Saturday, December 18.

SECOND DIVISION.

[Lord Hunter, Ordinary.

TAYLOR *v.* CORPORATION OF GLASGOW.

Reparation—Negligence—Burgh—Botanic Gardens Used as Public Park—Poisonous Shrub—Child.

A father brought an action of damages against the Corporation of Glasgow as proprietors and custodians of the Botanic Gardens there, which were open to the public as a public park, for the death of his child aged seven. The pursuer averred that in close proximity to a portion of the Gardens used as a playground for children there was a plot of ground open to the public, and that in this plot there was grown, along with specimen shrubs of various kinds, a belladonna shrub bearing berries rather similar in appearance to small grapes, and presenting a very alluring and tempting appearance to children, but which were in fact poisonous, that no precautions to protect children were taken by the defenders, and that his child, when in the Gardens with some of his companions, picked the berries and ate them and in consequence thereof died. *Held* (*rev.* judgment of Lord Hunter, Ordinary, Lord Salvesen *dissenting*) that the pursuer had stated a relevant case for inquiry, and issue *allowed.*

Observations per curiam on the liability incurred by owners of property towards children.

Authorities *examined.*

Peter Taylor, clerk, Maryhill, Glasgow, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, in which he claimed £500 as damages for the death of his son, aged seven, in consequence of eating the berries of a poisonous shrub in the Botanic Gardens, Glasgow. The defenders were proprietors and custodians of the Gardens, which were used and open to the public as a public park.

The pursuer *averred*—"(Cond. 2) On 20th August 1919 the pursuer's said son, aged seven, proceeded with some other young children to the playground in said Gardens surrounding the bandstand there. This part of the Gardens, as the defenders were well aware, was and is much frequented by young children. (Cond. 3) On said date, and for some time prior thereto, the defenders had growing on a small piece of ground in said Gardens immediately adjoining said playground, specimen plants and shrubs of various kinds. *Inter alia*, there were specimens of wheat, barley, oats, &c., and also a shrub Atropa belladonna, bearing berries rather similar in appearance to small grapes, and presenting a very alluring and tempting appearance to children. The said plot of ground, which was enclosed by a wooden fence, was open to the public, access being obtained by a gate in said fence, and as the defenders knew was frequented by members of the public of all ages. With reference to the statements in answer, admitted that said ground was frequented by students. Admitted that there is a wire loop on said fence which may be passed over the end of the gate. . . . Explained that the said gate and fence are only three feet in height and that the gate is a light rustic gate which, even when held in position by said wire hoop, can easily be opened by a child of tender years. (Cond. 4) On said date, being attracted while passing the place by the beautiful and tempting appearance of said shrub which was covered with said berries, and which extended to about 5 feet in circumference and overhung the adjoining path to the extent of about 2 feet, the pursuer's son and some of his companions picked a few of the berries and ate them. Shortly afterwards they became seriously unwell, and although he received medical attention the pursuer's son died the following morning. With reference to the statements in answer, admitted that said shrub did not overhang said fence. Explained that there are a number of plants on the enclosed piece of ground on which said specimens are grown. Admitted that the pursuer's son obtained access by said gate. Explained that said shrub is only a yard or two inside the fence and is quite visible from said playground, and that pursuer's son and his companions first noticed it while they were on said playground. (Cond. 5) The death of pursuer's son was solely due to the fault of the defenders and of their servants in charge of said gardens, for whom they are responsible. The attractive and striking appearance of said berries is accurately described in a well-known book on botany as follows:—'The attractive character of the berries, looking as they do to the uncritical eyes of young children like cherries or big black currants, has led to many serious accidents.' The poisonous character and the inviting and deceptive appearance of said berries were well known to the defenders and their said servants. They knew or ought to have known, if they had exercised reasonable supervision, that said shrub was growing in a conspicuous position in said Gardens in a part open to and much frequented by children, and that it was probable and indeed practically certain that children would be tempted and deceived by the appearance of said shrub, and would eat the berries, which have a sweet taste. The defenders and their said servants knew or ought to have known that said berries were a deadly poison, and that if one or two of them were eaten by a child it was certain to cause dangerous illness and likely to result in death. The defenders were in fault in having the said shrub growing in a part of said Gardens open to children and frequented by them, without taking any precautions, as they ought to have done but failed to do, to warn children against the danger or to prevent children from reaching said shrub and picking the berries. (Cond. 6) There was no notice of any kind in said Gardens warning the public of the presence of poison-

ous or dangerous specimens growing therein. It was the duty of the defenders and their said servants to have a notice in the vicinity of said shrub which would warn the public, both adults and children, of the poisonous and dangerous character of said berries or to have the said shrub fenced off for the protection of children. They failed to perform this duty, and took no steps of any kind to warn children or protect them from said danger, and the death of the pursuer's son was the natural and probable result of their negligence. Until after the death of the pursuer's son they failed to take even the usual necessary and obvious precaution of placing near said plant a label bearing the word 'Poisonous.' Belladonna is one of the scheduled poisons which under the Pharmacy Act 1868 are required to be distinctly labelled with the word 'Poison.' With reference to the statements in answer it is believed that there was a small label bearing in very small lettering the words quoted by defenders [Deadly Nightshade—*Atropa belladonna, L.*] on the ground near said shrub. Explained that the label was very small and the inscription in minute characters, and that said label was placed in the ground under the shrub solely for the information of persons interested in botany. At the time when the pursuer's son picked the berries said label and inscription were covered by the shrub and were practically invisible. . . . Explained that the defenders' bye-laws contain no reference to the presence of poisonous or botanical specimens in said Gardens and no warning to the public in connection therewith, and that any bye-laws published by the defenders were solely for the protection of their plants and shrubs and not for the protection of the public."

The defenders pleaded, *inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

On 2nd June 1920 the Lord Ordinary (HUNTER) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"The pursuer in this action seeks to recover damages from the Corporation of the City of Glasgow for the death of his son John Mackay Taylor, who died on 21st August 1919. It appears that on 20th August of that year the pursuer's son, aged seven, proceeded with some other children to the Botanic Gardens, Glasgow. The defenders are the proprietors and custodians of these Gardens, which are open to the public as a public park. On the date in question the children are said to have been playing on ground surrounding the bandstand. In the vicinity of this place there is an enclosed plot of ground in which specimen plants and shrubs of various kinds are grown. A wooden fence surrounds this plot of ground, access being obtained by a gate in the fence. According to the pursuer's case the defenders knew that this plot of ground was frequented by members of the public of all ages.

