ders liable in damages, but as the evidence stands, the failure to provide the pursuer with goods was a misfortune which left any loss to remain where it fell, because the pursuer failed to establish that it inferred any liability for damages on the defenders.

Lastly, I cannot find any sufficient proof of damages. [*His Lordship then dealt with the amount of damages.*]

In my opinion the Sheriffs were right in assoilzieing the defenders.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutors of 15th July and 18th November 1920 appealed against: Find in fact in terms of the first five findings in fact contained in the interlocutor of 15th July 1920: Find in fact (6) that the failure of the pursuer was due entirely to the defenders' failure to supply him with the goods ordered by him in due course during the currency of the agreements, and that if the defenders had implemented the pursuer's orders he would have largely exceeded the stipulated turnover; and (7) that the defenders have not proved that their failure to supply said goods was due to circumstances over which they had no control: Find in law that the defenders were not entitled to terminate the pursuer's agency as at 23rd February 1917, and that they are liable in damages for having done so: Assess the damages at the sum of two hundred and fifty pounds sterling: Decern against the defenders for payment to the pursuer of that sum in full of the conclusions of the initial writ."

Counsel for the Pursuer (Appellant)—Macmillan, K.C. — Aitchison. Agent—James A. B. Horn, S.S.C.

Counsel for the Defenders (Respondents)—Sandeman, K.C.—Russell. Agents—J. & J. Ross, W.S.

HOUSE OF LORDS.

Friday, November 18.

(Before Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

TAYLOR *v.* CORPORATION OF GLASGOW.

(In the Court of Session, December 18, 1920, 1921 S.C. 263, 58 S.L.R. 158.)

Reparation—Negligence—Injuries to Children—Poisonous Shrub in Public Park—Averments—Relevancy.

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 which, though enclosed by a fence, was open to the public, access being obtained by a gate in the fence; that in this plot there was growing 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, though they, the defenders, were well aware of the poisonous character and inviting and deceptive appearance of the berries; that his child when in the gardens with some of his companions picked the berries and ate them, and in consequence thereof died; and that the accident was due to the negligence of the defenders in failing to take the necessary precautions for the safety of children. *Held* (*aff.* judgment of the Second Division) that the pursuer had relevantly averred fault on the part of the defenders, and that the case must go to trial.

The case is reported *ante, ut supra.*

The defenders appealed to the House of Lords.

At delivering judgment—

LORD BUCKMASTER—[*Read by Lord Shaw*]—It would have been less easy to find the correct pathway through the difficulties which this case presents were it not that the road has already been travelled by learned Judges who have left clear and definite signposts by which to guide our feet. I do not propose to leave the beaten track thus pointed out, and shall content myself with saying that according to these directions, which are in my opinion correct, this appeal ought to fail. The case arises on a plea-in-law raised by the defenders, who asserted that the averments in the pursuer's condescendence were irrelevant and insufficient to support the conclusions, and that the action should be dismissed. The Lord Ordinary sustained this plea, but the Lords of the Second Division recalled his interlocutor and approved the issue proposed by the pursuer. From that judgment the present appeal is brought.

The case, as alleged in the pursuer's condescendence, is this—That the Botanic Gardens of Glasgow were a public park open to the public and in the custody of the defenders, the Glasgow Corporation. On a small piece of fenced ground in the gardens the appellants grew, among other botanical specimens, a shrub known as *Atropa belladonna*, whose berries present a very alluring and tempting appearance to children. Notwithstanding the fence, the piece of ground on which this shrub grew was open to the public. There was no isolation of the shrub, nor warning that could be seen of its dangerous character. The spot where it grew was frequented by children, and according to the pursuer's allegations the circumstances were such that the defenders knew that it was probable, and indeed practically certain, that children would be tempted and deceived by the appearance of

the shrub and would eat the berries. The knowledge that these berries were poisonous was also said to be possessed by the defenders. The pursuer's child, a little boy of seven, ate some of these berries and in consequence died. The question is whether the allegations before mentioned establish a cause of action by the father to obtain the money reparation for his affliction which the Scotch law permits.

