determined by arbitration under the contract. The appellants say, however, that the arbitration clause is inapplicable because the liability to make this delivery has been in some way extirpated from the contract by the action of the Governor-General in Council, or in other words, that there is a defence by reason of the Order in Council. The respondents answer that there is no such excuse at all, as the contract expressly provides for the circumstances that have arisen.

The question therefore is does that dispute arise under the contract? I admit that I find it difficult to understand how it can arise in any other way. The contract is the document that regulates the rights of the parties. The Order in Council is only to be considered for the purpose of seeing whether the rights so conferred have been taken away by overriding authority in a manner which the contract did not contemplate. This clearly is a question under the contract, and I entirely agree with the motion proposed by the noble and learned Lord on the Woolsack.

LORD CARSON—I agree that this appeal ought to be dismissed.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Macmillan, K.C. —Charles Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—William A. Crump & Son, London.

Counsel for Respondents—Gentles, K.C. —Arthur R. Brown. Agents—Aitken, Methuen, & Aikman, W.S., Edinburgh—Linklaters & Paines, London.

Thursday, January 25.

(Before the Lord Chancellor, Lord Dunedin, Lord Shaw, Lord Buckmaster, and Lord Carson.)

M'KINLAY *v.* DARNGAVIL COAL COMPANY, LIMITED.

(In the Court of Session, July 19, 1922, S.C. 714, 59 S.L.R. 553.)

Reparation—Negligence—Injuries to Children—Heavy Gate in Place Frequented by Children—Children Permitted to Play with Gate—Trap—Averments—Relevancy.

A father brought an action against a colliery company for damages for the death of his son aged nine, who while playing about a gate at the entrance to the colliery was fatally injured owing to the gate, on which other children were swinging, closing and crushing him between the hinge-end of the gate and the gate-post. The pursuer averred that the gate was so constructed that the space between the hinge-end of the gate and the gate-post varied from about one inch when the gate was closed to about one foot when it was open; that the gate when open was in the knowledge of the defenders dangerous owing to its size, construction, and weight; that it was in a state of disrepair, which prevented it from being secured when open by a device which the defenders had provided for that purpose; that children habitually played with the gate with the tacit permission of the defenders; that it formed an allurement which was of the nature of a trap; and that the defenders had taken no precautions to prevent children being injured. *Held* (*aff.* judgment of the First Division) that the pursuer had stated a relevant case for inquiry, and that accordingly the case must go to trial.

The case is reported *ante ut supra.*

The defenders appealed to the House of Lords.

At delivering judgment—

At the conclusion of the arguments on behalf of the appellants, counsel for the respondent being present but not called upon, their Lordships delivered judgment as follows:—

LORD CHANCELLOR — This appeal has been fully and fairly argued by the learned counsel for the appellants, but in the result I agree with the view of the Court of Session that this is a case which should go to trial.

Holding that view, I am unwilling to risk prejudicing the case by entering into a minute analysis of the statements which are made in the pleadings on behalf of the pursuer. Shortly, his allegations seem to me to come to this, that children were regularly permitted to play inside as well as outside this gate and to swing it, as children will, to and fro; that the gate was of such a size, width, and construction as to be unfamiliar and dangerous to children, and to constitute in effect a trap for them; and that this being so it was the duty of the defenders either to protect the children whom they allowed upon their premises against that danger or to exclude them.

Now, of course, I accept the view that if no relevant case is made on the pleadings the course taken in this case by the Lord Ordinary may properly be taken. The practice of stopping a case on what amounts to demurrer is less common in England than it was, but in this case the Scottish practice must of course be followed. But accepting that view I am not prepared to say that if all the allegations of the pursuer, fairly interpreted, are established and the answers are not made out, a jury could not properly find a verdict for the pursuer. I do not wish to put any obstacle in the way of any legal argument which may properly arise when the facts have been ascertained, and it is sufficient to say that the case ought not to be wholly withdrawn from a jury at the present stage.

For these reasons I am of opinion that this appeal fails and should be dismissed, and I move your Lordships accordingly.