"Among the plants growing in the plot of ground was a shrub, *Atropa belladonna*, bearing berries rather similar in appearance to small grapes and presenting a very alluring and tempting appearance to children. The pursuer says that his son and some of his companions were attracted by the beautiful and tempting appearance of the shrub, that they picked some of the berries and ate them, that shortly afterwards they became seriously ill, and that although he received medical attention the pursuer's son died the following morning.

"The berries of the *Atropa belladonna* shrub are poisonous, and the pursuer maintains that the death of his son was solely due to the fault of the defenders and of their servants in charge of the Gardens, for whom they are responsible. He says that the poisonous character and the inviting and deceptive appearance of the berries were well known to them. 'They knew, or ought to have known if they had exercised reasonable supervision, that said shrub was growing in a conspicuous position in said Gardens, in a part open to and much frequented by children, and that it was probable, and indeed practically certain, that children would be tempted and deceived by the appearance of said shrub, and would eat the berries, which have a sweet taste. The defenders knew, or ought to have known, that said berries were a deadly poison, and that if one or two of them were eaten by a child it was certain to cause illness and likely to result in death. The defenders were in fault in having the said shrub growing in a part of said Gardens open to children and frequented by them without taking any precautions, as they ought to have done but failed to do, to warn children against the danger or to prevent children from reaching said shrub and picking the berries.' It is also made a ground of fault that the defenders did not have a notice warning the public of the presence of poisonous or dangerous specimens growing in the Gardens. It is not, however, said that it is usual in botanic gardens to have such notices, and it is clear that such a notice would not have been any protection to the pursuer's son, who could not have read it. I attach no importance to the averment as to absence of notice about the plant being poisonous. The pursuer's real case, if he has one, is that the defenders were in fault in having the plant in a place to which with their knowledge children had access. At this stage all I have to consider is whether the record contains averments which if proved would entitle a jury to find for the pursuer.

"The pursuer relies upon the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway Company of Ireland*, 1909 A.C. 229. According to the head note in that case a railway company kept a turntable unlocked (and therefore dangerous for children) on their land close to a public road. The company's servants knew that children were in the habit of trespassing and playing with the turntable, to which they obtained easy access through a well-worn gap in the fence which the company were bound by statute to maintain. A child between four and five years old, playing with other children on the turntable, having

been seriously injured, *held* that there was evidence for a jury of actionable negligence on the part of the railway company. Lord Macnaghten quoted the following statement of Lord Denman in *Lynch* v. *Nurdin*, 1 Q.B. 29—"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer may have redress by action against both or either of the two, but unquestionably against the first.' His Lordship continued—'If that proposition be sound, surely the character of the place, though of course an element proper to be considered, is not a matter of vital importance. It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground.

"Hamilton, L.J. (now Lord Sumner) in *Latham* v. *B. Johnson & Nephew, Limited* (L.R., 1913, 1 K.B. 417) said that 'case (*i.e.*, *Cooke's* case) has been several times considered both in England, Scotland, and Ireland. The Court of Appeal in Ireland in *Coffee* v. *M'Evoy* (1912, 2 I.R. 290) declined to regard it as a case on the duty of an owner or occupier of property towards a trespasser, and decided against the injured plaintiff there because he clearly was a trespasser. In *Lowery* v. *Walker* (1910 L.R., 1 K.B. 173) in the Court of Appeal—the reversal of which case in the House of Lords does not affect the present point—Buckley, L.J., treats the decision as being one upon which the liability "may arise from the fact that the landowner knows that he is exposing the persons whom he allows to pass over his ground to danger of which he is aware and they are not;" and Kennedy, L.J., says of it—"That it is in my opinion a decision of plainly limited application . . . depending upon the special circumstances . . . that there was an allurement to children by reason of the condition in which the defendants kept their premises and the existence thereon of this unprotected machine, and that they knew that such a machine would be likely to allure children." In *Jenkins* v. *Great Western Railway* (1912 L.R., 1 K.B. 525), in this Court, all the members of the Court (the Master of the Rolls at p. 532, Fletcher Moulton, L.J., at p. 534, and Farwell, L.J., at p. 534) stated that in their opinion *Cooke's* case was decided on the assumption that Cooke was licensed by the railway company not merely to come upon the land but to play with the turntable, and it is the case that the jury had found in terms that the child was allured "through the hedge and up to the turntable." Lord Kinnear says the same in *Holland* v. *Lanarkshire Middle Ward District Committee* (1909 S.C. 1142), that in *Cooke's* case the railway company had "tempted children to play."'

"In the present case I do not think it can be said on the pursuer's averments that the defenders tempted his child to eat. It is well known to all who frequent botanic gardens that the plants and shrubs are not intended to be tampered with, and in particular that berries or fruit growing on trees are not to be eaten. There s nothing in the pursuer's averments to suggest that the defenders in the management of their garden failed to take precautions which are usually taken in connection with similar gardens. The berries of many plants, some of them common plants that grow wild in different parts of the country, are dangerous if indiscriminately eaten by children. It is not clear from the record what precautions the pursuer suggests should be taken by the defenders to protect children from the consequences of their own ignorance or thoughtlessness. On his averments I do not think that a jury could hold that the defenders were in neglect of ordinary care in growing the belladonna plant where they did. The case appears to me to be covered by the decision of the First Division in *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034. That action was brought against the present defenders in respect of an accident which had also occurred at the Botanic Gardens, Glasgow. An infant child was drowned in the river Kelvin while playing in the garden. An action of damages was brought by the father of the child against the defenders on the ground that it was their duty to fence the river as it was a danger to the public and especially to children. The Court dismissed the action as irrelevant. At the end of his opinion Lord Kinnear said—"There is nothing unlawful in making a public garden or in opening a garden to the public in a place where there are streams or ponds, and if the place is made safe for persons of average intelligence I know of no rule of law which requires the proprietors to take further precautions. It is impossible to lay upon the defenders a duty to protect children from risks which arise only from their own childishness and helplessness. That is the office of their parents or guardians."

