found liable in a previous litigation, dated 15th July 1919, and relative charge, dated 5th November 1919, which had expired, and intimated to the pursuer that a motion would be made to ordain him to find caution for expenses.

On 27th February 1923, after the record had been closed, the Lord Ordinary (MURRAY) ordained the pursuer to find caution to the extent of £25 sterling within fourteen days.

The pursuer having moved that a certain document should be accepted by the Court, as obtempering the order, his Lordship on 8th March 1923 refused the motion, and of new ordained the pursuer on or before the 15th day of March 1923 to find caution to the extent of £20 towards the expenses of the action, under certification that if he failed to do so, decree dismissing the action, with expenses against him, would be pronounced.

On 16th March 1923 the Lord Ordinary (MORISON), in respect that caution to the extent of £20 had not been found by the pursuer, dismissed the action.

The pursuer reclaimed, and the case was heard on 26th May 1923.

LORD PRESIDENT—This is a reclaiming note by the pursuer against an order upon him to find caution for expenses. It has been explained at the bar that the motion on which the order proceeded was based upon an expired charge, now some four years old, and upon certain circumstances arising out of former litigation between the parties. These grounds may be enough to justify the order for aught I know. But they are in dispute, and there is nothing in process—either by way of pleading on the record or by way of submission by minute—setting forth the special grounds on which the motion was supported. It is true that in the simple case of the sequestration of a pursuer the public notification of the sequestration is enough to justify the motion for intimation to the trustee, and the trustee's refusal to come in leads in ordinary course to an order for caution. But this simple procedure applies neither in practice nor in fairness (especially when the pursuer is conducting his own case) to a case which depends on circumstances so special as the expiry of a charge four years ago and the particular relations of parties to past litigation. In such a case some formal and definite statement of the grounds is necessary, either on record or by minute, which the pursuer can meet by an equally definite answer (if he has one), and on which the Court can proceed in disposing of the motion. In the present case the absence of any statement whatever leaves us in ignorance of the grounds on which the order was made, and without any means of deciding a dispute which is wholly unformulated. There is nothing for it, therefore, but to recall the interlocutors reclaimed against. And then the case must go back to the Lord Ordinary.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

LORD SANDS—I concur.

The Court recalled the interlocutors of 16th March and 8th March, and the interlocutor of 27th February so far as it dealt with the question of caution, and remitted to the Lord Ordinary to proceed.

Agent for Pursuer and Reclaimer—Party.

Counsel for Defender and Respondent—Mackintosh. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, May 26.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

BOYD *v.* GLASGOW IRON AND STEEL COMPANY, LIMITED.

Reparation — Negligence — Ruinous Building Adjoining Public Road—Injuries to Children—Duty to Fence—Boy Climbing up on Insecure Building for Birds' Nests.

A father brought an action against the proprietors of a disused pumping house, situated beside a public road and contiguous to dwelling-houses, for damages for the death of his son aged ten years, who was killed by a fall from the building, on which he had been climbing. The pursuer averred that the building was roofless and had breaches in the walls, and was an attractive playground for children; that the building was not securely fenced off from the public road; that there was no notice prohibiting persons from entering the building; that for many years, as was well known to the defenders, boys had been in the habit of bird-nesting in the building; that while searching for a nest the pursuer's son sat upon a stone that appeared to be securely embedded in the wall; that the stone fell to the ground and the pursuer's son with it; that it was the duty of the defenders, in the knowledge which they possessed, either securely to fence off the building or to have the building put into a safe condition; and that the defenders had failed to perform that duty and so caused the accident to the pursuer's son. *Held* (*rev.* judgment of Lord Ashmore, *diss.* Lord Hunter) that the pursuer had relevantly averred fault on the part of the defenders, and an issue for the trial of the cause *approved*.

John Boyd, steelworker, Motherwell, *pursuer*, brought an action against the Glasgow Iron and Steel Company, Limited, Glasgow, *defenders*, for £250 damages for the death of his son.

