that there was nobody in charge of the boys, but it was made clear that this only means that there was nobody actually in the room at the moment. It does not mean that there was nobody on the premises responsible for the boys, aware that they were playing in this room, and available in case of any disturbance. The case would have presented a different aspect if the accident had been one which might have been foreseen as not unlikely to occur—if, for example, blind boys had been left to romp by themselves in a room where there was an unguarded fire and one of them had run into it and been burned. Pursuer's case is much short of that. It seems to require that in order to guard against any such unusual misadventure as here occurred there must be some adult in the room with attention concentrated upon the romping children. A lady sitting there sewing or knitting or reading a book would hardly have sufficed to safeguard against such a mishap. It appears to me that this is too exacting a requirement, and that a jury could not reasonably hold that the defenders were guilty of negligence in not making such provision. The children were not in my view exposed to any danger other than such as is inevitable if children are to be allowed to play together. It is not said that the children were unruly or quarrelsome. I do not think a reasonable parent would have had any anxiety in leaving them playing together, and I do not think that any higher standard of precaution is incumbent upon the defenders than would be observed by a reasonable parent. I am accordingly of opinion that the reclaiming note ought to be refused.

The Court adhered.

Counsel for Reclaimer (Pursuer)—Watt, K.C. — Crawford. Agents — Manson & Turner Macfarlane, W.S.

Counsel for Respondents (Defenders) — D. P. Fleming, K.C. — Berry. Agents — Laing & Motherwell, W.S.

Thursday, February 16.

SECOND DIVISION.

[Sheriff Court at Stranraer.

PIRRIE AND ANOTHER *v.* M'NEIL.

Process—Sheriff—Joint Motion for Proof—Remit to Court of Session for Jury Trial—Competency—Bar—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

In an action of damages for personal injuries brought in the Sheriff Court the Sheriff-Substitute "on the motion of parties' procurators" allowed a proof. The pursuers subsequently required the cause to be remitted to the Court of Session for jury trial. A question having been raised by the Clerk of Court as to the competency of the remit in view of the joint motion for proof in the Sheriff Court, the Court *allowed* an issue.

Archibald Gillies Pirrie and Mrs Elizabeth Reynolds or Pirrie, his wife, *pursuers*, brought an action of damages for personal injuries in the Sheriff Court at Stranraer against John M'Neil, farmer, Kirkcolm, Wigtown, *defender*.

On 19th January 1922 the Sheriff-Substitute (WATSON) pronounced the following interlocutor — "On the motion of parties' procurators, allows to the parties a proof of their respective averments."

The pursuers thereafter required the cause to be remitted to the Court of Session for jury trial. On the case appearing in the Single Bills counsel for the pursuers moved the Court to approve of an issue for the trial of the cause. The Clerk of Court called their Lordships' attention to the terms of the interlocutor of 19th January 1922 as inferring a joint agreement to refer the cause to proof, and therefore barring the pursuers from applying to the Court of Session for jury trial.

Counsel for the defenders intimated that he did not oppose the motion for an issue, and referred to the following authorities:— *Paterson* v. *Kidd's Trustee*, 1896, 23 R. 737, 33 S.L.R. 568; *Fleming* v. *Eadie*, 1897, 25 R. 3, 35 S.L.R. 1; Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30.

The Court (LORD JUSTICE-CLERK, LORD SALVESEN, and LORD ORMIDALE) allowed an issue.

Counsel for Pursuers and Appellants — Grainger Stewart. Agents — Simpson & Marwick, W.S.

Counsel for Defender and Respondent— Patrick. Agents—Armstrong & Hay, S.S.C.

HOUSE OF LORDS.

Thursday, February 23.

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

GLENBOIG UNION FIRECLAY COMPANY *v.* INLAND REVENUE.

(In the Court of Session, February 5, 1921, S.C. 400, 58 S.L.R. 376.)

Revenue — Excess Profits Duty—Profits of Trade—Capital or Income—Compensation Paid by Railway Company in respect of Minerals Left Unworked—Finance (No. 2) *Act* 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40 (1) (2), *and Schedule IV, Part I, par.* 1, *Part II, par.* 1.