The pursuers reclaimed, and argued—The pursuers had averred facts and circumstances relevant to go to trial. There was a recognised difference in law between the duty of public authorities to a child and an adult. This had been authoritatively recognised by the House of Lords in the case of *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, 46 S.L.R. 1027. The judgment of the House of Lords in that case, while it gave conclusive recognition to the distinction in question, followed what had already been recognised in numerous decisions in the Courts of the United Kingdom —*Campbell* v. *Ord and Maddison*, 1873, 1 R. 149, 11 S.L.R. 54; *Green* v. *Stirlingshire Road Trustees*, 1882, 9 R. 1069, 19 S.L.R. 887; *Forbes* v. *Aberdeen Harbour Commissioners*, 1888, 15 R. 323, *per* L.J.C. Moncreiff at p. 325, 25 S.L.R. 239; *Cormack* v. *School Board of Wick and Pulteneytown*, 1889, 16 R. 812, 26 S.L.R. 599; *Findlay* v. *Angus*, 1887, 14 R. 312, 24 S.L.R. 237; *Gibson* v. *Glasgow Police Commissioners*, 1893, 20 R. 466, 30 S.L.R. 469; *Morrison* v. *Macara*, 1896, 23 R. 564, 33 S.L.R. 384; *Reilly* v. *Greenfield Coal and Brick Company, Limited*, 1909

S.C. 1328, *per* Lord Johnston, Ord., at p. 1334, 46 S.L.R. 962; *Lynch* v. *Murdin*, 1841, 12 B. 29; *Ponting* v. *Noakes*, [1894] 2 Q.B. 281, *per* Collins, J., at p. 291; *Williams* v. *Eady*, 1893, 10 T.L.R. 41; *Robinson* v. *W. H. Smith & Sons*, 1901, 17 T.L.R. 423; *Sullivan* v. *Creed*, [1904] 2 I.R. 317. The case of *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, 45 S.L.R. 860, founded on by the defenders, was not really an authority *contra*. The dicta of Lord Kinnear in that case at p. 1043 were no doubt sweeping, but they were not the true ground of judgment, and in any event they were overruled by the subsequent case of *Cooke* v. *Midland Great Western Railway of Ireland*. Further, in *Johnstone* v. *Magistrates of Lochgelly*, 1913 S.C. 1078, at p. 1089, 50 S.L.R. 907, Lord Kinnear expressed views which were not consistent with the theory that he intended to lay down a rule in *Stevenson's* case that a young child was entitled to no more protection than an adult from public authorities. In that case he expressed the view that the degree of duty varied with the relationship to the person injured, and that the liability for negligence varied according as the person injured was an adult or a child. Further, Lord Dunedin never concurred in the wide expression of the principle which Lord Kinnear appeared to give in *Stevenson's* case. In *Reilly* v. *Greenfield Coal and Brick Company, Limited*, all he did was to approve of Lord Kinnear's exposition of the law in *Stevenson* v. *Corporation of Glasgow*, as to how far a court was bound to allow a jury to try such a question. *Hastie* v. *Magistrates of Edinburgh*, 1907 S.C. 1102, 44 S.L.R. 829, only ruled *Stevenson* v. *Corporation of Glasgow* so far as the nature of the risk was concerned, but it had no general application such as was sought to be deduced from the latter case. Later cases were inconsistent with the view that there was no difference between the liability to children and to adults, and were consistent with the general principle affirmed in *Cooke* v. *Midland Great Western Railway of Ireland*, and *Mackenzie* v. *Fairfield Shipbuilding and Engineering Company, Limited*, where it was expressly recognised that a thing might be a danger to children which was not a danger to adults, and that in a place which was supposed to be closed to children; *Taylor* v. *Dumbarton Tramways Company*, 1918 S.C. (H.L.) 96, and *per* Findlay, L.C., at p. 100, 55 S.L.R. 443; *Jackson* v. *London County Council and Chappell*, 1912, 28 T.L.R. 359; *Latham* v. *R. Johnston and Nephew, Limited*, [1913] 1 K.B. 398, *per* Hamilton, L.J., at pp. 410, 413, and 414. A similar duty had been recognised as owing to blind persons—*M'Kibbin* v. *Corporation of Glasgow*, 1920, 59 S.L.R. 476. In all such cases the age, relationship, places, and kind of danger were of importance—*Morrison* v. *Sheffield Corporation*, [1917] 2 K.B. 866, *per* Viscount Reading at p. 870. The present case was really *a fortiori* of *Cooke* v. *Midland Great Western Railway of Ireland*, because that was a case of trespass, while in the present case the access was as of right. This was not a botanic garden in the proper sense of the term. It was really a public park. There was, therefore, an absolute duty on the controlling authority not to put a poisonous plant where children were playing. In the present case the plant was in an adjacent plot to which children had access. No precautions, however, had been taken, and there was not even a notice on the bush calling attention to its dangerous character. The distinction that it was a thing of nature was not tenable. No doubt a child must take nature as he found it and the risks attached thereto, but in the present case, though the plant was found growing wild, it had been artificially transplanted to its present position. The defenders must be taken to expect the consequences which would naturally flow from their act, and the accident in the present case was such a consequence—*Scott* v. *Shepherd*, 1771, 3 W.Bl. 892. Liability in all such cases was a question of circumstances. This made the question preeminently a jury question—*Toal* v. *North British Railway Company*, [1908] S.C. 29, *per* Loreburn, L.C., 45 S.L.R. 45. The unusual character of the risk was an additional reason for allowing a jury trial—*Scott's Trustees* v. *Moss*, 1889, 17 R. 32, 27 S.L.R. 30. Further, the risk in the present case was of the nature of a trap, because it was an attractive berry that looked like fruit, placed in a public place. In this respect the case differed from *Stevenson* v. *Corporation of Glasgow*, which dealt with a natural danger which was patent to everyone

Argued for the defenders—The present case fell within the principle of *Hastie* v. *Magistrates of Edinburgh*, *cit. sup.*, and *Stevenson* v. *Corporation of Glasgow*, *cit. sup.*, viz., that the fact that young children go unattended to public places does not impose a greater liability on the authorities than they would otherwise have—*per* Lord President Dunedin in *Hastie* at p. 1105, and Lord Kinnear in *Stevenson* at p. 1043, foot. According to Lord Kinnear's exposition of the law in that case, there was a duty on public authorities to take all reasonable precautions, but they were entitled to expect that persons resorting thereto would take reasonable precautions for their own safety. If an unusual danger was introduced the duty would be higher, but if a child was injured through its own childishness that fact would not impose liability. It was the duty of parents and guardians to take precautions in such cases—*Grant* v. *Caledonian Railway Company*, 1870, 9 Macph. 258, 8 S.L.R. 192. Lord Kinnear's views in *Stevenson* were approved in *Latham* v. *R. Johnson & Nephew, Limited*, *cit. sup.*, *per* Farwell, L.J., at p. 407, which was later in date than *Cooke* v. *Midland Great Western Railway of Ireland*, *cit. sup.*, on which the appellant founded and in which the scope and effect of the decision in *Cooke* were considered. In order to bring his case within the ratio of that decision, the pursuer would have to show that the plant in question was such an inherently dangerous thing as to make the duty of protection absolute—*Dominion Natural Gas Company, Limited* v. *Collins & Perkins*, [1909] A.C. 640, *per* Lord Dunedin

