and affirming the judgment of the Sheriff-Substitute.

The Court found in fact and in law in terms of the findings in the interlocutor appealed against, dismissed the appeal, and affirmed the interlocutor appealed from.

Counsel for the Appellants (Pursuers)—Mackay, K.C. — Macdonald. Agents — Murray & Brydon, S.S.C.

Counsel for the Respondents (Defenders) — MacRobert, K.C. — Patrick. Agents — Wallace, Begg, & Company, W.S.

Wednesday, July 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SLATER *v.* A. & J. M'LELLAN.

Nuisance—Dangerous Nuisance on Public Road—Locomotive Drawing Inflammable Load—Damage to Property Adjoining the Road—Liability—Locomotive Act 1861 (24 *and* 25 *Vict. cap.* 70), *sec.* 13—*Negligence.*

Whilst a load of compressed cork dust was being transported along a public road in a trailer drawn by a steam waggon, which from time to time emitted sparks from its chimney, some of the sparks ignited the load and caused a fire by which damage was done to a house and garden adjoining the road. In an action of damages at the instance of the owner of the house and garden against the owners and users of the steam waggon, *held* that the defenders were liable, without proof of negligence on their part, upon the ground that the steam waggon and trailer carrying a load which was readily ignitable by the sparks constituted a dangerous nuisance from which the damage complained of resulted.

James Peter Slater, Paisley, *pursuer*, brought an action in the Sheriff Court at Glasgow against A. & J. M'Lellan, cartage contractors, Paisley, *defenders*, for payment of £131, 0s. 6d. in name of damages for injury to his house and garden by the burning of a vehicle loaded with compressed cork which took fire when on the public road in front of the pursuer's house.

The following narrative of the circumstances of the case is quoted from the opinion of the Lord President—"The pursuer complains of damage to his house and garden as the consequence of a conflagration which happened on the public road in front of his house. The conflagration was caused by the ignition of a load of compressed cork dust while it was being transported in a trailer drawn by a motor waggon, itself full of a similar load. The motive power of the waggon was steam, produced in a boiler heated by coal. Like other similar waggons this waggon emitted sparks from its chimney, and the pursuer's case is that the conflagration of the load of cork was due to one of these sparks having fallen on or among the bales of cork. "The Sheriff-Substitute before whom this case was heard considered that this was not proved to have been the cause of the conflagration, because no eye-witness actually saw a spark from the chimney alight on the cork. But that is to apply a hypercritical test to a case in which *res ipsa loquitur*. It is not suggested that the cork went on fire of itself, and a spark from the chimney of the motor waggon which was towing it is the obvious and natural cause. In these circumstances we have no right to assume that the fire was caused by an unextinguished match or cigarette-end thrown by a careless passer-by on to the cork, or that a spark from some other motor waggon may have found its way on to the trailer. No other cause than the obvious and natural one—namely, that the trailer travelled just behind a motor waggon with a sparking chimney—is proved to have had anything to do with the conflagration which occurred. The inference that the obvious and natural cause was the true cause is thus not only legitimate but, in my opinion, conclusive. The conflagration was unfortunately aided by a wind blowing across the road in the direction of the pursuer's house. The flames caught the fence in front of his garden, scorched the garden itself, and produced large volumes of smoke and burning particles of cork, which were carried against the front wall of the house and reached the interior of it by door, fanlight, and window during the interval which elapsed before these could be closed, doing a good deal of damage to internal paint, paper, curtains, furniture and carpets."

The pursuer pleaded, *inter alia*—"3. The said steam lorry being liable to emit sparks, and so a nuisance within the meaning of section 13 of the Locomotive Act 1861 and also at common law, the defenders are liable for any damage caused by the use thereof, as condescended on. 4. Alternatively, the damage sustained by pursuer having been caused through the fault and negligence of the defenders' servant, for whom they are responsible, decree should be granted as craved, with expenses."

The defenders pleaded, *inter alia*—"1. The action as laid is irrelevant. 4. In respect that the said steam lorry was of the best and most recent type, and was handled in the most careful manner, and was not a nuisance within the meaning of the Act cited or at common law, the defenders should be assoilzied. 5. Any loss which the pursuer may have sustained not having been occasioned by the fault or negligence of the defenders, and their ownership or use of the steam waggon not involving any liability on their part to the pursuer, they are entitled to be assoilzied from the conclusions of the action."

The Sheriff-Substitute (FYFE) after a proof assoilzied the defenders, holding that the waggon and trailer did not constitute a nuisance within the meaning of section 13 of the Locomotive Act 1861, and that the

pursuer had failed to prove any fault or negligence on the part of the defenders.