The pursuer averred—"(Cond. 1) The pursuer's son Robert Freeland Boyd, aged ten years, died on or about 9th July 1922 in consequence of injuries sustained by accident after condescended on. The defenders are a limited company, and are proprietors of an old pumping engine-house abutting on the road to Kirklea. Many years ago the engine-house was used to pump water

from the river Calder to the defenders' works at Motherwell, but it has not been in use for at least twenty years, and is in a state of disrepair. There is no roof to the building, and there are breaches in nearly all the walls, which made them easy and attractive to children to climb. This condition has existed for many years. . . . (Cond. 2) The said building in its state of disrepair is not securely fenced off from the public road on which it abuts, and there is no notice prohibiting persons from entering the building. In fact the public has passed through and close by the building for many years without objection from and to the knowledge of the defenders. Immediately contiguous to the said building are dwelling-houses. The defenders' explanations are denied. The alleged gate is derelict. It is in two portions, and the right-hand portion is utterly broken down and useless for its purpose. The left-hand portion has been used by one of the said tenants of the said dwelling-houses to enclose poultry which he keeps. (Cond. 3) For many years children have been in the habit of playing constantly in the said building, and that with the knowledge of the defenders. It was an attractive playground for children, and as birds built their nests in the crevices of the walls, boys were in the habit of bird-nesting in the building and climbing up the breaches in the walls, which looked quite safe to climb. This was well known to the defenders, who allowed children to resort to the building although it was in its condition a trap dangerous to children climbing the walls. (Cond. 4) On or about 6th July 1922 the pursuer's said son, accompanied by some companions, had been to Shaws Banking, which is reached by the road on which the said building abuts, and on their return the pursuer's son climbed up one of the breaches in the wall of the said building in search of birds' nests. He sat on a stone in the wall and was putting his hand into a crevice where he thought there was a bird's nest when the stone fell to the ground and the pursuer's son with it. This stone appeared to be securely embedded in the wall and safe to sit upon, but owing to the said disrepair it was not really so, although this was unknown to the pursuer's son. He sustained a severe concussion of the brain and died on 9th July 1922. . . . (Cond. 5) The accident was entirely due to the fault and negligence of the defenders. They knew that the said building was a dangerous allurement to children, and they knowingly allowed them to use it as a playground and to climb up the walls, and the pursuer's son was ignorant of the danger, and the defenders did nothing to protect the children, and in particular the pursuer's son, from the said danger. It was their duty, in the knowledge which they possessed, either to securely fence off the building and take adequate measures to prevent children getting into the building or to have the building in a safe condition. They knew it was unsafe, and that parts of it had from time to time fallen down. They entirely failed to perform their duty, and so caused the accident to the pursuer's son, which resulted in his death. Had they taken, as they were bound to take, reasonable precautions to exclude children from the said building or to put the said building in a safe condition, the accident would not have occurred. On the contrary, they allowed them to play in and upon the insecure and dangerous building, and the death of the pursuer's son was the natural and probable result of their failure to take the said precautions. . . ."

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."

The pursuer proposed an issue in ordinary form.

On 2nd January 1923 the Lord Ordinary (ASHMORE) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"In this case the pursuer is suing the defenders for £250 as damages for the death by accident of his son, a boy ten years of age.

"The pursuer makes averments as to the circumstances under which the accident happened, to the following effect:—(*a*) that the defenders are proprietors of an old engine-house which has not been in use for at least twenty years, that it is in a state of disrepair, that it has no roof on it, and that there are breaches in nearly all the walls, which makes them easy and attractive to children to climb; (*b*) that for many years children have been in the habit of playing constantly in the said building with the knowledge of the defenders, that it was an attractive playground for children, and as birds built their nests in the crevices of the walls, that boys were in the habit of bird-nesting in the building and climbing up the breaches in the walls, which looked quite safe to climb, and that this was well known to the defenders, who allowed children to resort to the building although in its condition it was a trap dangerous to children climbing the walls; and (*c*) that on 6th July 1922 the pursuer's son climbed up one of the breaches in the wall of the building in search of birds' nests, that he sat on a stone in the wall and was putting his hand into a crevice in which he thought there was a bird's nest when the stone fell to the ground and the pursuer's son with it; that the stone appeared to be securely embedded in the wall and safe to sit on, but owing to the disrepair of the building it was not really safe, although that was unknown to the pursuer's son.

"I proceed to explain the grounds alleged by the pursuer as the basis of his claim for damages.

"His averments to the effect that the accident was entirely due to the fault and negligence of the defenders may be summarised as follows:—(*a*) that the defenders knew that the building was a dangerous allurement to children, and knowingly allowed them to use it as a playground and to climb up the walls; (*b*) that the pursuer's son was ignorant of the danger; (*c*) that

the defenders did nothing to protect the children from the danger; and (*d*) that the defenders knew that the building was unsafe and that parts of it had fallen from time to time, and that it was the duty of the defenders either (1) to fence off the building securely so as to prevent children from getting into it, or (2) to have it put in a safe condition.