at p. 646, 47 S.L.R. 583. The Case of *Cooke* was simply an illustration of the principle that the owners of dangerous machines had a special duty to those who came on their premises, whether of licence or of right, to see that they were adequately protected against the risks to which they were thus exposed. The strength of the defenders' position was that, as the name of their Gardens implied, they were entitled to exhibit botanical specimens for the education of the public. The risk therefore was not due to an unusual or concealed danger. It was not therefore a trap. To hold that the defenders were liable in the present case would be to impose a novel liability on all persons throwing their gardens or grounds open to the public. The risk in the present case was not different in character from the risks to which all young children were exposed who went out unattended in the hedgerows, woods, and fields. It was in no sense a trap in the sense of the trap cases as it would have been if it had been growing among fruit bushes—*Jenkins* v. *Great Western Railway*, [1912] 1 K.B. 525; *Lowery* v. *Walker*, [1910] 1 K.B. 173; *Coffee* v. *M'Evoy*, [1912] 2 I.R. 290; *Latham* v. *R. Johnson & Nephew, Limited*. There was no warrant in authority for including a natural production like a berry in the category of trap. It could not be said that there was any invitation in the present case as there was in the case of *Cooke—Holland* v. *Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142, *per* Lord Kinnear at p. 1149, 46 S.L.R. 758. There was further no sufficient averment of what precaution the defenders could have taken to avoid the accident.

At advising—

LORD JUSTICE-CLERK—The question we have to decide is whether the Lord Ordinary is right in holding that the pursuer's averments are irrelevant and therefore dismissing the action.

In his note the Lord Ordinary discusses the case of *Cooke* ([1909] A.C. 229), but I am not sure that I rightly appreciate the result at which he arrives with regard to that case. It is, however, a judgment of the House of Lords, and must be accepted with all the authority that belongs to such a judgment. The legal ground, however, on which the Lord Ordinary proceeds in holding the present case to be irrelevant is thus expressed by him — "The case appears to me to be covered by the decision of the First Division in *Stevenson* (1908 S.C. 1034)," and he quotes from that case a passage from Lord Kinnear's opinion in which it is said—"There is nothing unlawful in making a public garden or in opening a garden to the public in a place where there are streams or ponds, and if the place is made safe for persons of average intelligence I know of no rule of law which requires the proprietors to take further precautions. It is impossible to lay upon the defenders a duty to protect children from risks which arise only from their own childishness and helplessness. This is the office of their parents or guardians." For reasons which I shall hereafter explain I do not think the present case is covered by the decision in *Stevenson* (and *Hastie's* case (1907 S.C. 1102) seems to me *in pari casu* with that of *Stevenson*), and the main ground of the Lord Ordinary's judgment therefore, in my opinion, fails. The result at which he has arrived may, however, be right, and it is therefore necessary to consider the record and the more important of the authorities relied on.

The main averments of the pursuer may, I think, be summarised thus. The defenders are proprietors and custodians of the Botanic Gardens, Glasgow, used and open to the public as a public park. The pursuer's child was seven years of age, and went, on the date when he was poisoned, to the playground in the gardens surrounding the bandstand there, which as the defenders knew, was frequented by young children. At that date and for some time prior thereto the defenders had growing in a small plot immediately adjoining this playground, wheat, barley, oats, and a belladonna plant bearing berries rather similar to small grapes, and presenting a very alluring and tempting appearance to children. This small plot was enclosed by a wooden fence, but was open to the public by a gate in the fence, and as the defenders knew was frequented by members of the public of all ages including students. The gate was one which could easily be opened by young children. On the date in question some of the children, including the pursuer's son of seven, were attracted while passing the place by the beautiful and tempting appearance of the belladonna plant, which overhung the adjoining path by about 2 feet, and they picked a few of the berries and ate them. In consequence they became unwell, and the pursuer's son died next day. The belladonna plant was quite visible from the children's playground. The attractive character of its berries, looking as they do to the uncritical eyes of young children like cherries or big black currants, has led to many serious accidents. The poisonous character and the inviting and deceptive appearance of the berries were well-known to the defenders and their servants in charge of the gardens, and they knew or ought to have known that the plant was growing in a conspicuous position open to and much frequented by children who would probably be tempted and deceived by the appearance of the berries and would eat them, they having a sweet taste. The defenders knew or ought to have known that the berries were a deadly poison, and if eaten by children were likely to cause death. It was fault on the part of the defenders in having the plant growing where it was without warning the children of the danger or preventing the children from picking the berries. The defenders provided no warning of the dangerous character of the berries and no protection against children or others having access to them.

I do not think *Stevenson's* case applies at all to the present case. Lord M'Laren did not in that case "doubt that the corporation, as proprietors, are bound to give reasonable protection to members of the

public against unusual or unseen sources of danger should such exist. But in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures. The situation of a town on the banks of a river is a familiar feature. . . . But in none of these places has it been found necessary to fence the river." Lord Kinnear said (at p. 1042)—"Everybody resorting to the garden knows about these things as well as the owner and occupier himself. They are very obvious and patent, they are on the surface." There was no "unusual danger known to the proprietor and not known to people who may come upon premises with which they are not familiar." Moreover, his Lordship goes on to say that in that case there was no higher or other duty on the defenders towards children than towards adults. "If the place," he said (at p. 1045), "is made safe for persons of average intelligence I know of no rule of law which requires the proprietors to take further precautions. It is impossible to lay upon the defenders a duty to protect children from risks which arise only from their own childishness and helplessness." Lord Mackenzie said—"The reason why there is no obligation to fence is because the danger is an obvious one."

I have no criticism to direct against these observations, read *secundum subjectam materiem*. To my mind, however, it is not justifiable to treat them as of general application or even as applicable to the facts averred in this case. The playground for the children must be taken as being provided as a place reasonably suitable and safe for children, and I think the parents were entitled so to regard it. The children were there with as much right as if they had been on a public highway and with the added security that they and their parents were entitled to think they would be safe from at least many of the risks that are incident to and inseparable from the public streets.