LORD DUNEDIN—I agree. It is quite true that the foundation of this action is negligence, and that whenever you have to prove

negligence you must show that there is a breach of a duty, but where I think Mr MacRobert in his able argument rather failed to take the distinction that is necessary was in this. He asks us practically to lay down as a matter of law the whole duty of man as regards gates. Now duty cannot I think be treated in that way, because the duty in each particular case is deducible from, and referable to, the particular circumstances of the case, and I rather think therefore that the duty which is said to have been infringed as regards this particular gate is not one which we can settle at this time, but one which the jury must settle when the time comes.

I would also remark that of course in order to get a verdict the pursuer must not only show a breach of duty but must show that the accident occurred owing to that breach of duty, and therefore it is quite clear that if some of the defenders' averments were proved there would be no reason for giving a verdict in favour of the pursuer, even although there may have been something wrong as regards the construction of the gate. But I agree with your Lordship that it would not be advisable to make any minute analysis of what may or may not happen at the trial in order that neither side may be prejudiced.

LORD SHAW—I entirely agree.

LORD BUCKMASTER—I agree.

LORD CARSON—I also agree, and I should like to add, as Lord Dunedin has already done, a statement as to the result of what I consider I, at all events, am deciding in the matter. I agree with what Lord Skerrington says, that "even if the facts as averred by the pursuer are substantially accurate, it will still be for the jury to consider whether there was any breach of duty on the part of the defenders."

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants — MacRobert, K.C.—J. R. Marshall. Agents—W. B. Rankin & Nimmo, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for Respondent—T. M. Cooper. Agents — Erskine Dods & Rhind, S.S.C., Edinburgh—Hamlins, Grammer, & Hamlin, London.

Friday, January 26.

(Before the Lord Chancellor, Viscount Haldane, Viscount Finlay, Lord Dunedin, and Lord Shaw.)

BALLARD *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation — Negligence — Latent Defect—Liability for Loss.

Evidence—Onus of Proof—Res ipsa loquitur—Observations as to the Applicability and Limits of the Maxim.

The owner of a steam trawler, which was lying at a quay loading coal, brought an action against a railway company to recover damage done by the escape from the control of the defenders' servants of waggons conveying coal, which ran down an incline and fell from a height on to deck of the trawler, owing, as the pursuer alleged, to the fault of the defenders' servants in driving the waggons up the slope at an excessive speed. The method of loading the trawler followed by the defenders was to push the train of waggons by an engine behind up an inclined track until they were over the top of the up gradient, when the waggons were braked in succession by the guard in charge of the train, and placed in position on the down slope. The engine was then uncoupled and reversed, and the waggons taken singly on the down gradient to the coal hoist on the quay, emptied into the vessel, and then run out of the hoist. The waggons descended by the force of gravity, controlled by the brakes, which were manipulated by the servants of the coal merchant. On the occasion in question a train of sixteen waggons had been pushed up the incline, and the first and second had been braked on the down gradient when, owing to the snapping of the link coupling the waggon at the end of the train with the guard's van, which was next the engine, the whole sixteen waggons got out of control, ran down the slope at a high rate of speed, dashed against a waggon which was being unloaded, and drove it and two others on to the top of the trawler. The defenders pleaded that the damage was entirely due to the breaking of a defective link belonging to a third party, the defective condition of which could not have been discovered by any reasonable care or diligence on the part of the defenders.

Held, on the facts (*diss.* the Lord Chancellor and Lord Dunedin, and *reversing* the judgment of the First Division), (1) that the defenders had failed to get rid of the inference of want of care on their part, accompanying the happening of an accident of the nature described; (2) that the breaking of the link was in fact due to a strain being put upon it which ought not in ordinary circumstances to have been required; and (3) that the fact that no negligence was established in failing to detect the flaw in the link did not constitute any defence, and that accordingly the defenders were liable.

Scott v. *The London and St Katherine Docks Company*, (1865) 3 H. & C. 596, *commented on.*

The facts of the case sufficiently appear from the opinions of their Lordships.

At delivering judgment—

LORD CHANCELLOR—This is an appeal by the pursuer from an interlocutor pronounced by the First Division of the Court of Session, by which that Court recalled