The pursuer appealed, and argued—The motor waggon with its inflammable load constituted as it went down the public road a dangerous nuisance for which defenders were liable at common law without proof of negligence, of which there was, however, abundant evidence—*Rylands* v. *Fletcher*, 1868, L.R., 3 (H.L.) 330; *Jones* v. *Festiniog Railway Company*, 1868, L.R., 3 Q.B. 733; *Rapier* v. *London Tramways Company*, [1893], 2 Ch. 588; *Powell* v. *Fall*, 1880, 5 Q.B.D. 597; *Galer* v. *Rawson*, 1889, 6 T.L.R. 17; *Bantwick* v. *Roger*, 1891, 7 T.L.R. 542; *Gunter* v. *James*, 1908, 24 T.L.R. 868; *Ogston* v. *Aberdeen District Tramways Company*, 1896, 24 R. (H.L.) 8, 34 S.L.R. 169; *Jeffery* v. *St Pancras Vestry*, 1894, 63 L.J. (Q.B.) 618; *Mansel* v. *Webb*, 1918, 88 L.J. (K.B.) 323. The Locomotive Acts safeguarded the common law rights in respect of nuisance — Locomotive Act 1861, section 13; Motor Car Act 1903, section 15. The case of *Port-Glasgow and Newark Sailcloth Company* v. *Caledonian Railway Company*, 1893, 20 R. (H.L.) 35, 30 S.L.R. 587, was also referred to.

Argued for defenders—The waggon with its load did not constitute a dangerous nuisance, consequently the defenders were not liable unless negligence was proved. Moreover, the accident could not have been foreseen. It was the kind of danger which property adjacent to a high road was inevitably exposed to. The pursuer therefore must be held to have accepted the risk—*Fletcher* v. *Rylands*, 1866, L.R., 1 Ex. 265, *per* Blackburn, J., at 286.

LORD PRESIDENT (CLYDE) — [*After the narrative above quoted*]—The competency of an action upon common law grounds in respect of either "public or private nuisance" arising out of the use of a locomotive on a public road is expressly safeguarded by section 13 of the Locomotive Act 1861. "Every person so using such engine [that is, so as to cause either private or public nuisance] shall, notwithstanding anything in this Act, be liable to an indictment or action, as the case may be, for such use where but for the passing of this Act such indictment or action could be maintained."

Apart, then, from the provisions of the Locomotive Acts (for the saving of common law rights is preserved throughout the whole series), it is obvious that the use by any person of a locomotive on the public road is nothing but an instance of the right of such person as a member of the public to use the public road for passage. The public right in which he is a participant covers equally foot, horse, and wheeled traffic, and applies equally to carriages drawn by animals as to self-propelled vehicles. It is the public character of the right which goes a long way to explain its elasticity in view of recent developments of the means of transit and the increasing varieties of traffic. New means of transit, new varieties of traffic, are only new modes of exercise of a public right which covers all use of the public road by the public for passage. Accordingly the introduction of locomotives to the public roads of the country was impeded by no legal barriers, although it was found necessary to adapt the scale of tolls to the new form of traffic. It is, however, a universal principle applying to the exercise of public rights by individual members of the public that they must so regulate and (if necessary) restrict their individual participation in the public right as to make it consist with equal participation in the public right by every other member of the public. If any road-user uses the road in such a way—it does not matter by what kind of traffic—as to interfere with other people's use of the road, he commits what in Scotland we recognise as an encroachment on public right (we used to call it purpresture) remediable by interdict or by way of damages at the instance of the road authority or of any individual member of the public whose exercise of the public right has been interfered with. In England such interference is recognised as a "public nuisance," and the remedy is by indictment. The differences between our own law and that of England in this matter are differences of remedy, not of principle — see *Glasgow Corporation* v. *Barclay, Curle, & Company*, 1922 S.C. 413, at p. 427.

But the pursuer in this case is not complaining as a member of the public whose use of the public road has been interfered with, but as the owner of property adjoining the public road. It is again obvious that any person who is on the public road for purposes of passage—and is therefore lawfully there — besides respecting the rights of other road-users, must also respect the rights of those who own property neighbouring or adjoining the road. In respect of his lawful use of the surface of the road he is a neighbour of the adjoining owner for the time being, and is not entitled to destroy the comfortable and healthful occupation by such adjoining owner of his property. He has, in short, no right to create on the public road a nuisance to adjoining property—a "private nuisance," as the law of England calls it. The Locomotive Act of 1861, like many imperial Acts, is framed with reference to English legal phraseology and forms rather than to our own phraseology and forms. But, as Lord Fitzgerald remarked in *Fleming* v. *Hislop* (1886, 13 R. (H.L.) 43, at p. 48), if you get down to principle there is no material difference between the law of nuisance in Scotland and in England. The use of the expression "public or private nuisance" in the Act of 1861 therefore causes no difficulty in the application of the Act to Scotland, and the pursuer in the present case is entitled, if the facts warrant him, to recover damages for a nuisance to his property caused by a road-user on the adjoining public road. It will be observed that the use of locomotives on public roads was not given any immunity by the Locomotives Acts. Their use was not legalised by Act of Parliament; they got on to the public roads by common law right. And their position in relation to the rights of proprietors adjoining the roads used by them is therefore

