not be apportionable between these two feus whatever the due proportions may be. If it be the case that the two feus had they been sub-feued separately would have produced less than was got by sub-feuing them together, it remains none the less true that the better result which was obtained by taking the latter course represents what was potential value in the lands, and comes from no other source whatever. The case appears to me to be the same in principle as that which would have arisen had the lands of the two feus been combined in one agricultural lease at a cumulo rent larger than the sum of the separate rents obtainable from the subjects if leased separately.

As regards the timber, the grassum according to the feu-disposition was paid indiscriminately for all that was contained in the two feus. The timber simply formed one of the elements of heritable value in the feus, and it seems to me quite irrelevant to consider what the vassal did or could do with the timber after he acquired the sub-feu. If the rule of *Campbell* v. *Westenra*, 10 S. 734, is otherwise applicable, I see no reason why the timber should be eliminated from the calculation any more than any of the other elements of heritable value for which, all taken together, the grassum was paid.

As regards the remaining question, I do not think that the rule of *Campbell* v. *Westenra* necessitates the taking of 5 per cent. interest on all grassums which are paid for sub-feus irrespective of circumstances. The 5 per cent. rate, so far as the report shows, was not a matter of controversy or argument in the case at all. If, however, as was said by Lord Dunedin in the case of *Governors of George Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1122, the grassum was treated as being of the nature of a capitalisation of the feu-duty, it would seem to follow as the logical view that the rate of interest to be taken in any particular case should be such a rate as will correspond with the market value on sale of feu-duties of the particular class at the period of the transaction, seeing that the principal vassal is figured as buying up or redeeming beforehand by a capital payment the sub-feu-duty which otherwise would have formed the consideration for the grant. That view, however, has not been advanced by the defender, as it would not, it appears, be favourable to his interest, and no other definite alternative is advanced by him. In these circumstances it seems to me that we have no grounds for departing from the formula of *Campbell* v. *Westenra*, and I therefore think we should apply the rate of 5 per cent.

The Court pronounced this interlocutor—

". . . Repel the whole pleas-in-law in said amended closed record for the defender Sir Charles Stewart Forbes: Find and declare in terms of the first conclusion of the summons: Find that the composition payable by the defender Sir Charles Stewart Forbes in respect of the pursuer's Mrs Ann Stuart or Smith-Shand's trustees' portion of the superiority of the estate of Candacraig falls to be calculated on the basis of a year's sub-feu-duty together with a year's interest at five per cent. on that portion of the grassum paid for the whole estate of Candacraig effeiring to the portion of the said estate of which the said pursuers are superiors: Find in respect of the agreement of parties that for the purposes of this case said portion of the grassum is the sum of £29,381, 14s. 8d."

Counsel for Defender and Reclaimer Sir Charles Stewart Forbes—Dean of Faculty (Constable, K.C.)—C. Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defender William Mackintosh—Mackay, K.C.—W. H. Stevenson. Agents—John C. Brodie & Sons, W.S.

Counsel for Pursuers and Respondents—Chree, K.C.—Maitland. Agents—Murray, Beith, & Murray, W.S.

Saturday, March 18.

FIRST DIVISION.

GLASGOW CORPORATION *v.* BARCLAY, CURLE, & COMPANY, LIMITED.

Road — Public Street — Abnormal Traffic Causing Damage to Public Street — Liability of Traffic Owner at Common Law—Whether Abuse of Street or only Wear and Tear—Rights of Public Authority against Persons Responsible for Extraordinary Traffic.

A firm of boilermakers transported along the streets of a city a number of boilers which along with the bogies on which they were mounted weighed from 65 to 82 tons each, with the result that many of the granite setts with which the streets were causewayed were "crushed and ground." The streets, however, were not made dangerous or inconvenient for public use, although the date when operations of repair would be required was materially hastened, and part of the permanent material of the causeway was so damaged as to necessitate when the time for relaying the streets arrived complete renewal. The local authority within whose jurisdiction the streets in question lay brought an action of damages at common law against the firm (there being no statutory enactments dealing with excessive weight or extraordinary traffic applicable to the streets in question), in which it claimed to recover the cost of replacing the setts which had been destroyed, thereby seeking to vindicate its right to charge against any user of the streets whose traffic caused extraordinary damage the extra expense incurred. *Held* that as the user com-

plained of did not amount to an abuse of the streets, but disclosed merely a case of exceptionally heavy wear and tear, it could not be made the ground of liability for damages at common law, and defenders *assoilzied*. *Held further*, that the pursuers had not proved that the defenders had been guilty of negligence in failing to use another type of bogie.

On 21st April 1919 the Corporation of the City of Glasgow, *pursuers*, being the local authority for the County of the City of Glasgow, and as such responsible for the maintenance of the public streets of the city, brought an action against Messrs Barclay, Curle, & Company, Limited, shipbuilders, engineers, and boilermakers, Whiteinch, Glasgow, *defenders*, in which they sought to recover the sum of £460 in respect of damage alleged to have been done to certain public streets of the city by the conveyance over them by the defenders of traffic of abnormal weight.

The pursuers pleaded—"1. The pursuers having suffered loss and damage through the fault of the defenders, as condescended upon and to the extent sued for, decree should be granted as concluded for. 2. The traffic complained of being traffic of excessive weight, having regard to the traffic which the streets of a city constructed in the best usual methods can carry, and such traffic, for which the defenders are responsible, having caused damage to said streets in excess of ordinary tear and wear, the defenders are liable in compensation therefor to the pursuers, and decree should be granted as concluded for. 3. The defenders having transported along the streets traffic of excessive weight and having thereby caused loss and damage to the pursuers, all as condescended upon, are liable to compensate the pursuers therefor, and decree should be granted as concluded for. 4. In any event, the defenders being bound, in conveying said traffic over the streets specified, to do so in the manner least burdensome thereto, and having failed in this duty, are liable in compensation to the pursuers for the damage thereby resulting, and decree should be granted as concluded for. 5. The defenders' actings, as condescended upon, being in contravention of section 4 of the Locomotive Act 1861, and the damage complained of being the result of such contravention, the defenders are liable in the damage thus caused to the pursuers, and decree should be granted as concluded for."

The defenders pleaded, *inter alia*—"3. The pursuers not having suffered loss or damage through the fault of the defenders, the defenders are entitled to absolvitor. 4. The said traffic complained of not having been unusual, extraordinary, or excessive, having regard to the locality and the nature and extent of the industries carried on therein, the defenders should be assoilzied. 5. The defenders having conveyed their said traffic over the said streets with due care and regard to the prevention of unnecessary damage, are entitled to absolvitor. 6. The damage to the said streets having been caused or materially contributed to (*a*) by the failure of the pursuers to construct and maintain them in a condition to bear the traffic usually passing and reasonably to be expected to pass over them, and to provide for the increased requirements of the local industries, and (*b*) by the passage of traffic other than that of the defenders, the defenders are entitled to absolvitor. 7. Section 4 of the Locomotives Act 1861, not being applicable to the traffic complained of, *et separatim*, the defenders not having acted in contravention of the said statute, they should be assoilzied from the conclusions of the summons so far as based thereon."

The averments of parties and the import of the evidence sufficiently appear from the opinion (*infra*) of the Lord Ordinary (ASHMORE), who on 14th April 1921 sustained the third, fourth, fifth, sixth, and seventh pleas-in-law for the defenders, and assoilzied them from the conclusions of the summons.

Opinion.—"In this action the Corporation of Glasgow are suing the defenders for damages representing the cost incurred by the Corporation in repairing injury alleged to have been done to certain streets by the passage over them of what the pursuers describe as 'excessive' weights.

"It is a test case intended to vindicate the right of the Corporation to charge against anyone whose traffic causes extraordinary damage the extra expense incurred in making good the damage.

"The defenders are a well-known limited company who carry on business as shipbuilders, engineers, and boilermakers at no less than six establishments situated at different parts of Glasgow, one of these being their boilermaking works in Kelvinhaugh Street.

"The claim in the present case relates only to the carriage of boilers from the defenders' boiler-works in Kelvinhaugh Street to the docks over a period of three or four days.

"The defenders as owners and occupiers are at present contributing in the form of road assessments about one-thousandth part of the total expenditure incurred by the pursuers in maintaining the whole streets of the city.

"Hitherto the Corporation have not sought to recover any special payment in respect of heavy traffic, realising, no doubt, the practical difficulties attending both the proper ascertainment and the equitable apportionment of the extra cost in view of all the ordinary wear and tear and all the other injurious effects resulting from traffic of every kind.

"Indeed, the attitude of the Corporation before this litigation began and throughout its course has been wholly consistent with their interest in maintaining and indeed encouraging the traffic, however burdensome, and their recognition of the necessity that in the solution of the difficult problem now facing them out of the three factors involved — the weight, the vehicle, and the street — the weight must continue to pass.