In 1913, one of the two pre-war trade years, payment was made to the Glenboig Union Fireclay Company of £15,316, 11s. 4d. by a railway company as compensation in terms of the Railways Clauses Act 1845 for minerals left unworked for support of their line. The sum was entered in the revenue account of the Glenboig Company for the year in which it was paid, and on it the company paid income tax. A question

having arisen as to whether this sum fell to be included in computing the "amount of the profits arising from the trade or business" of the company in the pre-war year 1913, *held* (*aff.* judgment of the Court of Session) that the sum in question was not profits within the meaning of the Finance (No. 2) Act 1915, it not being of the nature of an annual profit arising from trade, but money paid in respect of an asset of the company which had to that extent been sterilised and destroyed, and that accordingly it could not be included as profit in the company's balance-sheet for the year 1913.

The case is reported *ante ut supra.*

The Glenboig Company appealed to the House of Lords.

At delivering judgment—

LORD BUCKMASTER—The Finance Act of 1915 imposed a duty known as excess profits duty, to be levied and paid upon profits arising from trade or business. The method provided for assessment was by comparing the profit in the particular business for the period known as the accounting period with the average pre-war standard of profit determined by taking the average of any two of the three last pre-war trade years, the difference between the two being liable to duty, which was imposed at the rate of fifty per cent.

The appellant company here, the Glenboig Union Fireclay Company, Limited, in making their return for the purpose of this statute included as one of the two pre-war years the year that ended the 31st August 1913, and into the accounts of that year they brought as items of profit a sum of £15,316 received from the Caledonian Railway Company on the 9th April 1913, and a further sum of £4500 received from the same company on the 29th August 1913. The question that is raised upon this appeal is whether or no the Company is entitled to increase the amount of their pre-war profits by these two sums, and thereby reduce the amount of the excess profits duty payable under the statute. There is no question whatever about the *bona fides* of the appellants in this case. Both these sums had been included in their balance-sheet as profit for the year 1913, and upon them they had paid income tax without demur.

The circumstances in which these moneys were paid may be shortly stated. The appellants the Glenboig Union Fireclay Company carry on business as manufacturers of fireclay goods and as merchants of raw fireclay. Part of their property consisted of mining rights over certain beds of fireclay at Gartverrie, Glenboig, and in the course of working these fields they were at the end of 1907 approaching the line of the Caledonian Railway, and due notice was given on the 25th January 1908 to the Railway Company of the intended extension of their working. The Railway Company being apprehensive as to the result, required the Fireclay Company to desist from working. A dispute arose as to whether or no the fireclay in question was a mineral, and litigation ensued during which the Railway Company were able to obtain against the Fireclay Company interdicts which operated for two periods—one from the 29th February 1908 to the 15th April 1910, and the second from the 12th November 1910 to the 28th April 1911, when the interdict was finally recalled. Upon the recall of the interdict the Railway Company accordingly became liable to pay the Fireclay Company the damages that had been caused to them by the order, and the sum of £4500 to which I have made reference was the sum that was paid under that head. The Railway Company now proceeded to treat with the Fireclay Company for the purpose of preventing any further working of this fireclay adjacent to their railway, and arbitration proceedings ensued for the purpose of determining what sum the Railway Company were bound to pay for this privilege, and ultimately the sum of £15,316 was fixed as the sum payable by the Railway Company, and this was accordingly paid on the 9th April 1913.

These two sums require some different consideration for the purposes of this appeal, but your Lordships are relieved with regard to the second sum of £4500, because the parties to this appeal have very wisely made an arrangement upon the point with the terms of which it is unnecessary to trouble your Lordships. The sum of £4500 is therefore removed from your consideration.

It therefore only remains to consider whether the sum of £15,316 was properly included as a profit in the appellants' balance-sheet for the year ending 31st August 1913. The argument in support of its inclusion can only be well founded if the sum be regarded as profits or a sum in the nature of profits earned in the course of their trade or business. I am quite unable to see that the sum represents anything of the kind. It is said, and it is not disputed, that the amount in fact was assessed by considering that the fireclay to which it related could only be worked for some two and a-half years before it would be exhausted, and it is consequently urged that the amount therefore represents nothing but the actual profit for two and a-half years received in one lump sum. I regard that argument as fallacious. In truth the sum of money is the sum paid to prevent the Fireclay Company obtaining the full benefit of the capital value of that part of the mines which they were prevented from working by the Railway Company. It appears to me to make no difference whether it be regarded as a sale of the asset out and out or whether it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the capital asset of the company to that extent has been sterilised and destroyed, and it is in respect of that action that the sum of £15,316 was paid. It is unsound to consider the fact that the measure adopted for the purpose of seeing what the total amount should be was based on considering what are the profits that would have been earned. That