The danger from poison has been classed by Lord Dunedin, and I think rightly classed, as dangerous in itself. In *Reilly's* case (1909 S.C. 1328, at p. 1335, foot) he referred to the thing "actually dangerous in itself, that is to say, where there is what I may call active danger in it, such as the case of the loaded gun, poison, or fire."

It is impossible in my opinion to say that in appropriate cases the law does not require a higher degree of duty and a stricter observance of it by the owners of property towards those who are entitled to be on it as matter of right in the case of children than in the case of adults. No one has more distinctly recognised this in my opinion than did Lord Kinnear. I refer to his opinions in the cases of *Stevenson* and *Johnstone* (1912 S.C. 1078, at p. 1089), where he deals specially with the class of things which he refers to as "dangerous in themselves." Lord President Dunedin's opinion in *Reilly* is to the same effect. He draws attention to the importance of the character of the instrument which did the damage, and he alludes (p. 1338) to *Cooke's* case as one where the railway company had allowed their turntable to become a matter of allurement to children to be used as their plaything, and which at the same time was fraught with elements of danger, and he takes *Cooke's* case as a better illustration for his purpose than the case of *Campbell* v. *Ord & Maddison* (1 R. 149). I refer also to the opinion of the Lord Ordinary (Johnston) in *Reilly*.

In the case of *Johnstone* (1913 S.C. 1078, at p. 1092) Lord Mackenzie considered it of importance that there was no averment "that the objects said to have attracted the children were put" where they were by the defenders. In this case the playground and the plant which did the mischief were brought by the defenders into immediate contiguity.

In the case of *Mackenzie* (1913 S.C. 213) the Lord Ordinary (Ormidale), whose judgment allowing an issue was affirmed, arrived at his decision "chiefly because of the case of *Cooke*." The Lord Justice-Clerk said that the case was just one of the class which are generally remitted to a jury. He added (p. 216)—"As to the relevancy, I have no doubt that the case is relevant. It is averred that the defenders, knowing that their sandpit was a dangerous place, allowed children to enter their ground and use the sandpit as a playground. It is also averred that the place immediately adjoined a public path, in the fence of which there was a gap, and that it was a common resort of children for the purpose of recreation. What force is to be given to the averments as to the dilapidated condition of the fence will depend entirely on the evidence. But the real ground of liability as alleged is the fact that the defenders allowed the children to make use of the pit." Lord Dundas concurred. Lord Salvesen said—"I think the crucial distinction between this case and the cases of *Devlin* (5 F. 130) and *Cummings* (5 F. 513) is that the danger here was not manifest to a child of tender years. Every child which is able to go out by itself is supposed to know that a pond or a hole is dangerous, but not that a bank of sand may give way because it is at a greater angle than the angle of repose.

The case of *Cooke* has been subjected in England to very searching discussion, but it is a judgment of the House of Lords. In my opinion it supports in material respects the views I have already indicated. The last paragraph of Lord Macnaghten's judgment (p. 236) especially refers to the duty requiring to be observed towards those "who are unable in consequence of their tender age to take care of themselves." This passage has been quoted with approval by Lord President Strathclyde in the case of *Wilson* (1915 S.C. 215, at p. 221) as very accurately expressing the general conclusion in non-technical words. In the judgment of Lord Atkinson the position of children and the nature of the duty required towards them is very fully set out on pp. 237 and 238 to which I refer. He concludes with this passage—"The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his

knowledge, actual or imputed, of the habits, capacities, and propensities of those persons"—a view which seems to me specially applicable in the case of a municipal corporation which provides a playground for the children of its citizens. In the same case Lord Collins (at p. 241) speaks of the facts as fixing "the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal, namely, those who from their tender age would be deemed incapable of caution and therefore of contributory negligence." At the end of his judgment he refers to the special considerations applicable in the case of young children as distinguished from adults. In my opinion these observations apply with even greater emphasis in the present case.

The case of *Latham* ([1913] 1 K.B. 398) in no way detracts from the importance of the passages I have just referred to. It seems to me to recognise and confirm all I have indicated as to the special duty to children and the importance of allurements in cases where children are concerned — traps and what the nature of a trap is — the significance of dangers known to the owner of the premises and not to the child.

As to the argument on the ground of public policy, if I may so call it, I refer to the closing paragraph of Lord Macnaghten's judgment in *Cooke's* case, and to the judgment of Hamilton, L.J., in *Latham's* case at p. 421. Such an argument ought of course to receive all due weight from the jury.

In my opinion the pursuer has sufficiently averred a duty on the part of the defenders and a failure to discharge it, and he is accordingly entitled to have his case submitted to a jury, which is all that we are asked to decide. In coming to that conclusion I have of course in view what Lord Kinnear said in *Stevenson's* case, with the approval of Lord Dunedin in *Reilly's* case, as to the respective functions of judge and jury in such cases, the result being that in this matter our law is the same as the law of England. In my opinion the reclaiming note should be sustained and an issue approved. The case is, I think, eminently one for a jury, who will of course have to consider whether the pursuer has proved his averments having regard to the evidence submitted by both parties. I neither have nor express any opinion as to what the result ought to be. I only decide that in my opinion there is so far as averment goes a case entitling the pursuer to an issue. Whether he will succeed in establishing his case by evidence is quite a different matter, which the jury, under the direction of the judge, will have to decide when the evidence on both sides is before them.

LORD DUNDAS—The pursuer's infant son unfortunately died from eating the berries of the *atropa belladonna* shrub in the Botanic Gardens, Glasgow, which are open to and used by the public as a public park, and belong to the defenders the Corporation of Glasgow. He seeks damages against the Corporation for the death, as having been caused by their fault and negligence. The Lord Ordinary dismissed the action as irrelevant. I have come to the conclusion that his interlocutor is wrong, and that we must approve of an issue for the trial of the cause before a jury.