"The defenders repudiate liability on various grounds, and at the diet for adjusting the issue, proposed by the pursuer for the trial of the case by jury, the defenders objected to the relevancy of the pursuer's averments.

"The questions which I have to determine—accepting for that purpose the pursuer's own averments regarding the state of the building, the defenders' knowledge, and the circumstances generally—are these —(*a*) Did the building constitute a trap in the sense that it subjected the pursuer's son to risks and dangers which were concealed from him but which were known to the defenders; and (*b*) was the accident which occurred one which the defenders ought reasonably to have anticipated and to have provided against by fencing the building so as to exclude children, or by putting the building in a condition safe for children when climbing its walls.

"In support of the contention that the building as described by the pursuer constituted a trap, counsel for the pursuer maintained that the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, is directly in point. He argued that just as in the case of *Cooke* the turntable allured the child of four years old, and while seeming safe to so young a child, was really a dangerous trap, so in the present case the wall with its breaches allured the pursuer's son, ten years old, seeming to him to be safe to climb, whereas it, too, was a dangerous trap.

"In view of the description given by the pursuer of the condition of the roofless building, out of use for twenty years and with breaches in its walls, I see no reasonable justification for regarding it as a trap in the sense of its having risks and dangers which were concealed from the pursuer's son but which were known to the defenders.

"On the contrary, having regard to the pursuer's own averments, I think that any risk and danger attending a climb of 15 or 20 feet up the wall must have been at least sufficiently obvious to a boy of ten years.

"Moreover, so far as appears from the pursuer's averments, it seems extravagant to suggest that the defenders could be reasonably expected to anticipate and provide against such an accident as occurred to the pursuer's son on his birdnesting climb by a complete overhaul of the building and its restoration from its broken-down condition to a state of repair.

"Then as regards the suggestion of fencing, if the building itself did not deter the pursuer's son from climbing, it is not likely that any ordinary fence would have deterred him. 'It is perhaps fortunate,' said Lord M'Laren, 'that there is no rule of law imposing on proprietors the impossible task of fencing their lands so as to keep out schoolboys—for the more difficult the fence was made the greater would be the temptation to overcome the obstacle.'—*Devlin* v. *Jeffray's Trustees*, 1902, 5 F. 130, at p. 134.

"After considering the case in the light of the decisions in this branch of the law, I have come to the conclusion that the pursuer's averments are irrelevant. In the circumstances disclosed by the pursuer I am of opinion that the principle given effect to in the case of Cooke is inapplicable in this case, and out of the various decisions I select two which seem to me to embody the true principle for the decision of this case. In the first place I refer to *Thomson* v. *Lanarkshire and Dumbartonshire Railway Company*, 1897, 24 R. 1025.

"In that case the pursuer sued the railway company for damages for the death of his son aged ten. The defenders' railway line was separated from a public court by a wall 5 feet high on the side facing the court but with a drop of 25 feet on the other side. The wall was flat on the top—14 inches wide. A heap of rubbish 2 feet in height had been left by the defenders against the wall in the court, and the pursuer's son mounted the wall and was walking along the top when he fell on to the railway and was killed.

"For the pursuer it was maintained that the defenders were in fault in not fencing the dangerous place and in adding to the risk by permitting the heap of rubbish to remain. The Second Division of the Court, however, held that no relevant case had been set forth, and accordingly refused trial by jury and dismissed the action.

"The other case is *Horsbrugh* v. *Sheach*, 1900, 3 F. 268. In it the pursuer sued for damages for the death of his son aged seven.

"A wall 8 feet high separated a public street from a mill pond 10 feet deep. The defender, a builder, deposited a large heap of building materials close to the wall and reaching to within 30 inches from the top, and the pursuer's son, when playing with other children on the top of the heap, fell over the wall into the pond and was drowned.

"The pursuer averred that the defender knew that children were in the habit of playing on the top of the heap, and that he was guilty of negligence in leaving the heap or in failing either to fence it or to adopt some other precaution to protect children from the danger. The Second Division of the Court, however, refused the pursuer an issue for trial by jury, and dismissed the case as irrelevant. Lord Justice-Clerk Macdonald said—'If the deceased had been a grown up person, or a child of ten years, I do not think that there would be a shadow of doubt that the defender was not responsible. The deceased was a child of seven, but even in such a case I do not think that the defender was bound to contemplate that a child of seven would climb on to the wall from a pile of gravel, the top of which was 30 inches below the level of the wall.'