The important facts that must be borne in mind in forming a conclusion on this matter are, first, that the children were entitled to go to the spot where the shrub was grown; secondly, that there was no warning giving parents and those who had the custody of children any knowledge of the danger; thirdly, that the danger was known to the appellants. In the case of *Cooke* v. *The Midland and Great Western Railway Company of Ireland* (in 1909 Appeal Cases, p. 229) Lord Atkinson states the principle applicable to such a case in terms which are in substance repeated by Lord Sumner in *re Latham* (1913, 1 K.B.). Lord Sumner there says—"The presence in a frequented place of some object of attraction tempting a child 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 of the peril of the object."

I can see no distinction between the conditions that are there postulated and those that obtain in the present case. How the questions of fact will be ultimately resolved is a matter for the jury before whom the case will be heard, but the condescendence alleges in plain terms all the essential conditions summarised by Lord Sumner. To the same effect also is the opinion of Lord Macnaghten in the case of *Cooke* v. *Midland Railway*. With regard to the cases of *Hastie* v. *Edinburgh Magistrates* in 1907 Session Cases, and *Stevenson's* case in 1908 Session Cases, both of which related to danger by water, the one of a pond and the other of a river, it is sufficient to say that the element of mistake and deception which is undoubtedly involved in the present case did not and could not arise. Here the children had, according to the allegations, placed within their reach something which they were tempted to eat, and to eat was the certain prelude to sickness and the probable precursor of death.

LORD ATKINSON—In this case the pursuer claims to recover from the appellants a sum of £500 together with a sum of £100 for expenses as solatium for the loss of his son, a boy of seven years of age, who was poisoned by eating berries of an *Atropa belladonna* shrub which grew in the Botanic Gardens, Glasgow, of which gardens the appellants are the proprietors and custodians.

The appellants are bound to permit, or do in fact permit, their gardens to be used as a public park open to all members of the public, including even those of the immature age of seven years though these latter should be unattended by persons capable of taking care of them. The question for decision upon this appeal is, as I understand it, this—whether, if the averments contained in the pursuer's condescendences were proved or admitted, they would *prima facie* establish the cause of action upon which the plaintiff relies

The question resembles that which would under the English practice arise upon a demurrer to a statement of claim. It is averred in condescendence 1 that on the 20th of August 1919 the pursuer's son, aged seven years, proceeded with some other young children to the playground in these gardens, which playground surrounds a bandstand; that this part of the gardens was as the defenders well knew much frequented by young children. In condescendence 3 it is averred that on this 20th of August 1919 and for some time prior thereto the defenders had growing upon a small piece of ground adjoining this playground specimen plants and shrubs of various kinds, including a shrub named *Atropa belladonna* bearing berries rather similar in appearances to small grapes, and presenting a very alluring and tempting appearance to small children; that this plot of ground, which was enclosed by a wooden fence, was open to the public, access being obtained to it by a gate in this fence, and was, as the defenders well knew, frequented by members of the public of all ages. It is in this condescendence admitted that there is a wire loop on this fence which may be passed over the end of the gate, and it is explained that the gate and fence are only three feet in height; that the gate is a light and rustic one which, even when held in position by the wire loop, could easily be opened by a child of tender years. In the fourth condescendence it is averred that on the 20th of August 1919 this belladonna shrub was about five feet in circumference, that it overhung the adjoining walk though not the adjoining fence, that there are a number of paths in the enclosed piece of ground, and that the pursuer's son was attracted while passing the place by the beautiful and tempting appearance of this shrub, which was covered with the berries described, that he picked a few of these berries and ate them, that he shortly afterwards became ill, and though he received medical attention died the following morning.