"In its legal aspect the case raises a novel question. Not only is it the first of the kind to be instituted by the Corporation, but it

has no recorded or known precedent in this country. I must deal later in detail with the legal question. Meantime it is sufficient to explain generally that this case falls to be distinguished from the somewhat analogous cases which arise under the Roads and Bridges Act of 1878 for recovery of extraordinary expense incurred by road authorities in repairing highways. The statutory remedy referred to does not apply to the city of Glasgow, and accordingly the claim in this case is based not on statute but on common law.

"The sum sued for is £460. The damage is said to have been caused by the transporting from the defenders' works in Kelvinhaugh Street to the Clyde Navigation crane at Lancefield Quay of seven boilers in all, as follows, viz.—On 22nd April 1918 two boilers weighing respectively 56 tons and 55 tons; on 27th April three other boilers weighing respectively 71 tons, 71 tons, and 72 tons; on 30th April a boiler weighing 55 tons; and on 1st May another boiler also weighing 55 tons.

"The pursuers' averments so far as material are to the following effect:—(*a*) That the pursuers had made proper provision for the traffic of the industrial district of the city by constructing and maintaining the streets according to the best methods and with the most suitable materials; (*b*) that the transporting of the defenders' boilers on the occasions stated substantially altered and increased the burden imposed on the streets by the usual traffic; (*c*) that in consequence of the excessive weights many hundreds of the granite setts in Kelvinhaugh Street, Argyll Street, and Finnieston Street were 'broken,' involving expenditure in repair to the extent of the sum sued for; and (*d*) that it was the duty of the defenders to have prevented the damage, and that they could have done so by the use of properly constructed bogies 'of a well-known type such as are used for the like purpose in Dundee.'

"The defence may be stated generally as follows:—(*a*) That the streets were not properly constructed and maintained, and in particular, as regards construction, that the setts used were hammer dressed, which are unsuitable for heavy traffic, and that nidged setts with smooth dressed surfaces should have been used, and as regards maintenance, that during the war the streets had suffered serious deterioration, and were out of repair in April and May 1918; (*b*) that the boilers referred to were not excessive in weight, and on the contrary that similar and also heavier weights had been regularly taken over the streets for many years; (*c*) that the damage complained of was largely accounted for by other heavy traffic and by lighter miscellaneous traffic; and (*d*) that the defenders did use care and caution to minimise damage, and that bogies of the Dundee type would have been inappropriate for the traffic.

"Put shortly, the contentions of the parties are as follows:—The pursuers' contention is that this is a case not of using but abusing the streets by employing an unsuitable vehicle for the carriage of the heavy weights, and the defenders' counter contention is that what was wrong was not the vehicle but the streets.

"On the questions of fact as to the alleged fault on the part of the defenders and as to the damage to the streets a long proof was led, and on both these questions the defenders were handicapped in adducing evidence. I say so because the first intimation of the present claim in connection with the conveyance of the boilers in April and May 1918 was only given some months later, viz., by the pursuers' letter of 20th September 1918, stating that an expenditure of £460 had been incurred in repairing the damage, and calling on the defenders to admit liability. Moreover, Mr Somers, C.E., the experienced assistant to the Master of Works for the city, who supervises the maintenance of the streets, was unfortunately in France in April and May 1918, and was unable to speak from personal knowledge either as to the state of the streets at the time or as to the damage done.

"Have the pursuers established, in point of fact, that the damage on which the claim is based was occasioned by the fault of the defenders?

"On this question of fault I think that in judging of the reasonableness or unreasonableness of the weights sent by the defenders over the streets, it is proper to keep in view the general and long-continued practice in the industrial parts of the city of transporting heavy traffic over the streets.

"Glasgow is the centre of the boilermaking industry of Great Britain. Moreover, the allied industries of boilermaking, engineering, and shipbuilding carried on for generations on both sides of the Clyde have gone far to make Glasgow the workshop of the world; and all along, as these 'heavy trades, as they are called, have been developing, the products of manufacture have been increasing, and the burden on the streets has been growing in volume and in concentration.

"In my opinion, whether regard be had to the traffic of the district generally or whether it be confined to the particular route from the defenders' boiler works to the quay, in either case the evidence shows that the weights complained of in this case, 55 to 72 tons, are much less than the heaviest weights which for many years past have been carried over the streets.

"On this subject it is not practicable to enter into details regarding the instances and examples of heavy weights sent over the streets, but I will indicate generally the nature and scope of the evidence.

"In the first place, various representatives of the boilermaking industry spoke to such weights as 89 tons in 1900, 103 tons in 1909, 104 tons in 1911, 122 tons in 1915, and 111 tons in 1917. Then an employee of the Clyde Navigation Trustees explained that in order to facilitate the handling of heavy weights the Trustees in 1894 installed two big cranes costing £16,000 each, one at Lancefield Quay and the other on the opposite side of the river; and as the result of his examination

of the records of the weighing machine at Lancefield Quay during the six years from 1914 to 1920 it was shown that very many weights over 50 tons were dealt with, and many considerably higher—up to a maximum of 120 tons.

"The managers of the two traction haulage contractors, who between them substantially conduct the whole of the heavy traffic of this kind, demonstrated how frequently during the five years from 1913 to 1918 heavy weights up to over 100 tons had been hauled by them over the streets.

"One of them stated that during the war his firm, in the employment of the pursuers, had carried weights up to 70 tons over the streets on the same type of bogie as that complained of in this case.

"So far the statistics have related to traffic over the streets generally. It was proved, however, that for many years prior to 1918, and at least since 1904, the defenders themselves were in the habit of sending boilers heavier than those taken in 1918 on similar bogies and along the same route.

"Moreover, this is not a case of selecting for heavy traffic a street not intended for it. According to the pursuers themselves no streets in the city were better constructed or better maintained than the three streets in question in this case, and *ex hypothesi* it must have been over streets so constructed and maintained that for very many years all the heavy traffic of all the heavy trades in Glasgow has been passing.

"I shall conclude my reference to the evidence on this part of the case by quoting the following passages from the evidence of the pursuers' leading official witness Mr Somers:—'(Q) I find that from 1879 to date there appears to have been close on 800 heavy boilers taken over the streets?—(A) Yes. (Q) So long ago as 1890 boilers up to 69 tons weight were evidently being manufactured and taken over the streets?—(A) Yes. (Q) And in 1903 up to 84 tons, and latterly as much as between 90 and 100 tons?—(A) Yes. (Q) This traffic is not confined to the three streets traversed by the defenders' bogies?—(A) No, the boiler traffic is not. (Q) It is to be found in other industrial parts of Glasgow?—(A) Yes, generally in the streets parallel with the river. (Q) And it has been going on there for a long time?—(A) No doubt.'

"Now if the practice of the last half century is to be taken into account, as I think that it ought to be, on the question now under consideration of the alleged fault on the part of the defenders in sending excessive weights over the streets, it seems to me that the evidence to which I have been referring is *prima facie* adverse to the pursuers' case on that head.

"I am further of opinion that it has been proved that the defenders consistently exercised care to prevent, or at least to minimise, damage to the streets and inconvenience to the other traffic. Before taking any heavy load over the streets the defenders communicated with the Corporation and also with the Tramways Department in case precautions had to be taken regarding parts of the street under repair or in order to get the overhead wires lifted to secure headway for the passage of the boilers. Then so as to lighten the load the defenders' practice was to strip off from the boiler proper anything that was detachable—smoke boxes, boiler mountings, and furnace bars—although the cost involved in doing this was considerable and might be as much as £50.

"Moreover, the inspectors of the haulage contractors whom the defenders employed to conduct the traffic went over the streets inspecting them by daylight and noting the manholes in the way and any parts that seemed to require protection so that steel plates might be put over these manholes and weaker parts. During war time the defenders, with the consent of the Master of Works, had all the manholes whitewashed so that they might either be avoided altogether or if to be passed over might be protected by the steel plates.

"The route included three busy streets—Kelvinhaugh Street, Argyll Street, and Finnieston Street; but the first of these on which there is no tramway is not so busy as the other two, on one of which (Argyll Street) the tramcars are constantly running, and on the other (Finnieston Street) there is often a continuous double line of traffic going to and from the docks.

"Accordingly the defenders when transporting a boiler had it brought along to the end of Kelvinhaugh Street in the afternoon, left it there till midnight, when the streets are quiet, and then had it removed through the night along Argyll Street and Finnieston Street.

"With regard to the vehicle and the actual conduct of the haulage, the defenders for many years have employed one of the two companies of haulage contractors who are generally employed by the transporters of heavy weights. The haulage contractors employed by the defenders have a stock of fifteen bogies built to suit the work in the light of long and varied experience. The other company have bogies of a similar type. All these bogies are low set so as to keep low the centre of gravity of the load, and to secure that in the event of a wheel breaking down there will only be a few inches between the axle and the surface of the street. The measurements of the actual bogies used in the transport of April and May 1918 were not noted by the pursuers and are not available. I hold it proved, however, that the bogies so used were of the usual standard type kept for heavy haulage in Glasgow, and that they were of the most up-to-date type known in the haulage trade.