analogous to that which in a cognate department of law is exemplified by *Jones* v. *Festiniog Railway Company* (1868, L.R., 3 Q.B. 733), and is in contrast to that exemplified in *Vaughan* v. *Taff Vale Railway Company* (1868, 5 H. & N. 679) and in *Port-Glasgow and Newark Sailcoth Company* v. *Caledonian Railway Company*, 1893, 20 R. (H.L.) 35.

What then is the nature of the pursuer's complaint? It is that the owner of this motor waggon which carried a lighted furnace and emitted from time to time sparks from its chimney—which sparks frequently burnt holes in the tarpaulin covers put over the contents of the waggon and its trailer—used that motor waggon on the public road opposite the pursuer's property to carry (both in the waggon and in the trailer) a large quantity of inflammable material. Inflammability is a relative quality, but it is clear that to allow bales of compressed cork dust to be in proximity to sparks falling from the chimney of a locomotive (without some efficient protection) was a dangerous thing. In short this motor and its load of cork dust constituted as they went along the public road a manifest source of danger. One of the categories of nuisance is that which is known as a dangerous nuisance. There is the well-known case of the smithy proposed to be established in the midst of a number of thatched houses which was interdicted as a nuisance by a neighbouring proprietor on account of the risk of fire—*Vary* v. *Thomson*, 1805, M. *voce* Public Police, App. No. 4. It was pled in that case, as it was pled by the defender in the present case, that the neighbourhood of a likely source of fire and inflammable material had not in actual experience proved a frequent cause of conflagration. But that does not count for much where the danger is an obvious one, and as it happened on this particular day the risks incurred resulted in a double disaster. For although the motor waggon escaped destruction while the trailer and its load were being devoured by the flames opposite to the pursuer's house it was itself consumed only a few hours later—from the same cause—on its road home. There is, I think, no doubt in these circumstances that the damage of which the pursuer complains was the result of a nuisance—a dangerous nuisance—which was created by the defenders on the public road opposite his house. It is not necessary for him in order to establish his right to damages to appeal to the doctrine of *Rylands* v. *Fletcher* (L.R., 3 H.L. 330) nor indeed to the law of negligence. His remedy is under the law of nuisance.

If I am right so far, then the pursuer is entitled to damages, and the question is how much he ought to get. Both parties very discreetly have left that as a jury question for our determination. I have gone carefully over such parts of the evidence as deal in detail with the question of damages, and I have kept in mind the very important point that no specific claim of damage was intimated for some months—I think nearly six months—after the occurrence, a circumstance which undoubtedly deprived the defenders of any opportunity of inspecting the damage while it was fresh. The pursuer claims £130, and I think your Lordships if you agree with me will give the pursuer a generous award if you assess the damages at £60.

LORD SKERRINGTON—This case does not in my opinion raise any general question as to the rights and responsibilities of persons who use locomotive engines upon public roads. The question is whether the defenders are responsible for injury to the pursuer's house, to his furniture, and to his garden caused by the burning of a vehicle loaded with compressed cork which took fire upon a public road while it was under the charge of the defenders' servants. The interlocutor appealed against contains no finding as to how it came about that the trailer or vehicle in question took fire, but the evidence leaves no doubt as to this matter. Mr James M'Lellan, the head of the defenders' firm, admitted in the course of his cross-examination that the only explanation of the fire which "any reasonable man could think of" was a spark from the engine of the steam waggon to which the trailer was attached. Moreover, there is the direct evidence of a witness who saw sparks coming out of the funnel of the waggon a short distance before it drew up in front of the pursuer's house, and the evidence of a policeman and of another witness who deponed that the driver of the steam waggon stated at the time that the fire was caused by sparks from the engine. This point being established, we have to consider whether the evidence shows that the occurrence of such an accident was something which it was the duty of the defenders to anticipate. In answer to the question "Do you know that Sentinels do emit sparks?" Mr M'Lellan answered "I suppose they all do that." He also admitted, and it was proved, that the tarpaulins used to cover the loads drawn by such waggons occasionally have holes burned in them by sparks falling upon them from the engine. While it was not proved that it was a common thing for the sparks from a steam waggon to set fire to the load which it was carrying or drawing, it was proved that this happens from time to time, and the evidence leaves no doubt in my mind that such accidents are not unlikely to occur if the circumstances happen to be favourable. On the day in question the circumstances were favourable. In the first place, as Mr M'Lellan deponed, "cork is very bulky and we cannot get it all covered" by a tarpaulin. In the second place, the wind was very high, and accordingly a hot cinder might have been carried from the side of the trailer into an interstice between the bales and there fanned into flame. In the third place the load though not highly inflammable was, as the events themselves proved, readily inflammable on a favourable occasion. After travelling a few miles farther along the road the steam waggon with its load suffered the same fate as had befallen the trailer, and obviously from a