In the fifth condescendence it is averred that in a well-known book on botany it is stated that the attractive character of these berries, looking, as they do, to the uncritical eyes of young children, like cherries or big black currants, has led to many serious accidents; that the poisonous character and inviting and deceptive appearance of these berries were well known to the defenders and their servants; that they knew or ought to have known, if they had exercised reasonable supervision, that this belladonna shrub was growing in a conspicuous position in their gardens on a part open to and much frequented by children; that it was probable, indeed practically certain, that children would be tempted and deceived by the appearance of the shrub and would

eat its berries, which have a sweet taste; that the defenders and their servants knew or ought to have known that these 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 likely to result in death; that the defenders did not take any precautions to warn children of the danger of picking the berries of this shrub or to prevent them from doing so. In the sixth condescendence it is averred that there was no adequate notice of any kind in these gardens warning the public of the poisonous or dangerous character of these specimen shrubs growing therein.

It was not disputed that the unfortunate child who lost his life was in these gardens on this 20th August not merely as a licensee but by right. It was not even suggested in argument that the child could by himself have ascertained the true nature and character of this shrub. Their Lordships' attention was called by Mr Sandeman to section 37 of the Glasgow Public Parks Act 1878 (41 and 42 Vict. cap. 60), which reads as follows—"The Lord Provost, Magistrates, and Council may from time to time make such bye-laws as they shall think fit for the good government and regulation of the said public parks, gardens, and open spaces, and of the museums, galleries, and collections of natural history, science and art, and other buildings, and persons frequenting the same, and of the superintendents, curators, rangers, parkkeepers, and other officers or servants appointed and employed by them. . . ." The 41st section provides for the publication and posting in the park of these bye-laws where made. It was admitted, however, that no bye-laws of the kind mentioned were ever made. The appellants must be taken, I think, to have assumed the responsibility whatever it was of this omission.

The question for decision is, If the relevant averments of fact contained in the pursuer's condescendence be taken to be true, as for the purposes of this appeal I understand they must be taken, do they establish that a duty lay upon the defenders to take reasonably adequate precautions to protect on the 20th of August 1919 the pursuer's son from the danger by which the child lost his life? In my opinion that question should be answered in the affirmative. If so, it is not contended that the duty was discharged. The appellants did nothing to protect the child, and contend they were not bound to do anything. There is in my view no resemblance between this case and those cases where mischievous boys sustain injury by interfering with or misusing natural objects, such as trees in public parks up which they may be tempted to climb, or water, ornamental or other, into which they may accidentally fall or be tempted deliberately to enter. The appearance of such objects as these is well known and unmistakeable. There is nothing deceptive or misleading about them. They cannot well be mistaken for things other than or different from what they really are. Whereas if the averments in the condescendences be true, in this belladonna plant, with the deadly berries which it bore, there was something in the nature of a trap. The berries looked alluring and as harmless as grapes or cherries. It is averred that the defenders and their agents knew this, and also knew—which the deceased child did not know—that the berries were, if eaten, highly poisonous. The defenders were therefore aware of the existence of a concealed or disguised danger to which the child might be exposed when he frequented their park—a danger of which he was entirely ignorant, and could not by himself reasonably discover—yet they did nothing to protect him from that danger or even inform him of its existence.

Many authorities are dealt with in the able judgment delivered by the learned Judges in the Second Division of the Court of Session. They have also been cited in argument before your Lordships on the hearing of this appeal. I only think it necessary to refer to a few of them, but particularly to *Cooke* v. *Midland Great Western Railway of Ireland* (1909 A.C. 229) and *Latham* v. *R. Johnson & Nephew, Limited* (1913, 1 K.B. 398).