"In the two cases to which I have been referring the circumstances are, of course, different in details from those in this case, but nevertheless I think that these cases support the principle to which I am giving effect in this case, viz., that the occupier of private ground owes no duty to persons whom he permits to come on the ground for recreation in the way of protecting them from ordinary and obvious risks and dangers.

"It is that principle and not the principle underlying the decision in the case of *Cooke* which seems to me to be applicable in the circumstances set forth by the pursuer in this action.

"Counsel for the pursuer, however, further contended that in view of the pursuer's averments this case involved a question of negligence which ought to be remitted to a jury for determination. I think that the contention was based on a failure to recognise and discriminate between the appropriate functions of the judge and the jury. On this matter I refer to Lord Kinnear's opinion in *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, at p. 1040. I select these sentences—

"'It was said that this is a question of negligence, and that this is always a question for the jury, which is the only proper tribunal by which it can be tried.

"'I cannot assent to that view. Whether the defender has or has not been negligent in point of fact in a particular case is a question for the jury, but there is, first of all, upon the relevancy of the record a question whether the negligence alleged constitutes a ground of legal liability, and that is a question for the Court.'

"For the reasons which I have given I will find that the pursuer's averments are irrelevant, and will disallow the issue proposed by the pursuer, and sustain the first plea-in-law for the defenders, and dismiss the action; and I will find the defenders entitled to expenses."

The pursuer reclaimed, and argued—There was a duty on the defenders either securely to fence off the building and take adequate measures to prevent children getting into the building or to have the building in a safe condition. This duty the defenders had failed to perform. The insecure stone on which the boy sat constituted a trap within a trap—*Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, *per* Lord Atkinson at 240; *Taylor* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 1, 59 S.L.R. 14, *per* Lord Atkinson at 1922 S.C. (H.L.) 5, 6, and 7, 59 S.L.R. 16 and 17, Lord Shaw at 1922 S.C. (H.L.) 12, 59 S.L.R. 20, and Lord Sumner at 1922 S.C. (H.L.) 14, 59 S.L.R. 21; *Mackenzie* v. *Fairfield Shipbuilding and Engineering Company, Limited*, 1913 S.C. 213, 50 S.L.R. 79, *per* Lord Ormidale at 1913 S.C. 215, 50 S.L.R. 80; *M'Kinlay* v. *Darngavil Coal Company*, 1923 S.C. (H.L.) 34, *per* Lord Chancellor (Cave) at p. 36, 60 S.L.R. 440; *Mitchell* v. *M'Harg & Son*, 60 S.L.R. 393, *per* Lord Ormidale; *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74, *per* Lord Buckmaster at 80; *Craig* v. *Beveridge*, 1914, 2 S.L.T. 435; *Latham* v. *R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398, *per* Hamilton, L.J., at 419; *M'Call* v. *John Porter & Sons*, 1909, 2 S.L.T. 407; *Findlay* v. *Angus*, (1887) 14 R. 312, 24 S.L.R. 237; *Lynch* v. *Nurdin*, (1841) 1 Q.B. (Ad. & E.) 29.

Argued for the respondents—The defenders had not failed in any duty which they owed to the pursuer's son. The building did not constitute a trap—*Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, *per* Lord Kinnear at 1042, 45 S.L.R. 860; *Latham* v. *R. Johnson & Nephew, Limited, cit.*, *per* Farwell, L.J. at 408, and Hamilton, L.J., at 410, 411, and 418; *Taylor* v. *Glasgow Corporation, cit.*, *per* Lord Dundas at 1921 S.C. 274, 58 S.L.R. 164, Lord Buckmaster at 1922 S.C. (H.L.) 4, 59 S.L.R. 15, and Lord Atkinson at 1922 S.C. (H.L.) 5, 59 S.L.R. 16; *Cooke* v. *Midland Great Western Railway of Ireland, cit.*, *per* Lord Atkinson at 238; *M'Kenna* v. *Henry Widnell & Stewart, Limited*, 1922 S.L.T. 172.