"So far as appears there has never been a breakdown or accident as the result of the use of the Glasgow haulage contractors' bogies, and until the present case began there had been no suggestion that the type of bogie was not as good as could be designed for the purpose.

"I ought to explain that it was only on the first day of the proof that the pursuers by amending their pleadings introduced a new averment to the effect that the defenders could have avoided the damage to the

streets if they had used a properly constructed bogie, such as the Dundee bogie. I proceed to the evidence relating to the Dundee bogie.

"The special feature of this bogie, in contrast with what I will call for convenience the Glasgow bogie, consists in the sheathing of the wheels with blocks of beechwood.

"The iron wheels have a hollow rim, and into this rim are fitted the blocks of wood so as to present a wearing surface of about 2 inches of beechwood before the iron rim would run on the granite setts. The effect is to interpose what may be described as a cushion between the load and the surface of the street.

"The pursuers' advisers claim that the wood introduces two advantageous conditions, viz., a certain resilience and a better distribution of the weight over the street surface.

"The Dundee bogie was adopted in that city seventeen or eighteen years ago as the result of a litigation between the city and a well-known Dundee company who it was said had been damaging the streets, breaking and crushing granite and whinstone setts, by the haulage of heavy loads up to 87 tons in weight. Thereupon the Dundee company hit upon the use of beechwood sheathing on the wheels.

"The evidence led for the pursuers in this case is that from 1903 onwards the Dundee bogie has been a success—that the boilers of heavy weight have ever since 1903 been carried over the streets without doing damage to them. The cost of the bogie is about £1500, and the cost of re-sheathing is about £100 each time.

"That evidence seems to support the pursuers' contention as to the desirability of using the Dundee bogie in Glasgow, but doubts suggested in the course of the evidence of the pursuers' witnesses were materially accentuated by the evidence for the defence.

"To begin with, it does seem strange if the Dundee bogie has been so effective all along that throughout the intervening years it has been introduced in no other town at either end of the island.

"Then there was great vagueness in the evidence for the pursuers as to the extent to which the Dundee bogie is used in Dundee itself.

"It turns out that only two such bogies are in existence in Dundee, that both belong to the same company, and that no one else requires to use them.

"The city engineer of Dundee spoke to the last load he had seen on the bogie—a load of 24 tons (hereinafter referred to as the exhibition load)—but he also deponed that five or six years ago he had seen what he called a maximum load of 80 tons, and further deponed that in 1915 he had arrived, on information available to him at that time, at an average weight of 50 tons as having been carried by the bogie on seventeen previous journeys. He could not say how many of these were made in any one year. Mr Somers saw the bogie carrying the exhibition load, and the general manager of the Dundee Tramway Company, a witness for the pursuers in this case, had examined the bogie but had never seen it under a load.

"The other witnesses who gave evidence for the pursuers regarding the bogie reported what they had observed on the occasion of the exhibition load. Mr Frew, C.E., admitted that he had waited six months for the opportunity of seeing the bogie under a load. Mr Cowan, C.E., saw the exhibition load carried, and that was all the testing of the loaded bogie that he ever saw.

"All of these witnesses thought well of the bogie, but substantially it was opinion evidence. The pursuers adduced no witness who could speak explicitly and fully as to the specific loads carried by the bogie, or could testify from actual practical experience as to the merits of the bogie for carrying loads such as the Glasgow bogie has to bear.

"The defenders' witnesses, speaking from general experience and on theoretical grounds, were at one in condemning the Dundee bogie as unsuitable for Glasgow. Their reasons may be summarised as follows:—(*a*) The greater traffic to be dealt with in Glasgow both as regards volume and weight. (*b*) The small factor of safety as compared with that afforded by the steel wheel of the Glasgow bogie. The evidence as to the crushing strain and the elastic limit of the beach sheathing in my opinion raised serious doubt as to the safety, the prudence, of subjecting the wood to the risks attending concentrated pressure under the very heavy loads over the uneven surface of the Glasgow streets. (*c*) The roughness of the hammered granite setts used in Glasgow. These setts with their 'pinnacles' on the top are calculated to make indentations on the beechwood, with the result that the sheathing would probably lose its uniformity of bearing surface after even a single journey, especially under a very heavy load. The contrast between the Dundee streets and the Glasgow streets in this respect was brought out incidentally in the evidence of the Dundee city engineer. He deponed that in order to meet modern heavy traffic Dundee was dressing the granite setts to make them as nearly as possible 'like bricks in smoothness.' That is what Glasgow does not do and what the defenders maintain should be done by the use of nidged setts. (*d*) The very serious effects of a breakdown of a heavy boiler load in Argyll Street. If a bogie carrying a heavy boiler broke down in Argyll Street, which is only 32 feet wide between the kerbs, the consequences might be disastrous. Apart from any other bad results, the probability would be that the tramway traffic would be stopped completely and the general vehicular traffic seriously hampered for several hours, with resulting loss of revenue to the city and to the great inconvenience of the general public.

"These practical considerations represent generally the chief grounds on which the witnesses for the defence were against the use of the Dundee bogie in Glasgow; and I think that their adverse opinions receive

substantial confirmation from the real evidence afforded by the experience of one of the Glasgow haulage contractors. He tried wood-sheathed wheels on the principle of the Dundee bogie, but found two fatal objections—(*a*) that the wood sheathing (he used oak blocks) tended to flatten under use, so that the wheel, losing its roundness, got into an eccentric shape and caused jolting, and (*b*) that the cost of renewing the sheathing was quite prohibitive.

"I have now reviewed the facts bearing on the question of the alleged fault on the part of the defenders, omitting no doubt very many details, but I think substantially indicating the state of the evidence.

"In the light of all the evidence I have come to the conclusion that the pursuers have failed to establish either (*a*) their general averment of fault with reference to the weights carried, or (*b*) their special averment of fault in continuing to use the Glasgow type of bogie, and in failing to adopt the Dundee type of bogie.

"So much for the facts, and my conclusions thereon, on this branch of the case.

"I think it right to add that even if the evidence in favour of the Dundee bogie as against the Glasgow bogie had been much stronger in favour of the Dundee type of bogie, it would not follow, in my opinion, that the defenders would necessarily be held as in fault in continuing to use the standard bogie of the trade in Glasgow. I refer on this matter to the case of *Wisely* v. *The Aberdeen Harbour Commissioners*, 1887, 14 R. 445, in which the Commissioners were blamed for using what are known as bulb or concave rails instead of the "box" rails with straight sides, commonly in use in street tramways. The Court held that although the box rails were, on the whole, of a safer description for traffic which had to cross the rails, as both kinds to a certain degree were dangerous to traffic crossing them, the Commissioners could not be held negligent for not scrapping the existing rails which in the past had proved reasonably safe.

"Although I have come to the conclusion that no fault on the part of the defenders has been established, nevertheless, on the assumption that the conclusion may be found wrong, *ob majorem cautelam* it would be proper for me to deal with the question of damages. In this case, however, even on the assumption that my conclusion is right, I must go on to deal with the question of damage, because the pursuers' counsel submitted a legal argument to the effect that, fault or no fault, the defenders are liable on the ground that they in using, or rather, as he put it, abusing, the streets, and thereby causing damage to the pursuers, had committed a public nuisance.

"The averment of the pursuers as to the damage done by the carriage of the boilers is to the effect that in each of the three streets many hundreds of granite setts were 'broken.'

"The two foremen in the employment of the pursuers, however, who counted the damaged setts admitted (*a*) that the setts described as broken included all setts which seemed to them to have been recently chipped in any way or which showed a powdering of the surface or any kind of mark of recent injury, and (*b*) that they had counted all such stones in Argyll Street and Finnieston Street, whether on the tramway track or the sides of the streets, and had attributed two-thirds of the total so arrived at to the defenders' traffic.

"It is necessary to explain that the pursuers' claim covers damage by the defenders' traffic only in certain parts of Argyll Street and Finnieston Street included in the route traversed by the boilers, viz., only these parts of these streets which are maintained by the statute labour department of the Corporation, exclusive altogether of the other parts which, being occupied by the tramway track, are maintained by the Tramway Department of the Corporation.

"In Kelvinhaugh Street there is no tramway. In Argyll Street and Finnieston Street, part of the width of each street, 17 feet broad, representing the portion between the tramway rails and a margin of 18 inches on each side, is maintained by the Tramway Department. Moreover, in Argyll Street and Finnieston Street any damage done by the defenders' traffic is necessarily limited to the crossing at Kelvinhaugh Street into Argyll Street and the crossing at the head of Finnieston Street, because in both streets the bogies keep in the centre of the street on the portion (17 feet in width) maintained by the Tramway Department.