The decision of this House in the first of these two cases has, no doubt, been frequently criticised. I am familiar with the criticisms, and have noticed that in them not unfrequently either no weight or not full weight is given to the vital fact that there was evidence to go to the jury from which they might reasonably conclude that the children mentioned in that case not only entered upon the lands of the company with the leave and licence of the company itself, but also played upon the dangerous machine, the turn-table, they found there, with that very same leave and licence. That is the feature of the case dwelt upon by Lord Macnaghten in the passage of his judgment to be found at p. 234 of the report. He said—"The question for the consideration of the jury may, I think, be stated thus — 'Would a person of common-sense and ordinary intelligence placed in the position in which the company was placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turn-table, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred.'" I emphasise the words "playing with the turn-table." Lord Collins at p. 241 says—"I think there was evidence that the turn-table, fastened as it was only by a bolt so easily withdrawn, was a dangerous thing for young children to play with, that the defendants as reasonable men ought to have known it, and that, situated as it was in such a conspicuous place, and frequented so largely by young people without remonstrance from the defendants, with easy access from the bridge road and through a gap in the hedge and along a well-trodden path down the embankment, it could hardly fail to present an irresistible attraction to young persons. I think all these facts in combination from which a

were evidence from which a jury might well infer not merely a licence but an invitation which fixed 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." And I myself at p. 239 of the report, after referring to the question which would arise in a case where the boys or children were trespassers, proceeded to say—"In the view I take it is not necessary to determine that question in the present case, because I think there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it but also played upon the turn-table—a most important addition—with the leave and licence of the defendant company." Such were the real facts and the real question decided in *Cooke* v. *Midland Great Western Railway of Ireland.*

Questions as to the liabilities of those who place on the public street, or other place which children of tender years have a right to frequent, and do in fact frequent, things, whether machinery or others, tempting and alluring in appearance to young children unable to take care of themselves, yet to the knowledge of those who placed them there most dangerous to children yielding to this temptation and interfering with them, are different questions from those decided in *Cooke* v. *Midland Railway of Ireland.* The principle applicable to these latter questions is, I think, clearly stated by Lord Denman, C.-J., in his judgment in *Lynch* v. *Nurdin*, (1841) 1 Q.B. 29. In that well-known case the defendant negligently left his horse and cart unattended in the public street. The plaintiff—a child of seven—got into the cart in play. Another child incautiously led the horse on, and the first child, the plaintiff, was thereby thrown out and hurt. It was held that the defendant was liable in an action on the case, though the plaintiff was a trespasser, not upon the street where he had a right to be, but upon the tempting thing the defendant had left unguarded in the street—the cart. In giving judgment Lord Denman, C.-J., said, at p. 38 of the report—"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." I do not think Lord Denman would have had much difficulty in dealing with *Lynch* v. *Nurdin* if there had been evidence to go to the jury that the child had got into the cart with the leave and licence of the owner of it.

It would appear to me that every word of this passage of Lord Denman's judgment applies to the present case. The child in the present case was of right in the gardens, as the child in that case was of right in the public street. The defendants planted and maintained in the garden, near the playground which children like the deceased frequented, a shrub bearing, to their knowledge, berries in appearance alluring and tempting to children, apparently harmless but deadly poisonous. The deceased child yielded to the temptation which was presented to him. The defendants, if the averments in the condescendences be true, knew of the nature, character, and strength of the temptation, and the dangerous and possibly deadly result of yielding to it. The deceased child did not know, and could not reasonably have discovered, this latter fact. If one of the servants of the defendants had left unattended in this garden a cart and horse, and the deceased, yielding to temptation had got into it, had fallen from it and been killed, his father could have recovered according to the principle of the decision in *Lynch* v. *Nurdin.* I utterly fail to see on what ground he is not equally entitled to recover in the present case.

In *Clark* v. *Chambers* (L.R., 3 Q.B.D. 327) Cockburn, C.-J., at p. 339 of the report, after reviewing all the authorities, says—"It appears to us that a man who leaves in a public place, along which persons and amongst them children have to pass, a dangerous machine which may be fatal to anyone who touches it without any precaution against mischief, is not only guilty of negligence but of negligence of a very reprehensible character, and not the less so though the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion."

In *Jewson* v. *Gatti* (2 T.L.R. 381 and 441) there was a cellar beside a highway in which painting was going on. A bar was placed round the opening. A passing child naturally looked down to see what was going on, the bar gave way, and he fell into the cellar. Day, J., nonsuited the plaintiff. Lord Esher in giving judgment said—"This was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was more than that, for there was painting going on in the cellar, and it must have been known that this would attract children, and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into the cellar where the painting was going on. This was almost an invitation, certainly an inducement, to the children to lean against the bar while looking down into the cellar. The child leant against it and it gave way and she fell down into the area."