In two recent cases — *Hastie* (1907 S.C. 1102), where a child was drowned in a pond in Inverleith Park, Edinburgh, and *Stevenson* (1908 S.C. 1034), where a similar accident took place in the flooded Kelvin in these Botanic Gardens, Glasgow — some broad general views were expressed as to the nature and limits of the duty owed at common law to the public, and particularly to young children, by the proprietors of public parks. It is clear that the latter do not ensure the safety of those who resort to the park. Such persons are entitled to reasonable protection against unusual or unseen sources of danger, but on the other hand must take reasonable care of themselves, and must accept all ordinary risks which are necessarily incident to such places as they may exist. This doctrine applies to young children as well as to adults. The proprietors have in such circumstances no special duty to protect young children from such risks as are incident to their tender years. That is the duty of their parents and guardians, and if young children are (unavoidably it may be) left unattended and so run greater risks than if they had been duly supervised, that, as Lord Dunedin said (1907 S.C. 1106), "is just one of the results of the world as we find it," and the proprietors are not liable for an ensuing mishap. This is also the law of England. In *Latham* ([1913] 1 K.B. 407) Farwell, L.J., said — "I am not aware of any case that imposes any greater liability on the owner towards children than towards adults; the exceptions apply to all alike, and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian." The learned Judge referred to *Stevenson's* case, and to *Burchell* (1880, 50 L.J., C.P. 101), where an instructive opinion by Lord Lindley (then Lindley, J.) will be found. By way of qualification however, or distinction from what has been said, it must be added that — as incidentally observed in *Hastie* and in *Stevenson*, and more fully developed in many decisions both Scots and English—a proprietor of ground to which the public are admitted, if he introduces upon it for his own purposes, however lawful, something which is in itself a source of danger, must take precautions for their safety proportionate to the danger, and to the ability of those who may encounter it to escape from its effects. Thus in *Reilly* (1909 S.C., at p. 1336, foot) Lord Dunedin, after referring to the case of *Hastie*, goes on to deal with "the other class of things where the thing is actually dangerous in itself, that is to say, where there is what I may call active danger in it, such as the case of the loaded gun, poison, or fire." Illustrations of this category of things occur in reported cases, and include, say, explosives, dangerous machines of all kinds

(*cf., e.g., Campbell* v. *Ord & Maddison* (1873, 1 R. 149); *Cooke* ([1909] A.C. 299)); a sandpit (*Mackenzie* (1913 S.C. 213)), and so forth. And where there is anything in the nature of a concealed trap the owner's duty of care and precaution may be greater in regard to young children than towards adults, for what is no trap to the latter may be so to the former (*cf., e.g., Johnstone* (1913 S.C., *per* Lord Kinnear at p. 1089)). In *Latham* ([1913] 1 K.B. 416) Lord Sumner (then Hamilton, L.J.), speaking of a child who has entered some place by leave or as of right, says—"The presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought as a reasonable man to have anticipated the presence of the child and the attractiveness and peril of the object."

It is in connection with the class of cases last mentioned that the delicacy of the present case arises. The Lord Ordinary considers that the case is covered by that of *Stevenson*. I do not agree. The danger of water, whether a pond or a running stream, is more or less obvious and patent even to children, and may be considered as one of the not unusual risks incident to a park or garden; it is not so easy, upon the pursuer's averments, to affirm these things of the presence of this poisonous but outwardly attractive berry. The pursuer's case, if he has one, is that the latter constituted an unusual and unseen danger of the nature of a trap for children, and as Lord Mackenzie observed in *Stevenson* (1908 S.C. 1046), "there may be cases in which it might be proper for a jury to say whether the danger was obvious or not."

The pursuer's averments, with which alone we are concerned at this stage, may be briefly summarised as follows:—He says that the Botanic Gardens are open to and used by the public, including children, as a public park; that his son, aged seven, went with other young children to the playground in said gardens surrounding the bandstand, a part of the gardens, as the defenders well knew, much frequented by children; that the defenders had in the immediate vicinity of this playground and visible from it some plants and shrubs, one of which was *atropa belladonna*, bearing berries rather like small grapes of a very alluring and tempting appearance to children, but in fact of a poisonous quality; that these shrubs were quite readily accessible to children, for though enclosed by a wooden fence there was a gate in it which even a child of tender years could easily open; that the shrub in question overhung the adjoining path to the extent of about 2 feet; and that the pursuer's son being attracted by its berries, ate of them, and so died. He avers (Cond. 6) that "it was the duty of the defenders . . . to have a notice in the vicinity of said shrub which would warn the public, both adults and children, of the poisonous and dangerous character of said berries, or to have the said shrub fenced off for the protection of children," and that they failed to perform this duty. The pursuer avers (Cond. 5) that "the defenders were in fault in having the said shrub growing in a part of said gardens open to children and frequented by them without taking any precautions, as they ought to have done but failed to do, to warn children against the danger or to prevent children from reaching said shrub and picking the berries."

I am not greatly impressed as matter of relevancy by the two failures in duty specifically alleged against the defenders, viz., failure to put up a notice and failure to fence round this shrub. The adoption of the first of these precautions might, I think, easily prove to be futile; a child of seven, even if it could read, would scarcely heed a notice. As regards the second, it is not, and surely could not be, said to be a usual precaution, and besides being highly inconvenient from a practical point of view would not if resorted to seem to secure immunity, except as regards this particular bush, to children, to whom bright but unwholesome berries or the like may present irresistible attractions. But the pursuer's case lies deeper than this. He alleges that *atropa belladonna* being deadly poison is not a safe or suitable, still less a necessary, inmate of a garden which is in fact used as matter of public right by children as a playground; that its presence constitutes a trap for them; and that the defenders keep it there at their peril. I am unable to affirm that the pursuer's averments are such as we are entitled to withhold from a jury. That is at the present stage the sole question we have to decide. Whether or not the pursuer is entitled to damages is of course quite a different matter. That can only be decided after the whole facts have been elicited, and the defender's counter statements as to the history and nature of these gardens, and the whole happenings in regard to this plant and this child, and their pleas, including those anent contributory negligence and contravention of bye-laws, have been the subject of inquiry and evidence.

The defenders' counsel strongly urged that if we allowed an issue here we should be inadvertently opening a wider door than we reckon for, or, in another metaphor, should be starting on a slippery slope upon which no halt could be called until we found ourselves constrained to pronounce decisions as unfortunate and possibly disastrous as they are at present uncontemplated. It was represented that not only in "botanic" gardens but in others there are many things—berries, fruits, pods, or leaves—which might well attract children, and if eaten by them cause grievous harm or even death, and that if this case be submitted to a jury there would be no limit to the cases which will have to be so tried. I am not, I confess, much moved by this argument. The Court may, I think, be trusted to protect itself from being thrust into extreme or absurd positions, and future cases may safely be left to be considered as they arise. But I find myself

unable to hold, as the Lord Ordinary does, that on the pursuer's averments this case plainly falls within the rules laid down in such cases as *Stevenson*, because I do not think that the danger as it is represented on his record can be affirmed *de plano* to be one of the ordinary and obvious risks necessarily incident to public parks or gardens. The case he sets forth is one of a danger unusual and not obvious, but of the nature of a concealed trap. Whether or not this will turn out to be the true nature of the case remains to be seen—but the averments cannot, in my judgment, properly be dismissed as irrelevant. We ought therefore in my opinion to recal the Lord Ordinary's judgment and approve an issue for the trial of the cause.