"In considering whether responsibility can be attributed to the defenders for the damaging of setts on the occasions referred to in April and May 1918 I think that various general considerations must be kept in view—(*a*) In my opinion the reasonable inference from the evidence as a whole is that the defenders' traffic on the occasions mentioned did do considerable damage in each of the three streets, and in particular in Argyll Street, more damage than usual, having regard to the fact that the weights carried did not on any occasion exceed 72 tons. (*b*) The general deterioration of the streets due to the abnormal war conditions seems to me to explain any unusual appearances of damage to the surface of the streets on the particular occasions. Before April 1918, which is the critical date in this case, an enormous traffic of war materials over the streets to the docks had been going on. It is not possible to obtain details of that traffic now, but glimpses of the abnormal conditions were given in the course of the evidence. For example, it appears that tanks weighing 20 to 25 tons were from time to time being taken over Finnieston Street, the hulls made at Beardmore's being transported to Mirrlees, Watson, & Company for engines, and then re-transported to Scotstoun for testing, all the traffic of that kind passing up and down Finnieston Street. (*c*) The necessary neglect during war-time of the usual careful attention given in Glasgow to the upkeep of the streets, a neglect enforced by the want both of labour and material. The pursuers' witness the city engineer of Dundee put the

position as regards his own city thus—I use his own words—'My roads all went to pieces for want of repair.' The evidence satisfied me that substantially similar conditions prevailed in Glasgow, and that for the same reasons the streets in Glasgow had got into an unusually bad condition.

"One piece of real evidence spoken to by the pursuers' witness, the engineer of the Glasgow Corporation Tramway Department, throws light on how the upkeep of the streets must have been prejudicially affected by reason of want of material. He deponed that he had experienced great difficulty for the last six years in maintaining his track—'As a matter of fact,' he added, 'we have bought no setts for four or five years and cannot get them yet.' (*d*) In Argyll Street the unusual damage to the setts spoken to by the pursuers' witnesses as the result of the defenders' traffic is fully accounted for by the exceptionally disturbed state of the surface along the tramway track. In Argyll Street, as I have indicated, the defenders' bogies (to avoid the slope at the side) kept to the tramway track—the near wheel on or close to the north rail and the off wheel on or close to the third rail. Now it is just on these parts over which the wheels of the bogie passed that the surface is apt to become most irregular. In Argyll Street over 1000 tramway cars pass along the rails every day each weighing 15 tons. These cars travel at considerable speed, and the effect of the vibration consequent on this daily passage of 15,000 tons of weight in 15-ton loads affects the stability of the paving which is up against the tramway rail—that is to say, the rails lose their bedding; they begin to pump, and this pumping action loosens the setts alongside the rails. Soon the binding between the setts becomes displaced and water gets in; then the setts become slack or rocking, and at some parts stick up perhaps as much as two inches above the rails and at other parts they are depressed an inch or two, the general result being an irregular surface with projections here and depressions there. Moreover, in Argyll Street, in addition to the tramway service there is a vast miscellaneous traffic of mechanically propelled vehicles, some having rubber tyres with a scouring or sucking action on the disturbed surface, and others having steel tyres, most of them running at a high speed and likely to chip projecting and exposed setts. Many of these have trailers carrying loads up to 10 or 15 tons, and these must do damage to the uneven surface. Lastly, motors and horse-driven vehicles when the wheels come off the tramrails and run alongside cause a rubbing of four or five inches in breadth.

"Under the conditions which I have been figuring, and which on the evidence I think were substantially present in Argyll Street and to some extent also in Finnieston Street in April and May 1918, it is evident that when a 70-ton boiler came along considerable damage must have been done to the projecting stones and to the stones exposed owing to depressions and rutting. The stone projecting above its neighbours, deprivad of lateral support and protection, subjected to the concentrated weight of the bogie and boiler, would almost inevitably be crushed or cracked, and the setts at the margins of the depressions and ruttings would suffer in a like manner or perhaps have their edges chipped off. It is not surprising that under such conditions the two foremen who counted the damaged setts found so many.

"Another consideration seems to me to throw doubts of another kind on the claim which the pursuers are now making.

"It appears that for the year ending May 1915 the cost incurred by the Corporation Tramway Department in the upkeep of Finnieston Street was £899, whilst the expenditure for the year ending May 1919 was only £878, and yet it is proved that the costs of maintenance had gone up 300 per cent. in the interval. The only explanation offered was that this might be accounted for to a certain extent because in 1918-19 redressed setts (costing only one-fourth of new setts) were used. In the previous year, however—1917-18—I see that the cost of upkeep was only £236. It seems to me that the use of redressed setts and the reduction of the pre-war rate of expenditure go to support the defenders' evidence that in April and May 1918 Finnieston Street, although no doubt patched up from time to time, was nevertheless not really as well kept up as in previous years. This view seems to me to derive direct support from an admission given by the engineer of the Corporation Tramway Department. He had been referred to the fact that the defenders were supplying more boilers than usual in the war years and was asked, 'How do you account for the fact that when the boiler industry is active the expense of keeping up Finnieston Street goes down?' and his reply was 'It was not kept up. There was no money spent—the street was just allowed to go.'

"Now the evidence which latterly I have been reviewing has no direct bearing on the question of the damage done to the particular bits of the route in connection with which the present claim is made, but it does in my opinion deprive the evidence given by the pursuers' witnesses as to the number of setts damaged in Argyll Street and Finnieston Street of all real importance. That means that the prejudicial inference which might otherwise have been applied as regards the damage found in the particular bits referred to is not available to the pursuers.

"Moreover, the direct evidence which is given by the two foremen as to the state of Kelvinhaugh Street and Finnieston Street strikes me as most unsatisfactory. One of them, asked in chief as to the state of Kelvinhaugh Street on his inspection just before the boilers were taken over the streets on 22nd April 1918, said, 'I found Kelvinhaugh Street not in very good repair.' Interrogated further, 'What was wrong with Kelvinhaugh Street,' he replied, 'It was out of repair by the passage of boilers pre-

vious to that date. That damage showed itself in the setts being all broken and smashed up.'

"If that is even substantially a correct description of Kelvinhaugh Street before the passage on 22nd April 1918 of the first two of the seven boilers which are said to have caused the damage now sued for, I do not doubt that there must have been considerable fresh damaging of the already broken setts and of other setts too, projecting and exposed because of the disturbed surface.

"I have come to the conclusion on the facts that there is no reliable evidence on which the specific damage done by the defenders' traffic on the occasions referred to can be determined and assessed. Damage was certainly done by the defenders' traffic, but I think that the reasonable inference is that the damage resulted largely from the deteriorated condition of the streets, due to the abnormal war conditions and the consequent want of the usual more thorough repair and upkeep.

"Further, in the circumstances and under the conditions to which I have referred, I am of opinion in law that any damage which could be fairly attributed to the defenders' traffic on the occasions in question, having been occasioned in the course of the legitimate and ordinary use of the streets attended with the observance by the defenders of all proper and reasonable care, no actionable claim arises in respect of such damage at the instance of the pursuers.

"I must now deal with the case in its main legal aspect as presented by the counsel for the pursuers.

"The learned counsel maintained that liability at common law had been established in respect that the haulage of the defenders' traffic was not in the exercise of the reasonable use of the public streets, but amounted in point of fact to an abuse of the streets, and in point of law, even apart from fault or negligence, constituted a public nuisance which involved actionable liability for damages.

"The question of liability on the ground of nuisance is not raised in the pursuers' pleadings either in the condescendence or in the pleas-in-law, but as the pursuers' counsel based his legal argument solely on the facts brought out in evidence, and as I did not understand the defenders' counsel to object to the competency of the contention, I think that I ought to consider it on its merits.

"The argument was based on the authority of a series of decisions—two Irish decisions, viz.—*The Guardians, Armagh Union* v. *Bell*, 1900, 2 Irish Reps. 371, and *Cavan County Council* v. *Kane*, 1910, 2 Irish Reps. 644, and 1913, 2 Irish Reps. 250; and two English decisions, viz.—*Attorney-General* v. *Scott*, 1905, 2 K.B. 160, and the *Mayor of Chichester* v. *Foster*, 1906, 1 K.B. 167.

"In my opinion none of these decisions is applicable. The ground of decision in each of them was the commission of what in England and Ireland is a public nuisance in connection with a highway, viz., (*a*) the use of a vehicle calculated to cause danger to others using the highway for passage; (*b*) the destruction or obstruction of the highway so as to cause risk or danger, or so as to cause inconvenience, or so as to prevent the proper use of it by others; or (*c*) the injury of the drains or pipes below the surface of the highway.