The case of *Harrold and Another* v. *Watney* (1898, 2 Q.B. 320) approved of and

followed in principle *Lynch* v. *Nurdin* on the question of the necessity of taking into account in such cases the propensities of children.

The case of *Latham* v. *R. Johnson & Nephew, Limited* (1913, 1 K.B. 398) was on its facts in my view quite different both from the case of *Cooke* v. *Midland Railway of Ireland,* and from the present case. The land upon which the injured child had there entered and where it met with its injury was the site of some old houses and a wall which had been pulled down, leaving an open space of waste ground upon which were heaps of debris. The public were allowed by the defendants to traverse this piece of waste ground, and children were in the habit of playing upon the heaps of debris and other materials deposited by the defendants upon the ground. The waste ground did not adjoin the public highway, but was accessible by a path which led from the back of the house in which the injured child lived. On the morning of the day upon which the child was injured a quantity of paving stones were deposited on this waste ground in an irregular heap. The child unobserved by anybody left her mother's house, and a short time afterwards was found sitting on one of the stones with her hand beneath another by which it was crushed. There was no evidence to show how the accident occurred. The jury found (1) that the children played upon the land with the knowledge and permission of the defendants, (2) that there was no invitation to the child to go on the land unaccompanied, (3) that the defendants ought to have known that there was a likelihood of children being injured by the stones, and (4) that the defendants did not take reasonable care to prevent children being injured thereby. If the jury had found that the heap of paving stones was in the nature of a dangerous machine, and that the child was sitting upon the heap and meddling or interfering with the stones with the leave and licence of the defendants, the case might to a slight extent resemble *Cooke's* case. While if, on the other hand, the jury had found that the child was on the waste ground as of right, and that heaps of paving stones are so enticing and alluring to children that they were tempted to sit upon them and meddle with them, the case might have some slight resemblance to the present case, but as the Court of Appeal found (according to the head-note) that there was neither allurement nor trap, nor invitation, nor dangerous object placed upon the land, I utterly fail to see how the facts of that case resemble those of the present if the averments of the condescendences be taken as true, which for the purposes of this appeal they admittedly must be.

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 though in fact most poisonous. I think in the latter case, as much as in the former, the defendants would be bound by notice or warning or some other adequate method to protect the children from injury. In this case the averments are that the appellants did nothing of the kind. If that be true they were in my view guilty of negligence, giving the plaintiff a right of action.

For this reason I think the judgment appealed from was right and should be affirmed, and this appeal dismissed with costs.

LORD SHAW—In a discussion taking place upon the relevancy of the pursuer's averments the House must, of course, assume that the whole of these averments are true. That is the familiar and settled condition of the argument.

The articles of the condescendence are before the House. In the case for the appellants there is so clear and accurate a statement of the contents of these articles that for convenience sake I insert it here—"The place and circumstances of the occurrence are described in articles 2, 3, and 4 of the respondent's condescendence. In these articles the respondent avers that on 20th August 1919 his son, aged seven, with some other young children proceeded to the Botanic Gardens, Glasgow, which are open to the public as a public park. The children went to the playground surrounding the bandstand there—a part of the Gardens which in the knowledge of the appellants was and is much frequented by young children. At that date and for some time prior thereto the appellants had growing in a small plot immediately adjoining this 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 tempting and alluring appearance to children. This plot was enclosed by a wooden fence and was open to the public, access being obtained by a gate in the fence fastened by a wire loop. The plot was frequented by members of the public and by students. The gate could be easily opened by a young child. On the date in question, being attracted by the beautiful and tempting appearance of the berries, some of the children, including the respondent's son, entered the plot through the said gate and picked and ate a few of the berries. Shortly afterwards they became ill, and the pursuer's son died the following morning. The respondent further avers in condescendence 5 that the attractive character of the 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'; and that the poisonous character and the inviting and deceptive appearance of the berries were well known to the appellants and their servants."

