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds it not proved that the defender knew of any unsoundness in one of the horses sold and delivered by him to the pursuer, and finds that the pursuer was not entitled to reject the said horse on the ground of breach of warranty; therefore assoilzies the defender from the conclusions of the action and decerns: Finds the defender entitled to expenses, &c.

"*Opinion.*—This is an action by the purchaser of a pair of carriage horses against the seller, claiming repayment of the price of the horses (£100) and to be relieved of the expense of the railway carriage of the horses to and from the pursuer's residence and of their keep pending the dispute.

"The pursuer founds on a written warranty contained in the receipt given for the price, and also on certain verbal assurances which he says amount to a warranty.

"The written warranty is to the effect that the horses were warranted 'quiet in all harness and saddle, and sound to the best of my knowledge.' The word 'quiet' is not in the original, but I understand that the parties are agreed that the ellipsis in the sentence should be supplied by the insertion of this word.

"The horses were sent by rail from Dalkeith to the pursuer's residence at Duns, and on two successive days they were tried in single harness. It is proved that on each trial in single harness the dark horse shied; and the pursuer being on this ground dissatisfied with its performance, and having bought the horses as a pair, rejected both horses, and returned them to the seller at Dalkeith. If there was ground for rejection, there can be no doubt that the course followed by the pursuer was correct. It was open to him doubtless to offer to keep the admittedly sound horse, and to have the other exchanged; but this was a proposal which could only have been carried out by an amicable arrangement, and not to be insisted in as of right.

"The first question is, what is the meaning of the warranty? The defender relies on the words 'to the best of my knowledge,' as importing a limitation or qualification of the obligation. The pursuer contends that these words only qualify the warranty of 'soundness' and have no relation to the warranty of quietness in all harness.

"If I had any reason to suppose that the seller