At advising—

LORD JUSTICE-CLERK — The pursuer in this case avers that the defenders are owners of an old pumping engine-house, which is in a state of disrepair, which abuts on a public road, and which is contiguous to dwelling-houses; that for many years there have been breaches in the walls of the building which make them easy and attractive to children to climb; that the building is not fenced off from the public road; that for years children have played in the building to the knowledge of the defenders; that in particular boys were in the habit of birdnesting in the building, and of climbing for this purpose the breaches in the wall, which looked safe to climb; that the defenders knew that this was being done; that the pursuer's son climbed up one of the breaches in the wall in search of birds' nests; that he sat on a stone in the wall, which looked safe to sit on but which was not, though the pursuer's son was unaware of this; that the stone fell to the ground and the pursuer's son with it; that the defenders should either have fenced off the place and excluded the public from it or should have put the building in a safe condition; that they did neither; and that the accident which occurred was a natural and probable result of the defenders' negligence. These averments, if proved, are, I think, relevant to infer liability on the part of the defenders. They amount to this, that the pursuer's son was a licencee; that as such it was the duty of the defenders to protect him against any concealed danger or trap; that there *was* such a danger or trap in this place, against which they failed to protect him; and that they are therefore liable in damages.

As the case is to go to trial I do not desire to prejudice either the pursuer or the defenders by any detailed observations upon it. It is sufficient to say that in my opinion the case falls well within the ambit of the doctrine which underlies the decisions in *Cooke*, [1909] A.C. 229; *Taylor*,

1922 S.C. (H.L.) 1, [1922] 1 A.C. 44; and *M'Kinlay*, 1023 S.C. (H.L.) 34. I cannot distinguish this case from these.

I am unable to apprehend how, as the Lord Ordinary holds, the principle of *Cooke's* case is inapplicable to the present case. His Lordship does not explain why he has reached that conclusion. He states that he decides the case on the principle that the occupier of private ground owes no duty to persons whom he permits to come on the ground for recreation in the way of protecting them from *ordinary and obvious risks and dangers*. But the pursuer's case is that the risk was neither ordinary nor obvious. In fact, he avers that it was a concealed danger which was known to the defenders, but of which the pursuer's son was ignorant. On the facts the defenders may have a strong case. They will doubtless maintain that, contrary to the pursuer's averments, the danger was obvious, and should have been obvious to a boy of ten years old. But that I think is for the jury, not for us, to decide.

Accordingly I suggest to your Lordships that the Lord Ordinary's judgment should be recalled and that an issue should be allowed.

LORD ORMIDALE—The scene of the accident which is the subject of the present case is an old pumping engine - house belonging to the defenders. It has not been in use for upwards of twenty years and has fallen into a state of disrepair and dilapidation. It possesses no roof and there are breaches in all its walls. These breaches, it is averred, make them easy and attractive to children to climb. The building abuts on a public road, and is in close proximity to dwelling-houses. There is no notice prohibiting the public from entering and there is no fence. There was at one time a gate, but the gate is now derelict, and has indeed ceased to exist. It is not surprising that the building formed an attractive playground to children. It was, according to the averments of the pursuer, much frequented by children, and that within the knowledge of the defenders, who allowed them to resort to the building and to climb about the walls looking for birds' nests. This the defenders did although they also knew that the building was unsafe, and that parts of it had from time to time fallen down.

The pursuer's son therefore, who met with the accident which cost him his life while climbing up one of the breaches, was not a trespasser, but was doing what he did with the leave and licence of the defenders. The pursuer further says that the building, looking to its condition, was a trap dangerous to children climbing its walls. That I take to mean that it was alluring and attractive, and that it had within it sources of danger not conspicuous or apparent but hidden and concealed. The accident and the cause of it are thus described—The pursuer's son while climbing one of the walls in search of a nest sat on a stone in the wall, and was putting his hand into a crevice where he thought there was a nest when the stone fell to the ground and the child with it—"The stone appeared to be securely imbedded in the wall and safe to sit upon, but owing to the disrepair it was not really so, although this was unknown to the child."

The question is whether the pursuer's statements disclose any duty on the part of the defenders which they failed to perform. The defenders say "No," that on the pursuer's own averments the building was so dilapidated that anyone invading it did so at his own peril, that the child in climbing the wall in search of birds' nests was taking an obvious risk incident to the kind of property, that the child being a lad ten years of age the danger he was running was in no sense a concealed danger. The Lord Ordinary has given effect to this contention and refused an issue.

I respectfully differ. On the statements of the pursuer the questions (1) whether the risks to be encountered were familiar and obvious, and (2) whether the boy was of sufficient age and intelligence to realise and appreciate them, are for a jury to answer. I think that on the authorities—which I do not at this stage deem it necessary to detail or examine—the pursuer's statements are relevant to necessitate inquiry; that they are sufficient, if proved, to instruct a failure on the defenders' part to take reasonable precautions to protect the children whom they permitted to play about the engine-shed from the risk of encountering hidden perils which could not reasonably be detected or anticipated by the children.

In my opinion an issue should be allowed.