I agree with your Lordships that these averments are relevant to be admitted to probation, and if true to infer liability on the appellants for the death of the pursuer's child. This is not a case of trespass. It is only indirectly that the cases of trespass throw light upon the present appeal. According to the averments of the pursuer, his son, aged seven, had a right to go where he was. He had equally with any other citizen a right to open the little gate which gave access to the shrubbery containing the poisonous plant. There is no trespass in the case. The child having a right to be in these gardens was in my opinion entitled, as were also his parents, to rely upon the gardens being left in a reasonably safe condition. Or in the language of the Lord Justice-Clerk — "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." To this would I venture to add that it matters not that the gardens were, or were called, Botanic Gardens. They admittedly were a public place of recreation for the citizens of Glasgow.

In ground open to the public as of right the duty resting upon the proprietors, or statutory guardians like a municipality, of making it 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. The two Scotch cases of *Hastie* and *Stevenson* clearly illustrate the distinction.

Grounds thrown open by a municipality to the public may contain objects of natural beauty, say, precipitous cliffs or the banks of streams, the dangers of the resort to which are plain. In the language of Lord M'Laren in *Stevenson's* case I do not 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. Lord Dundas very properly, if I may say so, accentuated this consideration in the present case.

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. The parent or guardian of the child must act reasonably; the municipality or guardian of the park must act reasonably. This duty rests upon both and each, but each is entitled to assume it of the other.

Where the dangers are not familiar and obvious, and where, in particular, they are or ought to be known to the municipality or owner, special considerations arise. In the case of objects, whether artificial and, so to speak, dangerous in themselves, such as loaded guns or explosives, or natural objects such as trees bearing poisonous fruits which are attractive in appearance, it cannot be considered a reasonably safe procedure for a municipality or owner to permit the exhibition of these things with their dangerous possibilities in a place of recreation and without any special and particular watch and warning. There can be no fault on the part of a parent in relying on the fact that such obligations of safety would be duly performed by the municipality or owner, and in allowing his child accordingly to pass into the grounds unattended the parent commits no negligent act. As for the child itself, while it may do things and incur dangers by inquisitively meddling with things it should not touch, it is plain that when the incurred danger against which no protection or sufficient warning was directed to anybody produces its unfortunate evil effect, the municipality or owner is answerable for it, and there is no defence of contributory negligence.

Lord Macnaghten made this observation in *Cooke*—"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 a 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." The present is a case much stronger than one of tacit permission to resort, and the observation which I have ventured to quote seems to me to apply with singular cogency to the owners or guardians of public property and places of recreation.

I do not find myself able to draw a distinction in law between natural objects such as shrubs whose attractive fruitage may be injuriously or fatally poisonous, and artificial objects such as machines left in a public place unattended and liable to produce danger if tampered with. The act of tampering might be contributory negligence on the part of a grown-up person, but would not be so reckoned on the part of a child. I think the language of Lord Chief-Justice Cockburn in *Clark* v. *Chambers* (3 Q.B.D. 339) still remains of the highest authority—"It appears to us that a man who leaves in a public place, along which persons and amongst them children have to pass, a dangerous machine, which may be fatal to anyone who touches it, without any precaution against mischief is not only guilty of negligence but of negligence of a

very reprehensible character, and not the less so because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion." I think that the same principle completely covers the present case, and that it does not, as I say, make any difference that the object which produced the danger was an artificial machine or a growing shrub. I think there was fault in having such a shrub where it was without definite warning of its danger, and definite protection against the danger being incurred. To give such protection was part of the reasonable duty of the Corporation, and citizens were entitled to rely upon it having been given.

I have stated the case as I view it without entering upon those points as to allurement or trap which more naturally occur in the leave and licence cases. But I must not be held to dissent in any way from the view that has been taken in regard to that aspect of the case. I might indeed venture to repeat Lord Sumner's language in *Latham* and respectfully adopt it—"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."