"Thus in the *Armagh Union* case the ground of action was that a traction engine had injured the water and sewer pipes laid in the street, and the ground of the decision was the use of an engine 'fraught with danger' and causing damage to the pipes legitimately laid in the subsoil of the street.

"In the *Cavan County Council* case what happened was that the defendant's traction engine instead of keeping to the main road was taken, owing to a mistake on the part of the driver, over a rural road not fit and not intended for heavy traffic, with the result that the traction engine sank into the road to a depth of about a foot, tearing up and destroying about 58 perches of the road. In the words of Lord O'Brien, L.C-J.—'This amounts to a public nuisance, being fraught with very substantial inconvenience and even risk of injury to an ordinary careful travelling public.'

"In the case of the *Attorney-General* v. *Scott* an injunction was sought to restrain the defendant from using a traction engine on a road in such a way as to make the road dangerous to the public. Mr Justice Jelf, who gave judgment for the defendant and whose judgment was affirmed on appeal, stated the ground of action as follows:—'The defendant was a hauler, and the complaint of the County Council was that he hauled stone with a traction engine and trucks over the main road . . . in such a way as to cut up that section of the main road and render it dangerous and practically impassable both for vehicles and pedestrians.'

"Mr Justice Jelf, however, held upon the evidence that the road before the traction engine went over it was already in bad condition, and he therefore held that the plaintiff's case failed.

"On appeal Lord Justice Vaughan Williams stated the question for decision thus—'Whether the evidence showed that the defendant had turned the road into a condition in which it is unfit for public user, or in which the public user has been rendered substantially less convenient.'

"In the only other case of the kind founded on by the pursuers' counsel, viz., the *Chichester Corporation* case, the plaintiffs, who were both the road authority and the water authority, were suing the defendant for damages for the breaking of their water main in a street by the passing over it of a heavy traction engine. The County Court Judge found for the plaintiffs on the ground that the damage had been caused by the use of 'a dangerous thing upon the highway.' The judgment was affirmed.

"All these decisions are illustrations of the application of the English and Irish common law relating to obstructions and nuisances on public roads.

"In Pratt and Mackenzie's well-known

treatise on the Law of Highways (16th ed., p. 116) the following definition of nuisance is given—'Nuisance may be defined with reference to highways as any wrongful act or omission upon or near a highway whereby the public are prevented from freely, safely, and conveniently passing along the highway.'

"The definition as given does not cover all the cases, but I think that it does indicate essential characteristics of a public nuisance relating to highways, viz., (*a*) the doing of something in itself illegal, (*b*) the causing of danger, injury, destruction, or inconvenience to the normal or legitimate passage over or use of the highway, its surface, or its subsoil.

"I refer to Pollock's Law of Torts, 5th ed. (1920), p. 320.

"In the recent English case of *Weston-Super-Mare Urban Council* ((1919) 1 Ch. 11, *aff.* 1919, 2 Ch. 1) Mr Justice Eve drew a distinction between the statutory remedy under the English Act of 1878 (analogous to the remedy given by the Scottish Act of 1878) and the common law remedy of an action for public nuisance. The plaintiffs the Urban Council were suing the defendants on two grounds, viz., (*a*) for damage done to their roads by extraordinary traffic within the meaning of the Act of 1878, and (*b*) for damages at common law for public nuisance. Mr Justice Eve affirmed the claim on the ground of extraordinary traffic, but held that so far as laid on public nuisance the claim was untenable. His Lordship put his opinion thus—'In my opinion no case of nuisance has been made out. Except for two trifling instances of damage to motor cars . . . there is no evidence to prove the allegations that either of the roads was even a source of danger to the public.'

"I refer also to certain English cases selected out of those examined by me on this branch of the law as bearing on the question under consideration:—(1) *The King* v. *Russell*, 1805, 6 East. 427, 8 R.R. 506; (2) *Rex* v. *Cross*, 1812, 3 Camp. 224, 13 R.R. 794; (3) *Wandsworth Board of Works*, 1884, 13 Q.B.D. 904, Brett, M.R., p. 910; (4) *Attorney-General* v. *Brighton, &c., Supply Association*, 1900, 1 Ch. 276; (5) *Latham* v. *Johnson*, 1913, 1 K.B. 398 (*per* Hamilton, L.J.); (6) *Crane* v. *South Suburban Gas Company*, 1916, 1 K.B. 33.

"Now in the present case there is no averment of danger to the public or interference with other traffic, and there is no mention whatever of anything of the nature of the public nuisance of the English law. Moreover, in the evidence not a word was said as to any such danger or interference or public nuisance. On the other hand there was clear evidence to the contrary. Assuming, therefore, that in Scotland the doctrine of the English and Irish law of public nuisance in connection with highways is applicable, that doctrine in my opinion has no application to the facts of this case.

"I may add that I think that in the circumstances to which the English and Irish law of nuisance applies the law of Scotland does afford appropriate remedies. I mean that our law would give a remedy, *e.g.*, interdict or damages or both, for an act in itself illegal ('a nuisance') which caused substantial injury or danger or inconvenience or discomfort to persons or property even although fault or negligence could not be established—*Shotts Iron Company* v. *Inglis*, 1882, 9 R. (H.L.) 78, *per* Lord Blackburn at p. 88; *Duke of Buccleuch* v. *Cowan*, 1866, 4 Macph. 475, at p. 482.

"An alternative argument of the pursuers' counsel depended on proof of negligence, which was the ground on which the action as brought (and as amended) was laid. On my findings in fact, however, the argument fails in respect that the evidence does not establish negligence either in the carrying of excessive weights or in the use of an improper vehicle.

"In my opinion on the facts brought out in this case the pursuers can find no judicial remedy under the common law of Scotland and no statutory remedy under the existing legislation.

"For the reasons which I have given I must assoilzie the defenders."

The pursuers reclaimed, and argued—No ordinary well-constructed road could stand the wear and tear of the traffic complained of in the present case. The streets in question were proved to be as suitable as they could be for the purposes for which they had been constructed, viz., the ordinary traffic of the city. Although it might be that in certain instances the damage was greater where portions of the streets were in a lesser state of repair, still the streets sustained damage even when in the best possible state of repair. The defenders were not entitled to ask the pursuers to keep their streets in a higher state of repair than was necessary for ordinary traffic. The pursuers were not bound to construct or maintain streets that met merely the requirements of one user out of millions. The only traffic which did damage of this nature to the streets was that of the defenders, who accordingly were abusing the streets rather than using them. It was illegal traffic which amounted to a public nuisance in the English sense of that term—Bell's Principles, sec. 974. The damage was not due to ordinary wear and tear, but to sudden and substantial breakage of specific portions of the streets. The pursuers could not construct better streets than those they had constructed, nor could they make streets that were at once suitable for the defenders' and other traffic also. The pursuers were only bound to conform to the standard set by ordinary normal traffic—*Mackenzie* v. *Bankes*, (1868) 6 Macph. 936, 5 S.L.R. 607; Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 310. Assuming, however, that the defenders' traffic was legal, the onus lay upon them to prove that they had conducted it in a manner least likely to injure the pursuers' property, and this onus they had failed to discharge. The defenders were guilty of negligence in using the bogies in question when a better type was available—Bevan on Negligence, p. 117. Counsel quoted the following authorities in illustration of the common law of the subject—*Gas Light and*

Coke Company v. *Vestry of St Mary Abbott's, Kensington*, (1885) 15 Q.B.D. 1; *Hill* v. *Thomas*, (1893) 2 Q.B. 333, *per* Bowen, L.J., at p. 340; *Attorney-General* v. *Scott*, (1904) 1 K.B. 404, (1905) 2 K.B. 160; *Chichester Corporation* v. *Foster*, (1906) 1 K.B. 167, *per* Lord Alverstone, C.-J., at p. 174, and Wills, J., at p. 176; *Billericay Rural Council* v. *Poplar Union and Keeling*, (1911) 2 K.B. 801, *per* Vaughan Williams, L.J., at p. 809, and Fletcher Moulton, L.J., at p. 813; *Weston-Super-Mare Urban Council* v. *Henry Butt & Co.*, (1919) 1 Ch. 11; 2 Ch. 1, *per* Swinfin Eady, M.R., at pp. 7, 8, and 9; (1920) W.N. 241; Solicitors' Journal, (1921) vol. lxv, p. 680; *Egerley's* case, 3 Salk. 182; *Guardians, Armagh Union* v. *Bell*, (1900) 2 I.R. 371, *per* Sir P. O'Brien, L.C.J., at p. 373; *Cavan C.C., and Bailieborough, R.D.C.* v. *Kane*, (1910) 2 I.R. 644; (1913) 2 I.R. 250. Reference was also made to the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 57; the Locomotives Act 1861 (24 and 25 Vict. cap. 70), sec. 4, *proviso*, repealed by the Roads Act 1920 (10 and 11 Geo. V, cap. 72), sec. 16.