similar cause — another spark from the engine. In that state of matters it seems to me impossible to acquit the defenders of having failed to pay due regard to the rights and interests both of the travelling public and of the owners of property adjoining the highway, when they caused a locomotive to travel on the highway with a load which as they knew, or ought to have known, was liable to be ignited by a spark from the engine. In order to establish liability against the defenders it was not in my opinion necessary for the pursuer to prove that the engine was defective in construction or that it was negligently handled by the defenders' servants.

As regards the damages, I agree with the award suggested by your Lordship.

LORD CULLEN—I agree with your Lordships regarding the effect of the evidence as to the source of the conflagration.

I think that the combination of the spark-and-cinder emitting steam engine with the inflammable freight in the trailer behind it, provided with no covering capable of protecting it effectively against fire, was within the class of distinctively dangerous things, and I am of opinion that the defenders enjoyed no licence under the statutes any more than right at common law to use such a dangerous thing on the highway immune from liability to others whom they chose thereby to expose to the danger and who suffered injury in consequence.

I agree as to the amount which should be awarded in name of damages.

LORD SANDS—I am unable to agree with the learned Sheriff-Substitute that the case of *Powell* v. *Fall* (5 Q.B.D. 597) can be distinguished in the defenders' favour from the present case. On the contrary, I think the present case is very much *a fortiori* of *Powell's* case. In *Powell's* case there was an engine liable to spark. In the present case there was an engine liable to spark, and the spark and the tinder ready provided to receive the spark were carried together along the road. The question of what is a nuisance attended with danger is a question of degree, and it is unnecessary here to consider whether the circumstances in the case of *Powell* were such as would satisfy this Court of the existence of a nuisance. The circumstances of the present case are very much stronger in that direction than those in the case of *Powell*, and I have no difficulty in concurring in your Lordships' conclusion. I also agree as regards the amount of damages.

The Court found in fact, *inter alia*—(1) That the locomotive waggon and trailer passed along Greenock Road, Paisley, both waggon and trailer being loaded with bales of granulated cork; (4) that the said bales formed a load which was readily ignitable by sparks emitted from the funnel of the locomotive and falling on or among them, and were not so efficiently protected or covered as to provide against risk of fire from that source; (8) that in the circumstances above set forth the use by defenders on the public road adjoining the pursuer's property of the said locomotive waggon and trailer carrying a load readily ignitable by sparks from the funnel of the locomotive constituted a dangerous nuisance to the pursuer's property; and found in law (1) that the defenders were liable in damages to the pursuer for the injury to his property caused by the said nuisance; (2) that the said nuisance was a nuisance within the meaning of the Locomotives Act 1861, and assessed the damages at £60.

Counsel for the Pursuer—Brown, K.C.—J. C. Watson. Agents—Balfour & Manson, S.S.C.

Counsel for the Defenders—Wark, K.C.—Strachan. Agents—Macpherson & Mackay, W.S.

Tuesday, July 15.

FIRST DIVISION.

EGLINTON SILICA BRICK COMPANY, LIMITED (IN LIQUIDATION) *v.* INLAND REVENUE.

Revenue—Income Tax—Assessment—Excess Profits Duty—Assessment to Income Tax of Repayments of Excess Profits Duty—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *Schedule D, Rules Applicable to Cases i and ii, Rule* 4 (1), *and Case vi.*

Rule 4 (1) of the rules applicable to Cases i and ii of Schedule D of the Income Tax Act 1918 enacts—". . . when any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received."

A company in liquidation which had made a loss in trading for the last year in which it carried on business and was therefore immune from income tax on its trading profits for that year had received, however, within the year certain repayments of excess profits duty levied some years earlier. *Held* (*dub.* Lord Sands) that the amounts so repaid were to be deemed to be ascertained and taxable trading profits in the year of repayment and not merely items to be taken into account in the computation of the trading or other profits of that year.

The Eglinton Silica Brick Company, Limited (in liquidation), *appellants*, being dissatisfied with a decision of the Commissioners for the Special Purposes of the Income Tax Acts confirming assessments to income tax on the sums of £7224 and £1150 for the year ending 5th April 1922 and the year ending 5th April 1923 respectively, obtained a Case for appeal in which H. G. Marrian, Inspector of Taxes, was *respondent*.

The Case stated—"1. The following *facts* were admitted or proved:—(1) The appellant company carried on the business of brickmaking. In the year 1904 it went into voluntary liquidation, but the liquidator