LORD HUNTER—This is an action of damages brought by John Boyd against the Glasgow Iron and Steel Company for the death of his son aged ten years. The defenders are the proprietors of an old pumping engine-house abutting on the road to Kirklea. Many years ago the engine-house was used to pump water from the river Calder to the defenders' works at Motherwell, but it has not been in use for at least twenty years and is in a state of disrepair. There is no roof to the building and there are breaches in nearly all the walls. The pursuer alleges that the building is not securely fenced off from the public road on which it abuts, and there is no notice prohibiting persons from entering the building. Immediately contiguous to the said building are dwelling-houses. He also avers that for many years children have been in the habit of playing constantly in the said building, and that with the knowledge of the defenders. He says it was an attractive playground for children, and that as birds build their nests in the crevices of the walls, boys were in the habit of birdnesting in the building and climbing up the breaches in the wall which looked quite safe to climb. On 6th July the pursuer's son climbed up one of the breaches in the wall of the building in search of birds' nests. He sat on a stone in the wall, and was putting his hand into a crevice where he thought there was a bird's nest when the stone fell to the ground and the pursuer's son with it. This stone appeared to be securely embedded in the wall and safe

to sit upon, but owing to the said disrepair it was not really so, although this was unknown to the pursuer's son. He sustained a severe concussion of the brain and died on 9th July 1922.

The only question which we have to determine at this stage is whether the pursuer has made averments which, if established, would entitle him to obtain a decision in his favour. It is admitted that liability does not attach to the defenders merely because of their ownership of the buildings but can arise only from their failure in the performance of some duty which they owed to the pursuer's son. In argument for the pursuer it was maintained that the defenders had a duty to take precautions, which they failed to take, because the building in the state of decay into which it had fallen constituted a trap to the pursuer's son, and that the insecure stone on which he rested was a trap within a trap. The law relating to traps has been authoritatively explained by the House of Lords in the cases of *Cooke* v. *Midland Great Western Railway of Ireland* ([1909] A.C. 229) and *Taylor* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 1, [1922] 1 A.C. 44. In the former case the verdict of a jury awarding damages against the railway compay was approved. The defendants kept a turntable unlocked (and therefore dangerous for children) on their land close to a public road. According to the headnote 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 a fence which the railway company were bound by statute to maintain. The infant plaintiff, who was between four and five years old, was playing with other children on the turntable when he was seriously injured. It was held that there was evidence for a jury of actionable negligence on the part of the railway company. At the conclusion of his opinion Lord Macnaghten said (at p. 236)—"Persons may not think it worth their while to take ordinary care of their own property, and may not be compellable to do so; but it does not seem unreasonable to hold that if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable in consequence of their tender age to take care of themselves." In the same case Lord Atkinson said (at p. 238)—"I . . . think that if the owner of any premises on which dangerous and alluring machines or vehicles of the character I have mentioned are placed gives leave to boys of a mischievous and intermeddling age, or to children of such tender years as to be quite unable to take care of themselves, to enter upon the premises, he will be quite as responsible for any injury one of the boys or children may sustain as if he had deposited the same machine or left the same vehicle in the public street. The right of the boy or child to be on the public street as one of the public is, no doubt, a larger right than that which would belong to him as a licencee, but the knowledge of the owner of the machine or vehicle that he is placing or leaving in the way of boys and children a temptation alluring to them, and dangerous in its nature, with which, moreover, it is not improbable they will come in contact is not less in the latter case than in the former. And it would appear to me that the liability of the owner is at bottom based upon this knowledge." In the passage I have quoted Lord Atkinson is showing that the liability of the defendants in the case with which he was dealing was similar to the liability of the defendants in the earlier case of *Lynch* v. *Nurdin* ((1841) 1 Ad. & E. 29), where the defender had negligently left his horse and cart unattended in the public streets. A child aged seven got into the cart in play and another child led the horse on with the result that the first child was thrown out of the cart and injured. It was held that the injured child was entitled to recover damages against the owner of the cart. In giving judgment Lord Denman, C.-J., said (at p. 38)—"But the question remains, can the plaintiff then, consistently with the authorities, maintain his action having been at least equally in fault. The answer is that supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation." In *Taylor* v. *Glasgow Corporation* the defenders were sued by a father for damages in respect of the death of his son aged seven under the following circumstances:—The deceased boy had eaten the poisonous berries of a belladonna shrub growing in the Botanical Gardens, Glasgow, and had in consequence met his death. It was averred by the pursuer that in the part of the gardens where this dangerous plant was growing there was a playground for children, who were not prevented from approaching the belladonna plant, but on the contrary had easy access thereto. The berries were said to resemble small grapes and to present an alluring and attractive appearance to children, who did not know of the danger attendant upon eating the berries. The pursuer averred that the dangerous character of the berries was well known to the defenders, who neither warned the children against the danger nor took means to prevent them reaching the shrub. It was held that the pursuer had stated a relevant case of fault on the part of the defenders, and that the action ought to proceed to trial. In the course of his opinion in this case Lord Atkinson said (at p. 9)—"The liability of defendants in cases of this kind rests, I think, in the last resort upon their knowledge that by their action they may bring children of tender years, unable to take care of themselves, yet inquisitive and easily tempted, into contact,