Argued for the respondents—No action lay at the instance of the pursuers unless they could prove danger or damage on the part of the defenders to another user of the road. The pursuers had not attempted to prove this, and accordingly the defenders' use of the streets was legal and proper, and not outwith their rights as members of such a large industrial community as Glasgow. The pursuers had never sought to interdict the defenders' user of the streets. They had never tried by this means to stop the alleged wrong, but had, on the contrary, in various ways, such as by lifting electric tramway wires, positively encouraged the defenders and then sought to obtain compensation in the present action. The pursuers had no remedy at common law in this case. Traffic such as that complained of here was no novelty in Glasgow, but had been carried on for half a century. The defenders, whose traffic only occasioned more distinctive wear and required the execution of more frequent repairs, were only causing such damage as they did to the streets in pursuance of their lawful business. Boilers such as those made by the defenders had frequently been carried over the streets in question. The evidence showed that the principal damage was done by the general volume of traffic, especially the electric tramcars, which rendered the granite setts irregular, and the defenders' bogies only completed the damage thus already done. It was impossible to distinguish between the damage done by the defenders and that caused by other users of the streets. The pursuers never hitherto complained that the defenders' bogies were unsuitable. The Glasgow type of bogie was the ordinary one used in every town in the country where boilers were made. The local authority was bound to keep its roads in a condition sufficient to cope with the increase in the extent and weight of traffic which with the progress of time it might reasonably expect. The following authorities were referred to:—The Locomotives Act 1865 (28 and 29 Vict. cap. 83); Locomotives Amendment (Scotland) Act 1878 (41 and 42 Vict. cap. 58); Highways and Locomotives (Amendment) Act 1878 (41 and 42 Vict. cap. 77), sec. 23; Locomotives Act 1898 (61 and 62 Vict. cap. 29); Local Government (Scotland) Act 1908 (8 Edw. VII, cap. 62); Glasgow Corporation Order Confirmation Act 1912 (2 and 3 Geo. V, cap. cxlix), schedule, par. 28; Ferguson on Roads, chap. vii; *Port Glasgow and Newark Sailcloth Company* v. *Caledonian Railway Company*, (1893) 20 R. (H.L.) 35, 30 S.L.R. 587; *Deer District Committee of the County Council of Aberdeen* v. *Shanks & M'Ewan*, (1911) 1 S.L.T. 314, 2 S.L.T. 497; *Milne & Company* v. *Aberdeen District Committee*, (1899) 2 F. 220, *per* Lord Low at p. 224 and Lord M'Laren at p. 230, 37 S.L.R. 171; *Lord Aviland* v. *Lucas*, (1879) 5 C.P.D. 211, *per* Lindley, J., at p. 223, and in the Court of Appeal *ibid.* at p. 351, *per* Baggalay, L.J., at p. 353; *Cadenhead* v. *Smart*, (1894) 22 R. (J.) 1, 32 S.L.R. 7; *Wallington* v. *Hoskins*, (1880) 6 Q.B.D. 206; *Wisely* v. *Aberdeen Harbour Commissioners*, (1887) 14 R. 445, 24 S.L.R. 315.

At advising—

LORD PRESIDENT—This is an action of reparation by the Corporation of Glasgow in respect of the damage done to certain streets of that city by a firm of boiler makers. On four days at the end of April and beginning of May 1918 the defenders transported along the streets in question seven boilers which, along with the bogies on which they were mounted, weighed from 65 to 82 tons each. The bogies have no locks, and run on four barrel-shaped wheels. The weight loaded on each wheel at the point of contact with the street was thus from 16 to 20 tons. The damaged streets are causewayed, the causeway being supported on a cambered bed of concrete, 6 inches thick; this is covered by a layer of sand, on which a causeway of granite setts, suitably grouted, is laid or built. The effect of the passage of the boilers was that a considerable number of the setts lying in the track of the bogie wheels were (I use the words employed by the leading witnesses for both parties) "crushed and ground." No damage was done to the supporting concrete, and the causewayed surface was not cut into ruts; but many of the setts were so far destroyed as to render the fragments to which they were reduced liable to be worked loose and displaced by the regular street traffic, and to make it impossible to put the setts to any further service by redressing and relaying them in the usual way. On the one hand the street was not made dangerous or inconvenient for public use, although the date when considerations of safety and convenience would require the causeway to be relaid was no doubt anticipated; on the other hand, a part of the relatively speaking permanent material of the causeway was so damaged as to be beyond repair, and to necessitate—whenever the operation of putting the streets in order has to be undertaken — complete renewal. The cost of restoring the causeway by supplying and laying new setts in place of those which

were "crushed and ground" to pieces is the measure of the damages sued for.

In the streets with which the present case is concerned the defenders' occasional boiler traffic is the only traffic of its kind. In some other streets of the city there is similar occasional boiler traffic belonging to other firms, which produces more or less similar effects on the causeways. No other traffic using the streets of the city "crushes and grinds" the setts as above described except this kind of traffic. There is thus no difficulty in showing that the peculiar form of damage done to the streets which gives rise to this case was directly attributable to the defenders' use of them for the transportation of their boilers. This peculiar form of traffic requires to have the streets to itself, and is therefore carried at night only; it has to be brought out of the defenders' works at closing time and allowed to stand on some appointed part of the public streets till other forms of traffic have left them; and the overhead tramway wires have to be specially lifted for it. These facilities have been afforded by the street and tramway authority for many years; but the average of the weights carried has tended to increase, and the cost of street construction and maintenance has tended to rise. It was proved that those portions of the route followed by the boilers which are constructed of macadam suffer little or no damage. This, I imagine, is due to the resiliency of the surface in the absence of a concrete bed; and it seems likely that the comparatively recent introduction of concrete as the foundation for causeway has rendered the setts more susceptible of damage by very heavy weights than formerly. The extraordinary traffic clauses of the Roads and Bridges Act 1878 are not available to the pursuers, and this action is intended to test the rights of parties at common law. The pursuers maintain that the defenders' boiler traffic goes beyond a legitimate use of the causewayed street, because it brings on to the street weights greater and more concentrated than the structure of the street is capable of sustaining without being destroyed, and therefore amounts to an illegal abuse of the defenders' rights as road users. The defenders on the other hand assert an absolute right to use the streets for their boiler traffic, and to load weight on the wheels of the bogies up to any limit which suits their business requirements, regardless of the effect produced on the structure of the street.

The only right the defenders have to use the streets is their right as members of the general public. That right being a public one is not unlimited. On the contrary, it is limited by the inherent condition of respect for the equal rights of other street users. The law of Scotland depends on this principle entirely, which does not, I think, differ in essentials from the English doctrine of public nuisance which figures so prominently in the English cases cited to us. There are, no doubt, differences affecting the mode of remedy; thus the functions of the Attorney-General in connection with public nuisances have no counterpart with us. But I do not doubt the competency of proceedings by way of interdict or action of damages at the instance of a Scottish road or street authority to protect the general public use of the roads or streets under its charge against abuse by a particular road or street user. It is only to be expected that the developments of traffic on the one hand, and of road and street construction and management on the other, should make possible forms of abuse—and necessitate corresponding restrictions—unknown in the simpler conditions prevailing on the ancient King's highway, destitute as it was in Scotland of artificial making up or maintenance till the institution of what was practically statute labour under the Justices of the Peace in the 17th century. But the principle stated above is so broad, and considerations of materiality and reasonableness necessarily play so large a part in its application, that its generality cannot afford anything like so effective a means of restraint as the definite, if more or less arbitrary, regulations embodied in statute or authorised bye-laws. At common law everything depends on making out a clear case of abuse, and that is the crux of the present case.