I do not desire to close my opinion without stating that I attach my express concurrence to the statement of my noble and learned friend Lord Atkinson in regard to the true scope and effect of the case of *Cooke*.

LORD SUMNER—That this case must go to trial there can be no doubt. It was admitted by counsel for the appellants that the child had a right to be in the park where the bush was. If so, and if the pursuer can prove his allegations, the case would fall within the principle of *Lynch* v. *Nurdin*.

How the right arose was not explained. Under their Act the defenders could have but had not made bye-laws for the regulation of the park so as to affect this case. Perhaps the section would not justify total prohibition of the entrance of infants under the name of regulation, even if public opinion would tolerate it. Perhaps a regulation that a child must be and remain in the charge of some responsible person as a condition both precedent and subsequent to its admission would not be worth much in itself, and a jury might find that being often evaded it had been waived. On the other hand the admission may have meant no more than that the child was not doing wrong in being in the Botanic Garden, having an unconditional leave and licence from the defenders. Be this as it may, for present purposes I think the admission must go to its full extent. As, however, it is an admission only, nothing is decided as to the rights of any other case in accepting it, and nothing prevents the nature of the admitted right from being further examined, if necessary, at a later stage of this case. The position, therefore, I take to be, that the child had a right to be in the part of the park where the defenders had a right to grow their bush, and the law has to place the exercise of each of these two rights in a just relation to that of the other. The child had no right to pluck the berries, but the Corporation had no right to tempt the child to its death, or to expose it to temptation without reference to consequences. The question is therefore one of the relative duties of care between the Corporation and the child when each was exercising a right, and neither right was as such subordinated to the other. Nothing, I think, turns on the fact that the Corporation's right arose out of ownership of the soil and the child's did not. It would have made no difference in *Lynch* v. *Nurdin* if the cart had belonged to the road authority and the careless carter had been its servant, or if the soil of the road had belonged to the infant and the cart had been there in the exercise of a public right-of-way.

Further elaboration of the case at this stage is needless and perhaps undesirable. I think I can probably be of more service if I indicate what in my opinion your Lordships' decision does not involve than what it does. We are not dealing with trespassers or with licencees or with invitees as such. Nothing is laid down as to the duty of private landowners towards such persons; nothing as to any general duty to erect fences or to alter the natural features and state of private lands; nothing as to safeguarding at all hazards any children found thereon; nothing as to seen dangers, or as to places in which the presence of children is not to be expected. Such cases must be discussed in the light of other decisions appropriate to them.

At the bar some argument arose as to the pursuer's own responsibility in respect that he either had not effectually taught the child not to take what did not belong to it, or that he had not caused it to be in charge of someone able to take care of it while in the defenders' park. In some previous cases these points have been spoken of as going to the measure of care which the defenders owed to the child, so that the child would be entitled to no greater care than an adult —*Stevenson* v. *Corporation of Glasgow*, 1908 S.C., *per* Lord Johnston at p. 1036. The same learned Judge in *Reilly* v. *Greenfield Colliery* (1909 S.C. 1328) speaks of a parent's negligence being the same whether he sues as tutor-in-law for the injured infant to recover for it damages for injury or in his own right to recover solatium for himself, and says that such negligence is "attributable vicariously to the child." Lord Ardmillan in *Grant* v. *The Caledonian Railway* (9 Macph. at p. 464) regards the age of the infant as unimportant, for either the child was able to take care of itself, or if not it should have been taken care of by its parents. The parent's obligation has often been stated as being a material matter, *e.g.*, by Alderson, B., in *Lygo* v. *Newbold* (9 Ex.