in a place in which they (the children) have a right to be, with things alluring or tempting to them, and possibly in appearance harmless, but which unknown to them and well known to the defendants are hurtful or dangerous if meddled with. I am quite unable to see any difference in principle between placing amongst children a dangerous but tempting machine of whose parts and action they are ignorant, and growing in the vicinity of their playground a shrub whose fruit is harmless in appearance and alluring but in fact most poisonous. I think, in the latter case as in the former, the defendant would be bound by notice or warning or some other adequate means to protect the children from injury."

Lord Shaw (at p. 10) said—"In grounds open to the public as of right the duty resting upon the proprietors or statutory guardians like a municipality of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Dangers, however, which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning of prohibition as reaches the mind of the persons prohibited. . . . When the danger is familiar and obvious no special responsibility attaches to the municipality or owner in respect of an accident having occurred to children of tender years. The reason of that appears to me to be this, that the municipality or owner is entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship."

If the pursuer is right in his contention that if he establishes the averments which he has made, he will be entitled to found upon the principle laid down in the House of Lords in the two important cases to which I have referred, he is undoubtedly entitled to have the case sent to a jury. On the best consideration, however, which I have been able to give to the opinions delivered in those cases I am unable to hold that the pursuer has satisfied the requirements of a relevant case. In reaching this conclusion I hope that I have not in any way unconsciously trespassed upon what is the peculiar province of the jury in such actions as the present. The case of *Taylor* and the later case of *M'Kinlay* v. *Darngavil Coal Company* (1923 S.C. (H.L.) 34) afford specific warning against committing such an error.

The pursuer has averred that the building in the state of disrepair in which it was at the date of the accident constituted an allurement or trap to his deceased son. He has also made use of much of the phraseology that is to be found in cases where the Court has held that a trap had been proved to exist, or at all events that there was a case for inquiry. He maintains, therefore, that he is entitled to have it left to a jury to say whether or not in the circumstances of the present case the building constituted a trap. I do not think that this necessarily follows. In the case of *Latham* v. *R. Johnston & Nephew* ([1913] 1 K.B. 398) Lord Sumner (then Hamilton, L.J.) in the course of his opinion said (at p. 415)—"A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licencees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them but not to lead them into temptation." On the following page the same learned Judge proceeds — "What objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap."

It appears to me that a building in a state of decay or ruin cannot properly be said to be a trap to boys who choose to ascend the walls with a view to birdnesting. The danger connected with slipping from the walls is an obvious and not a concealed danger. To boys of the age of ten part of the attraction consists in the element of risk attendant on the venture of ascending the walls. A locked gate to keep people away from the building would probably only add to the attraction from the point of view of boys intent on collecting eggs. I think that to hold that the owner of a building in decay is bound either to level it to the ground or to take positive measures to see that boys can only indulge their natural proclivities for mischief in perfect safety to themselves is to place a burden upon the owners of property which, so far as I know, has never yet been done in any decided case.

It may be noted that the House of Lords neither in the case of *Cooke* nor *Taylor* disapproved of the decision of the First Division in *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034. In that case a child was drowned in the river Kelvin while playing in one of the public parks adjoining the river. The father of the child brought an action against the corporation alleging that the river when in flood, as it was at the time of the accident, was a source of danger to the public and especially to children, that it was their duty to have it fenced, and that their negligence in failing in that duty had caused the accident. The action was dismissed as irrelevant. In the course of his opinion Lord Kinnear pointed out (at p. 1041) that ". . . learned judges in England have a power of withdrawing cases from juries after the cases have gone to trial which this Court has not been accus-