The pursuers' arguments turned on the distinction between tear and wear which is inseparable from the use of a street by all road-users, and the destruction of it by a particular form of traffic putting upon it a load greater than its structure, though properly maintained, makes it capable of sustaining. The public authority is bound to keep its roads and streets in a safe and convenient condition for public use by maintaining them in repair, and (apart from extraordinary traffic clauses) has no remedy against particular road-users whose traffic plays a disproportionate share in causing tear and wear. But in principle I think it is true that if a particular road-user's traffic be such in its character, or in the weight loaded on its wheels, that the damage it does to the roads or streets is more than the operations of repair and maintenance can meet or keep pace with—consistently with preserving to the general public a reasonably convenient, safe, and continuous means of transit—his traffic has passed beyond the bounds of legitimate use and has become an abuse of public right. The only means by which the general public rights could be preserved in such a case as that would be the substitution for the road or street (as constructed and provided by the public authority) of a new structure capable of sustaining the particular road-user's traffic as well as of satisfying ordinary requirements. No individual road-user has the right at law to require the execution of works of this kind at public expense. He must, I think, take the roads as he finds them, and such as they have been constructed, for it is the public authority's affair to determine in the interests of the general public what should be the structure and strength of the roads and streets committed to its management. He is no more entitled, in my opinion, to complain if prevented from bringing greater concentrated weights on a street than its construction

enables it to carry than he is if prevented from going at his own speed along a crowded thoroughfare which has been constructed of dimensions too narrow to enable the volume of traffic resorting to it to flow freely. In both cases his rights must suffer restriction so as to accommodate them to the general rights of the public as a whole. He is only entitled to share in the public right, not to engross or monopolise it. The facts of the present case present at one point a fairly simple illustration of the principle I have attempted to formulate. In the Glasgow streets there are a number of manholes and gratings communicating with sewers and drains and other underground works. These form part of the street surface provided by the street authority for the use of traffic. The defenders prudently lay steel plates over these before taking their heavily laden wheels across them. Yet they maintained in argument that they were under no obligation to do this; that the manholes were part of the *opus manufactum* tendered to them for traffic use; and that if they fractured them by submitting them to weights greater than they were known to be capable of resisting, the street authority would have no remedy either by way of interdict or by way of damages. I should be very reluctant so to interpret the legal rights of a road-user.

The difficulty of applying to a particular set of facts these principles in their blunt generality, neither precisioned nor sharpened by being reduced into the form of statutory regulations, remains. The fracture of an arch or girder forming the supporting structure of a road or street might provide a comparatively simple case. In the present instance, if the weight of the boilers had been such as to fracture the concrete bed of the causeway instead of merely "crushing and grinding" some of the setts forming the surface of the streets the case might have been easier. But tear and wear is a thing of many degrees and it may be greatly aggravated without constituting an illegal abuse. This is one of the reasons why in many cases road and street authorities have resigned themselves without protest to abandon a course of futile repairs in favour of the substitution of a new and stronger form of road. The defenders have not succeeded in this case in showing that the pursuers' methods of street construction fall short in any particular of the best practised, but the effect of their traffic as described at the outset of this opinion does not, I think, disclose anything more than a case of unusually heavy tear and wear. The time when operations of repair will be required will no doubt be anticipated, but it was admitted at the debate that the effects of the damage done have not even yet resulted in necessitating any material operations of that kind to be undertaken. It is not enough that a number of the setts will be incapable of further service, because the result has not been, and so far as the proof goes will not be, to cause any material interference with the convenient and continuous use of the streets by other members of the public greater than inevitably results from operations of repair and maintenance. It does, however, appear to afford justification for giving to the street authority in Glasgow greater powers of regulation than they possess, but that of course is not a matter for us. I should add that while it is true that any inequality in a causewayed surface exposes the setts in its vicinity to exceptional stresses, I do not think the defenders were successful in making out that the damage done was substantially due to deficient repair of the streets.

The pursuers' case on the form of bogie used by the transport contractors who are employed by the defenders fails on the proof. It may be that this is a matter which might be made the subject of regulation under the Locomotives (Scotland) Act 1878. It was decided in *Crichton* v. *Forfar County Road Trustees* (1886, 13 R. (J.) 99) that the bye-law power covers bogie construction. But in the present case the onus is on the pursuers; and while the defenders' evidence does not satisfy me that they have given this matter — and particularly the feasibility of employing a wood-sheathed wheel on a bogie with a lock—the attention which it deserves, I do not think the pursuers have discharged the onus resting on them.

LORD MACKENZIE — The Corporation of Glasgow claims damages from Barclay, Curle, & Company, who are boilermakers, because, as they allege, they destroyed certain streets there in transporting their boilers. It is contended (1) that such traffic is not ordinary and is therefore illegal, and (2) that if not illegal there is an onus on the defenders to show that they could not by adopting better methods of transport avoid breaking the setts with which the streets are laid.

It is proved that for half a century boilers have been transported along the streets of Glasgow. The boilers in question, whose transport is said to have caused damage estimated at £460, were by no means as heavy as many others conveyed along the streets. They were seven in number, and ranged in weight from 55 to 72 tons. Their carriage occupied three or four days in April and May 1918. No intimation was made of the present claim until September 1918, although the question of the carriage of boilers was a vexed one and had formed the topic of previous correspondence. The boilers were borne on bogies supplied by the contractors whom the defenders engaged to do the work. This type of bogie, according to the admission of the pursuers' leading witness, is the ordinary type of bogie used by contractors who carry out heavy haulage work of this sort. As the argument before us developed, no attack was made upon the way in which or the material with which the streets are laid. The defenders through their counsel expressed themselves as satisfied in regard to these matters. It is, however, proved that during the years of war the streets had been allowed to get into disrepair.

The foundation of the pursuers' case is to lay on the table of the Court bags of broken

material and to say—Those were setts; they are our property; these and many others you, the defenders, have broken by your unlawful use of our streets, and you must pay us damages. The action has been brought in order to test the rights of parties at common law with reference to administrative powers which the Corporation may have by statute or under bye-laws. When brought to the test the most striking feature of the case is that the pursuers disavow any attempt to show that the broken setts they complain about ever obstructed any person using the streets or any traffic passing along them. They do not attempt to prove that the defenders' traffic obstructed or was a source of danger to other traffic using the streets. The broken setts, whether nidged or others, apparently were allowed to remain for indeterminate periods, and for aught that appears in the proof no passer-by with or without goods was any the worse.

It may well be that the ratepayers are worse off, for the life of the street may not be anything like as long if subjected to boilermakers' traffic. But we are dealing with the common law, and the common law as appears from the cases cited by the pursuers, whether in England or Scotland, takes no note, apart from questions of negligence, of the relation of traffic to an *opus manufactum*, in so far as it merely imposes a greater expense in upkeep. Those who make the street and lay the setts thereby tender the *opus* they have made for user by the public. If the user by A obstructs the user by B C and D, then A may be interdicted from such a user. In the same way if A's user is a source of danger to his fellow users, again the common law will intervene to stop him. In either of these cases he may also be liable in damages. But if his user result, not in obstruction or danger to other users, but merely in the stones being worn and torn, there is no right of action at common law. The stones were put there to be used. Wear and tear is the result of use. The expense consequent on wear and tear falls on the ratepayers, but it is not from the common law that the ratepayers' purse will receive protection. I am far from saying that it ought not to receive protection. Indeed I think it certainly ought, but this must be secured in the region of administration. There are sufficient indications in various statutes, notably the Locomotive Acts, how the safeguards can be worded and enforced, but the common law does not arm the administrative authority with discretionary powers. It may be equitable that A should, in consequence of his traffic, contribute more in rates than B. This must be matter of regulation. The Corporation shrinks from bringing the boilermakers' traffic to the test of interdict. The reason is evident. They do not want to stop the traffic but to continue it, subject always to the payment of a differential rate. This is to say that the traffic is lawful, but that it should be put under conditions. In other words, this means that tear and wear of a street cannot, apart from negligence, be the foundation of an interdict. There may be *damnum*. There is no *injuria*. Whatever adjective is put in front of "tear and wear," whether "ordinary," "extraordinary," or "excessive," provided it is not taken out of that category, the user is lawful so far as the common law is concerned. I do not doubt that if the weight carried is so excessive as to "spoil" the street, to use the phrase of one of the English cases, then in Scotland it would not be difficult to aver and prove that this impeded the use of the street. No such case is attempted to be made by the pursuers in the present action. So long as the user results merely in wear and tear, then such user is lawful, and such lawful use cannot be the ground of liability for damages at common law. When the matter comes to be dealt with by statute or bye-law, then excessive tear and wear, caused not by excessive volume of traffic but by excessive weight of an individual unit in the traffic, may be stopped altogether, or permitted only on payment of special tolls.

Viewed as a common law action to recover damages, the pursuers' case fails. There is no evidence in support of what, as above indicated, is necessary in order to make a case at common law.

This in my opinion is sufficient for the disposal of the case adversely to the contention of the pursuers.

I am further of opinion, agreeing with the Lord Ordinary, that the pursuers have not proved the damage they seek to establish. Nor do I think there are materials, even if their case were relevant, for awarding any damages. As regards the case sought to be made against them, of fault because they did not use a bogie of the type used in Dundee, the onus is not here upon the defenders but on the pursuers. They fail in their proof on this point. For these reasons I think that the Lord Ordinary's judgment should be affirmed.