302) and by Lords Kinnear and Salvesen in *Hastie* v. *Edinburgh Magistrates* (1907 S.C. 1102—see also *Davidson* v. *Monklands Railway*, 17 Dunlop 1038). It is evident that these propositions though much alike are not really identical. The child's own contributory negligence, in the true sense of the term, is for the defenders to prove; so, it would seem, is the parent's. In the former case it must be direct or not remote; in the latter it is not easy to see, apart from cases where the parent's negligence is continuing so as to constitute a joint cause of the injury concurrent with the negligence of the defenders, why the neglect to have the child better taught or to keep it in charge of a competent person is not too remote to be a contributory cause of the accident. On the other hand, if the child's inability to take care of itself is part of those circumstances which define the defenders' obligation of care it is the pursuer who should prove it. Again, if the true proposition is that a parent can only sue for solatium in his own right where he can show that he has satisfied the condition-precedent of having taken all reasonable precautions to protect the child from the consequences and risks of its own childishness, it is for him to prove the fulfilment of this condition. But what if the person provided, though proper, is careless, and what if the accident would have happened all the same whether such a person was provided or not? If the parent, who presumably knows all about his child, did not anticipate risk enough to require that the child should not go alone, can it be negligence in the defenders, who do not, to take no precautions for their part in view of the possible tender age of the visiting child? If so, the matter is one to be raised by the defenders. Again, the pursuer no doubt owes a duty to his child, but what is the duty to be careful of the child which he owes to the defenders, as distinct from mere conduct on his part, qualifying him to recover his own solatium? The former duty the defenders would have to prove; the latter as part of his own qualification must be proved by the pursuer. I confess that in view of such opinions as I have cited, the law on this point in actions brought by the parent for the loss of his child does not seem to me to be settled or even to be simple. If a parent sues because he is bereaved, what if it appears that if he had done his parental duty no harm would have come to the child and he would not have been bereaved at all? Is the matter merely one of cause and effect? If a parent's neglect of that duty is not a cause, but at most a *sine qua non* of the child's death, who then in law has caused the child's death? I offer no opinion on any unsettled question. All that I desire to make quite clear is that although these matters were discussed in the Court below, and to some extent also at your Lordships' bar, none of them have arisen for decision at this stage of the case, but they remain open if it becomes necessary to raise them later on.

The position is the same as to the age of the child. The question whether it was or was not capable of contributory negligence on its own part, just as the question whether the parents are or are not guilty of contributory negligence in fact, is untouched. It was contended before the Court of Session that a child has in such matters as this a separate and distinct right in regard to the care that is due it—"that there is a recognised difference in law between the duty of public authorities to a child and to an adult"—58 S.L.R. 158. This is not really a correct statement. Where a question arises as to the care to be used between persons using the place, where they respectively act as of right, infancy as such is no more a status conferring right, or a root of title imposing obligations on others in respect of it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others who know of, or ought to anticipate, the presence of such persons within the scope and hazard of their own operations.

I think the appeal fails.

LORD WRENBURY—I concur.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Sandeman, K.C. — Gilchrist. Agents — Campbell & Smith, S.S.C., Edinburgh—Sir J. Lindsay, Town Clerk, Glasgow—Martin & Company, Westminster, Solicitors.

Counsel for the Respondent—MacRobert, K.C.—Duffes. Agents—Paterson & Ross, Glasgow—Arch. Menzies & White, W.S., Edinburgh—Faithfull, Owen, Blair, & Wright, Westminster, Solicitors.

Friday, November 18.

(Before Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

CURLE'S TRUSTEES *v.* MILLAR AND OTHERS.

(In the Court of Session, May 28, 1920 S.C. 607, 57 S.L.R. 574.)

Succession — Will — Construction — "Survivors"—"Survivors" read Stirpitally.

A testator directed his trustees to hold the residue of his estate for his son and two daughters in equal shares for their liferent use allenarly and their issue in fee. In the event of his son or daughter or any of them dying without leaving lawful issue the trustees were directed to hold the capital of the said shares for behoof of the survivors of his son and daughters if more than one, or for the survivor if only one, in the way already provided with regard to their original shares. The testator further provided that if any of his children should predecease him leaving issue, such issue should receive the capital which would have been liferented by their parent, and that if any of his children should predecease him leaving no