tomed to exercise, and it must be observed that a judge of this Court is not at liberty to adopt of his own authority a new form of procedure, however useful in itself, and however it may be justified by English practice. Trial by jury in civil causes is introduced into our system by comparatively recent statutes, and the procedure is fixed by statutory enactments which the Court is bound to follow." His Lordship then proceeded to emphasise the point that at the adjustment of issues a Scots judge must say whether, if the facts averred by the pursuer and no more are proved, there is any case to go to a jury. In the present case there is no such initial act of negligence averred as is involved in leaving a machine unattended in the public street or in a place where it may be tampered with, or in allowing children to have access to a shrub with poisonous berries of an apparently innocent and alluring appearance. What danger there was from climbing the walls of the building was as obvious to a boy of ten, if not more so, than to the defenders. On the whole matter I think that the Lord Ordinary took a right course in dismissing the action, and that his interlocutor should be affirmed.

LORD ANDERSON — I have reached the conclusion that the pursuer's averments are relevant, and that he is entitled to an issue. The owner of heritable property owes a duty of care towards those whom he invites to his property or whose presence he tolerates thereon. In both cases he is bound to protect the visitor from concealed dangers — that is, from dangers which are not manifest to the visitor, but which are or ought to be known to the owner. In a case like the present it is suggested that this duty of care presses harshly on the heritable proprietor. Why should the owner of a building, it was said, be under obligation to make it safe for children engaged in birdnesting? The rejoinder is that this obligation need not be undertaken. In the present case the licence need not have been granted or it might have been revoked. In my view the owners of a dangerous ruin which is becoming daily more dangerous—a ruin situated in a populous district and in close proximity to a public highway—ought never to have licensed it for the use of children for the purpose of birdnesting or for any other purpose. The object of the user is immaterial if user is tolerated. It is in my opinion the plain duty of the defenders to pull down this ruin and so render it innocuous or to fence it. It is true that mischievous children may climb a fence, but if the defenders erect a fence they do their best to exclude children, they negative the plea of tolerance, and they provide themselves with a complete answer to an action like the present. A child who climbs a fence is a trespasser to whom the owner of heritable property owes no duty of care — *Latham*, [1913] 1 K.B. 398.

This, then, being the duty owed to licencees, the pursuer's leading averment is that his son was on the ruin as a licencee. The pursuer avers in effect that this ruin was an allurement and attraction to children. It invited them to climb, and there was the added fascination that birds' nests might be discovered in its crevices. The pursuer further avers that this enticing ruin contained concealed dangers, one of which was that a stone seemingly securely embedded in a wall and apparently safe was in reality dangerous, as the whole ruin was in a state of disrepair. He goes on to allege that these two circumstances were known to the defenders, namely, that the ruin was frequented by climbing children, and that it was in a state of disrepair. He avers, on a reasonable reading of his averments, that the defenders knew or ought to have known of the particular defect which caused the boy's death, and that they should have made it safe.

The error of the Lord Ordinary seems to me to consist in this, that he has decided against the pursuer the two points as to which the parties are at issue, to wit, whether or not the danger was obvious, and whether or not the deceased was guilty of contributory negligence. In my opinion these issues are for the jury. The pursuer alleges that the danger inherent in the stone was concealed, and I am unable to hold that the state of danger was so obvious that this should be so held now. Again, it was urged that a boy of ten was equally qualified with any representative of the defenders to discover that the state of the stone was dangerous. The same contention might have been urged in such cases as *Finlay*, 14 R. 312, and *M'Kinlay*, 1923 S.C. (H.L.) 34. It is in my opinion for the jury and not the Court to say whether the intelligence of a boy of ten was sufficiently mature to appreciate the danger which existed.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled and the proposed issue allowed.

The Court recalled the interlocutor reclaimed against, and approved of an issue for the trial of the cause.

Counsel for the Reclaimer (Pursuer) — Morton, K.C.—Macgregor Mitchell. Agents —Ross & Ross, S.S.C.

Counsel for the Respondents (Defenders) —D. Jamieson—G. R. Thomson. Agents— Drummond & Reid, S.S.C.

Saturday, May 26.

SECOND DIVISION.

AYRSHIRE COUNTY COUNCIL *v.* LINDSAY.

Revenue—Customs and Excise—Duties on Mechanically-Propelled Vehicles—Rate of Tax—Finance Act 1920 (10 *and* 11 *Geo. V, cap.* 18), *sec.* 13, *and Second Schedule — Roads Act* 1920 (10 *and* 11 *Geo. V, cap.* 72), *sec.* 5 (1).

The owner of a Chevrolet motor lorry in applying for a licence therefor made a declaration in accordance with the provisions of the Roads Act 1920, sec. 5