Before concluding I should like to add a few words about the case of *Cooke*, which figured prominently in the discussion. For some reason, perhaps in some measure from a rather misleading headnote (*pace* the learned editor's explanatory note in [1913] 1 K.B., p. 421, foot), the case seems to have been relied on ever since by pursuers and plaintiffs as establishing law of a new and startling character, to the effect, as Lord Sumner (then Hamilton, L.J.) put it in *Latham* (at p. 410, top), "that an infant, even though a trespasser, is entitled to have the place it wanders into and the things it finds there made so safe with reference to its own incapacity to take care of itself as to safeguard it from injury." In truth, however, as the learned Judges in *Latham* pointed out, *Cooke's* case declared no new law or principle and overruled no old case. *Cooke* was a case of limited application, and was, as appears from more than one of the judgments of the noble and learned Lords, a very narrow one upon its individual facts. The decision amounted in my judgment to this, that the jury were upon the facts before them entitled to hold the defendants guilty of negligence inferring damages, in respect that the children were, by licence of the defendants (or as Lord Collins thought, by their invitation), in use to play upon a turntable which not only constituted an allurement to them but was of the nature of a trap, inasmuch as it was not kept locked or fastened as it might easily have been, and as (according to uncontradicted skilled evidence) was usual in the case of such machines. There seems to be no mystery about *Cooke's* case. It is just an example—somewhat special in its facts—of the class of decisions about traps for young children.

LORD SALVESEN—This case, which has been made the subject of anxious and prolonged argument, involves a point of general importance. I cannot say, however, that it has caused me any difficulty, for I entirely agree with the opinion of the Lord Ordinary. If the circumstances could be assimilated to those which occurred in the case of *Cooke* ([1909] A.C. 229), decided in the House of Lords, I should of course have felt myself constrained to follow that decision. Indeed, notwithstanding the criticism to which the decision has been exposed by English judges, I should have no difficulty in following it in circumstances such as those disclosed in the pursuer's condescendence, because I apprehend that if a public authority admits children to gardens for purposes of recreation, they would be answerable for anything in the nature of a trap through which a child of tender years was injured. Thus if the turntable which was set in motion by the children in *Cooke's* case had been situated on ground which the public were entitled to use, and no precautions had been taken to prevent the turntable being put in motion by children, although precautions of a simple kind could easily have prevented injury, I cannot conceive upon what ground the Court would refuse compensation against the owners of the premises for injuries to a young child caused by himself or his companious putting it in motion.

I am, however, unable to hold that a bush or tree growing in a botanic garden is to be considered as a trap simply because it bears fruit of a kind which if plucked and eaten by a child may have injurious consequences. If, as Lord Kinnear said, there is no duty on a public authority "to protect children from risks which arise only from their own childishness and helplessness," there is still less any duty upon them to protect children against their own mischievous acts. If there were, it is difficult to see where such a duty would end. No doubt it is the case that children frequently do things which they know are forbidden, and indeed may be tempted to do because they are so forbidden, but that is no reason why the responsibility for any injury which they may do to themselves or others should fall upon the public authority. The duty of protecting children against injuries sustained by their own acts lies in general upon their parents and guardians, who must take care that they are not permitted to go into places where they are exposed to risks through their own helplessness, or where the indulgence of their own mischievous propensities may cause them injury. The matter seems to me, as Lord Dunedin said, to be one of common sense rather than of law. It might be otherwise if the temptation to which this child succumbed of plucking and eating poisonous berries had been one which had been unnecessarily introduced, but a botanic garden is a place where it is proper to have plants of all descriptions, and there is no implied representation that plants which are grown there must necessarily be harmless. It is common knowledge that such a garden could not exist except under the regulation that those who frequent it should not interfere with the growing plants by stripping them of their flowers or fruit. This knowledge it is the duty of parents who allow their children to play there to impress upon them, and if they fail to do so or the child disobeys them it is no fault of the public authority. The point is very well illustrated in the present case by considering the failure of duty which is averred by the pursuer here. The pursuer does not say that the defenders were in fault in having a shrub which bore poisonous berries in

their gardens, but he does say that they were to blame for having had it there without taking precautions to warn children against the danger or to prevent children from reaching the plant and taking the berries. The only concrete suggestion which he makes is that the belladonna plant should have had a label bearing the word "poisonous" upon it, or that the shrub should have been fenced off so that children could not reach it. How the first of these precautions could have been effectual I fail to see even in the case of a child able to read, and how the second could have been adopted consistently with the use of the gardens by botanic students I am equally at a loss to conceive. In every garden there are shrubs and trees which bear leaves or fruit which are injurious to health if eaten—the common laburnum tree is a good example—and the suggestion that all such should be protected by a child-proof fence in case an inquisitive or mischievous child should injure himself by eating the fruit does not commend itself to my mind. The risk of children injuring themselves by partaking of poisonous berries appears to me to be far less than the risk of their getting drowned in pleasure ponds. In any case the fault, if there be any, lies with the parent if it is too young to understand the danger, or with the child if he is old enough to understand it but cannot resist his own inquisitive or mischievous propensities. The number of ways in which children may injure themselves is endless. They may do so by climbing trees in public parks and falling to the ground, or by putting pebbles or beech nuts or acorns in their mouths and accidentally swallowing or choking themselves with them. They may even run the risk of dying from being pricked with a thorn, as a case reported in the *Scotsman* of 14th December illustrates, where a man died from a prick of a common thistle which set up blood poisoning. Where they or their parents know that they are doing something forbidden the case is *a fortiori* of what I have figured, and the only efficient protection, short of closing a botanic garden entirely to children, is that the parents impress upon them the impropriety of interfering with any of the plants in the garden.

I would only add that in my opinion a judgment against the defenders in the present case would have far-reaching consequences. No proprietor would be safe in throwing his gardens open to the public if he were to be held liable for the death of any child who assumed that every berry that he saw was fit for his consumption, and in the course of his experiments partook of poisonous berries, although he was admitted on the condition that he was not to touch any of the plants. I am accordingly of opinion that the condescendence discloses no relevant ground of action, and that we should affirm the interlocutor appealed from.