LORD SKERRINGTON—In the speeches of senior counsel in support of and against the reclaiming note the issues between the parties were very much narrowed, and it is therefore unnecessary to consider various controversial matters which bulked in the pleadings and in the evidence and in the arguments of junior counsel. Thus the pursuers' senior counsel admitted that he had not proved that the transport of the defenders' boilers on the occasions and over the streets libelled had necessitated the immediate repair of these streets, or had materially interfered with their use by other members of the public. All, as it appeared to me, that he claimed to have proved, and had in fact proved, was that the weights of the several boilers transported by the defenders on these occasions were, as they knew or ought to have known, excessive when compared with the weights transported over the same streets by other members of the public; that the injury thus done to these streets and the destruction of the material of which they were constructed were similarly excessive; that the defenders thereby made it necessary for these streets to be repaired or recon-

structed substantially sooner than would otherwise have been requisite, but how much sooner did not appear; and that the cost of the necessary repairs would be materially increased by the fact that the transport of the defenders' boilers, unlike the traffic of the other users of these streets, broke many of the granite setts which were thus rendered incapable of being re-dressed and used for a second time. On the other hand, the defenders' senior counsel did not, if I understood him correctly, dispute that the injury caused by his clients to the streets in question was substantially as above described. He further stated that he had no criticism to make upon the way in which these streets had been constructed and maintained by the pursuers.

In this state of the facts the first and most important question argued was whether the use which the defenders had admittedly and knowingly made of the pursuers' streets was illegal at common law. If so, then it followed that the pursuers might have restrained the defenders by interdict from using, or rather from abusing, the public streets in the manner complained of, in which case the defenders would have had no option except to purchase the pursuers' consent upon such terms as the latter might dictate. It is difficult to believe that according to the common law of Scotland every road and street authority possesses a remedy so much more drastic than that which section 57 of the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), confers upon the authorities to which that statute applied. That section is not founded upon in the present action, and apparently it is not applicable to two of the streets referred to in the pleadings. The pursuers' counsel was unable to cite any authority which supported his contention that the traffic in question was illegal at common law, or which sanctioned an action of damages as a method of exacting a special contribution towards the cost of maintaining a public road or street. The inferences to be drawn from the statutes relating to public roads are unfavourable to the existence of any such right on the part of a road authority. Thus in the Turnpike Roads (Scotland) Act 1758 (32 Geo. II, cap. 15, sec. 6) there is a clause exempting from the payment of additional duty any waggon employed to carry "any machine or engine in one piece." So too in the Locomotive Act 1861 (24 and 25 Vict. cap. 70), section 4, the regulations of weight therein mentioned are declared not to extend to any waggon carrying only one "vessel of iron or other metal." It is difficult to draw any distinction between the traffic of which the pursuers complain in condescendence 6 as illegal and the presumably legal traffic in respect of which statutory compensation can be recovered in cases to which section 57 of the Act of 1878 applies. No doubt one is surprised to learn that a granite sett is often broken into several pieces and partially reduced to powder by the passage of a single heavy boiler, but there is no essential distinction between such injury and the more familiar destruction of a macadamised surface caused by what section 57 describes as "excessive weight passing along the same." An examination of the pursuers' averments in condescendence 6 and of their first three pleas-in-law shows that their counsel have been unable to formulate any clear distinction between traffic which they regard as in its nature illegal owing to its great weight, and traffic which though legal may in certain cases be required to pay a special statutory contribution in respect of the damage caused by its "excessive weight." My conclusion is that the pursuers' main contention fails, and that their first three pleas-in-law should be repelled.

In condescendence 7 the pursuers set forth a separate ground of liability (the relevancy of which the defenders admit), viz., that any serious damage to the streets would have been avoided by the use of a particular construction of bogie. I agree with the Lord Ordinary that this part of the pursuers' case has not been proved. Accordingly the pursuers' fourth plea-in-law falls to be repelled. The same applies to their fifth plea-in-law, which is based on a misreading of section 4 of the Locomotive Act 1861, and in support of which no argument was offered.

LORD CULLEN—Regarded apart from its effect in increasing the burden of repair of the streets over which it passes, the defenders' traffic here in question is lawful traffic incident to one of the old and characteristic industries of Glasgow, and taking place in pursuance of the normal objects of that industry. It is no new species of traffic on the Glasgow streets over which similar and greater weights have been in use to be transported for about half a century. As regards its effects on the streets, the traffic *prima facie* seems to form a typical example of excessive weight or extraordinary traffic for which provision has been made both in Scotland and England by statutory enactments such as that contained in section 57 of the Roads and Bridges (Scotland) Act 1878, whereby there is thrown on the persons responsible for such traffic the proved exceptional cost of upkeep of roads which it occasions. According to the conditions of the argument, however, there is no such statutory provision applicable to the three streets here in question. In the absence of any such provision the pursuers' claim is laid as one at common law. Now at common law public highways and streets are open for the passage of all the lieges alike. The traffic which they conduct in exercise of their rights is capable of varying widely in its character and its effect in causing tear and wear of the road giving rise to need for repair; but there is no provision of the common law for classifying the users of a road and bringing them under contribution for the expense of its repair in proportion to the tear and wear to which their respective traffic subjects it. Accordingly the pursuers pitched their case, in argument, on a different plane from that of tear and wear. They contend that the defenders'

traffic falls to be regarded not merely as having subjected the streets on the occasions libelled to severe tear and wear through lawful user, but as having abused the streets in making a partial destruction of them so as to be unlawful traffic which the pursuers might have brought under interdict had they so chosen. This contention raises a question of law and a question of fact. On the former I do not doubt that if the direct effect of the passage of a particular traffic transcends tear and wear so as wholly or partially to destroy a public road or street, and thereby to prevent or endanger or materially impede other members of the public in using it, the common law of Scotland gives a remedy. No particular user of the road can be entitled to monopolise it in so rendering it by his traffic unfit for use by other people. On the question of fact raised I agree with the Lord Ordinary and your Lordships in the view that the case does not present more than a high degree of tear and wear. The pursuers on record do not allege that the effect of the passage of the defenders' traffic on the occasions libelled was to prevent, endanger, or impede the use of the streets by other members of the public. And the evidence led is to the contrary. The streets continued to be as freely used as before by the general traffic of the public without hindrance or complaint. No repair was undertaken until long afterwards, it is not clear when. The true position appears to me to be that the effect of the defenders' traffic in question being added to the other traffic on the streets was to make the burden of repairing the streets perceptibly heavier through the work of repair having to be undertaken earlier than would otherwise have been called for. This represents to my mind the statutory extraordinary traffic or excessive weight type of case occurring in the course of lawful user. If this is right, the pursuers' remedy is to take steps to obtain appropriate legislation.

A separate case of fault is sought to be made against the defenders in respect of the construction of the bogie on which the boilers were carried. I agree with the Lord Ordinary's conclusion on this matter and with his reasons, to which I do not desire to add anything.

I am accordingly of opinion that the reclaiming note should be refused.

The Court adhered.

Counsel for the Pursuers — Sandeman, K.C. — D. P. Fleming, K.C. — T. Graham Robertson. Agents — Campbell & Smith, S.S.C.

Counsel for the Defenders — Macmillan, K.C. — Gilchrist. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

VALUATION APPEAL COURT.

Thursday, February 23.

(Before Lord Salvesen, Lord Cullen, and Lord Hunter.)

ALEXANDER'S TRUSTEES *v.* ASSESSOR FOR AYRSHIRE.

Valuation Cases—Annual Rent or Value—Insanitary Houses—Houses Occupied by Tenants in virtue of Statutory Rights Conferred by the Rent Restriction Acts and against the Wish of the Owners—No Rent Demanded — Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6.

The proprietors of a number of houses in a mining village, which they considered insanitary, and with respect to which they had unsuccessfully applied to the local authority for a closing order, were unable owing to the restrictions imposed on landlords by the Rent Restriction Acts to eject the occupiers. In these circumstances they formally warned out the tenants and repudiated responsibility for the condition of the premises. They further intimated that no rent would be demanded from occupiers who remained in the houses, and that any who chose to remain would do so on their own responsibility and at their own risk. The assessor entered the houses in the valuation roll at the usual rents. The proprietors maintained that the houses should be omitted from the roll or entered at the value of *nil*. *Held* that the houses were rightly entered in the valuation roll at the usual rents.

The Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91) enacts—Section 6—"In estimating the yearly value of lands and heritages under this Act the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year."

At a meeting of the Lands Valuation Committee for the County of Ayr, held at Ayr on the 19th day of September 1921, the trustees of the late Major-General Sir Claud Alexander of Ballochmyle, Baronet, *appellants*, appealed against the entries proposed to be made in the valuation roll of the parish of Auchinleck of various items as being houses situated at First Square, Second Square, One Front Row, One Back Row, Two Back Row, Two Front Row, Three Front Row, Four Front Row at Darnconner, Lugar, in the parish of Auchinleck, in so far as the said 'houses' were entered as tenanted and occupied and were valued at a yearly rent or value. These 'houses' are Nos. 345 to 426 of the valuation roll of the parish for the year 1921-1922.

The appellants craved that no entries should be made in the valuation roll in respect of these subjects, or alternatively that no annual value in respect thereof should be entered in the appropriate columns in the roll.