LORD ORMIDALE — I concur with your Lordship and with Lord Dundas that on the averments made by him the pursuer is entitled to have his case submitted to a jury.

The pursuer tells us that the Botanic Gardens are used by and open to the public as a public park, and, further, that a portion of this public park is appropriated as a playground for children; that in close proximity to this playground there is another part of the public park accessible to all and sundry, including children; that children are known by the defenders to frequent it; that in this plot of ground there is grown a plant displaying berries which are in fact deadly poisonous, but which by their inviting and attractive appearance are calculated to tempt children to pluck and eat them; and that his son, aged seven years, was so tempted and did so eat, with the result that he died from the poison. He further says that no precautions are taken by the defenders to warn children of the nature of the plant or to prevent them from reaching and picking the fruit of it. He also states two precautions which might have been taken.

Now on the pursuer's averments these berries constituted a danger, or a source of danger, not like a river or pond, as in *Stevenson* (1908 S.C. 1034) and *Hastie* (1907 S.C. 1102), open and patent alike to children and their parents. They were of the nature of a trap. Lord Justice Hamilton in *Latham's* case ([1913] 1 K.B., at p. 405) says (p. 415)—"A trap involves the idea of concealment and surprise, an appearance of safety under circumstances cloaking a reality of danger." These berries were not only apparently harmless while in reality extremely dangerous, but they were also attractive and inviting to the eye. They were at once an allurement and a trap.

If that be so, then I think that the case of *Cooke* ([1909] A.C. 229) is *a fortiori* of the present, for there is on the pursuer's averments no question of trespass here. The pursuer's son had a right to be where the plant was growing, and the berries were within his reach. But it appears to me that in *Cooke* the House of Lords did no more than give effect in the special circumstances of that case to a principle or rule of law which had been already recognised in many cases, not involving any question of trespass, both in Scotland and England—the principle, namely, that where the danger to be encountered arises from the existence on the ground in the knowledge of the proprietor of something of the nature of a trap, and it may be also of an allurement, the proprietor owes a duty to those entitled to frequent the place to safeguard them against it, and that in the case of children the proprietor must exercise a greater degree of care than in the case of adults.

Your Lordships have already commented on the principle and illustrated it by reference to cases, and I do not feel that I can usefully add anything to what your Lordships have said.

I agree that it is not possible, without inquiring into the circumstances attending the death of the pursuer's child, satisfactorily to determine whether or not the death was due to the fault or negligence of the defenders.

The Court recalled the interlocutor re-

claimed against, and approved of an issue for the trial of the cause.

Counsel for the Pursuer and Reclaimer—MacRobert, K.C.—Duffes. Agents—Arch. Menzies & White, W.S.

Counsel for the Defenders and Respondents—D.-F. Constable, K.C.—Gilchrist. Agents—Campbell & Smith, S.S.C.

Thursday, November 25.

FIRST DIVISION.

[Exchequer Cause.

ADAM STEAMSHIP COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Deductions—Insurance—Calls Paid by Members of Mutual Assurance Association—Proof that Payments were for Insurance or Other Trade Purposes—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40, *Fourth Schedule, Part I.*

A steamship company being desirous of insuring their ships, joined a mutual assurance association and came under obligation to pay certain sums of money under the name of calls. The objects of the association included, in addition to insuring its members, that of promoting the interests of shipowners as a body by contributing to the funds of a shipping federation. The company having claimed that the amount of the calls paid by them should be attributed to the benefits of insurance and be deducted from their gross returns in arriving at the assessment of their profits for the purposes of excess profits duty, the Commissioners required the company to produce the accounts of the federation and other papers relative to that body. The company having failed to produce these particulars the Commissioners confirmed the assessments.

The Court *recalled* the confirmation and remitted to the Commissioners to give the appellants an opportunity of producing evidence as to how much of the calls paid by them were for insurance or other trade purposes.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 40, sub-section (1)—"The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purposes of this part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modification set out in the first part of the fourth schedule to this Act and to any other provisions of this Act."

The Adam Steamship Company, *appellants*, being dissatisfied with a decision of the Commissioners for the General Purposes of Income Tax at Aberdeen confirming the assessments made upon them for excess profits duty of £49, 10s. for the accounting period ended 30th April 1915, £124, 5s. 4d. for the accounting period ended 30th April 1917, and £123, 4s. for the accounting period ended 30th April 1918 under the Finance (No. 2) Act 1915, the Finance Act 1916, and the Finance Act 1917, obtained a Case for appeal, in which D. Matheson, Surveyor of Taxes, Aberdeen, was *respondent*.

The Case stated—"The point on which the decision of the Court is sought is whether the General Commissioners were entitled to require the appellants to produce or cause to be produced particulars of the purposes for which the amounts of the calls after referred to were expended by the Shipping Federation, Limited, and in default of such production by or through the appellants to dismiss the appeal, or were bound to decide on the evidence produced whether the amounts of the said calls were proper deductions for the purpose of excess profits duty.

"The following *facts* were admitted or proved—1. The appellants are members of the North of England Protecting and Indemnity Association (hereinafter called 'The Association'), which is a mutual insurance association, and which in turn is a member of the Shipping Federation, Limited. 2. The assessments are additional assessments made under No. 11 of the Regulations prescribed by the Commissioners of Inland Revenue under section 45 (7) of the Finance (No. 2) Act 1915 in respect of certain calls made on the appellants by the Association in terms of the articles of association and relative rules of the Association. 3. Clause 26 of the said articles of association provides—'The directors may from time to time make calls upon the members for payment, either in one amount or by instalments, of any sums which the members are liable to pay to the Association.' Clause 33—'If any member makes default in payment of any call at the time and place appointed for payment thereof, he may be forthwith sued by the Association for the amount thereof, and he shall pay interest thereon at the rate of £7, 10s. per cent. per annum from the day appointed for payment to the time of actual payment. And the directors may also by resolution declare that such defaulter shall as from the date of the default, or as from any later date fixed by the directors, cease to be in any way protected or indemnified in the Association, but the member shall, notwithstanding any such resolution, remain liable to pay to the Association the amount of all calls owing by him at the date of the resolution, and of all subsequent calls in respect of obligations incurred during his membership, with interest thereon at the rate aforesaid.' 4. Clause 62 of the said articles of association is in the following terms—'The directors may put out of the funds of the Association any sum or sums of money not exceeding in the whole in any one year the sum of £500, or such greater sum as the Association in general meeting may from time to time determine, to any hospital or to any benevolent, charitable, educational, industrial training or