features are, first, partial incapacity found and compensation awarded; second, suspension of the payment of compensation owing to the wages actually earned exceeding the pre-accident wage; and third, wages actually earned fallen below the pre-accident wage. The right to receive compensation for partial incapacity then revives and the amount due in respect thereof necessarily involves inquiry as to what the man is competent to earn. The whole position is absolutely different from that to which the appellants seek to assimilate it, *i.e.*, when a workman with a standing award makes an application to have that award altered upon a mere averment that the wages in respect of partial employment have fallen. Even then the case of *M'Alinden* v. *James Nimmo & Company* (1919 S.C. (H.L.) 84, [1920] App. Cas., p. 39), not adverted to by the appellants, may have to be considered.

I am of opinion that the judgments in all three cases are right, and that the appeals should be dismissed with costs.

LORD ATKINSON—I too have had the pleasure and advantage of reading the judgment prepared by my noble and learned friend Lord Dunedin. I thoroughly concur in it and have nothing to add.

Their Lordships ordered that the interlocutors appealed from be affirmed and the appeals dismissed with costs.

Counsel for the Portland Colliery Company, Limited, Appellants—Graham Robertson, K.C.—Albert Russell—Beveridge.

Counsel for John Watson, Limited, and William Dixon, Limited, Appellants—Graham Robertson, K.C.—J. R. Marshall—Beveridge. Agents—W. & J. Burness, W.S.—Beveridge & Company, Solicitors, Westminster.

Counsel for John Murray, Respondent—Mackay, K.C.—Normand—B. Sandeman. Agents—Macpherson & Mackay, W.S.—John Kennedy & Company, Solicitors, Westminster.

Friday, July 6.

(Before the Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

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

(In the Court of Session, March 18, 1922 S.C. 413, 59 S.L.R. 329.)

Road—Public Street—Damage to Street by Exceptionally Heavy Traffic—Liability of Traffic Owner at Common Law—Whether Abuse of Street or only Wear and Tear—Rights of Public Authority against Persons Responsible for Illegal Use of Street.

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. The evidence showed that traffic of the sort complained of had been taken along the streets in question for many years, and that the respondents had conducted it with proper care and caution. *Held* (*aff.* the judgment of the First Division) that as on the facts proved the user complained of did not amount to an abuse of the streets, but disclosed merely exceptionally heavy wear and tear, it was not illegal, and that as the pursuers had failed to show any negligence on the part of the defenders in their use of the streets the defenders were not liable at common law for the damage done.

Observed per Lord Atkinson—"I think it is ordinary wear and tear, and that therefore the appeal fails, but I do not desire for one moment to give any countenance to the respondents' contention that they are entitled to transport over the Glasgow streets whatever weights they please irrespective of the results to the streets."

The case is reported *ante ut supra.*

The Corporation of Glasgow appealed to the House of Lords.

EARL OF BIRKENHEAD—[*Read by Lord Dunedin*]—The issues raised in this appeal have caused me considerable doubt. Indeed, had I been sitting alone I am inclined to think that I should have decided the matter favourably to the appellants. But I should have regarded such a decision as highly disputable. I have now had the advantage of reading the opinions of those of your Lordships, who sat with me to hear the appeal. I find that all your Lordships, including my noble friends Lord Dunedin and Lord Shaw who advise with so much authority on matters appertaining to the law of Scotland, are of opinion that the appeal fails. In a Scotch appeal, raising some matters at least which are peculiar to the practice and law of Scotland, I am not prepared to set myself against so great a weight of authority. I do not, therefore, great as is the doubt which I have entertained, record a dissenting opinion, but I move that the appeal be dismissed.

VISCOUNT FINLAY—[*Read by Lord Dunedin*]—This appeal raises a question of interest and great importance as to the right of user of public highways. The action was brought by the Glasgow Corporation to recover damages in respect of injury caused to certain streets in Glasgow by the defenders. The defenders have large engineering works in Kelvinhaugh Street and have been in the habit of carrying large boilers made by them from their works to the quay. It is alleged by the pursuers that on the 22nd, 27th, and 30th April 1918 the defenders conveyed along Kelvinhaugh Street, Argyle Street, and Finnieston Street boilers which, with the bogies used in carrying them, were of weights ranging from 63 tons or thereabouts to 80 tons, and that by these excessive weights the granite setts in the roadway were crushed and destroyed. The pursuers claimed that these acts were in excess of lawful user of the roadway, causing damage other than that which would result from fair wear and tear, and that the defenders are bound to compensate the pursuers as owners of the streets. The defenders denied the commission of the alleged wrongful acts. They further pleaded that the traffic complained of was not unusual, extraordinary, or excessive, having regard to the locality and the nature and extent of the industries carried on therein, and that it had been conveyed with due care to prevent unnecessary damage. They also pleaded that the damage had been caused or materially contributed to by the failure of the pursuers to construct and maintain the roads in a condition to bear the traffic usually passing and reasonably to be expected thereon.

The case came before Lord Ashmore as Lord Ordinary. He assoilzied the defenders, and his decision was on appeal affirmed by the First Division, consisting of the Lord President (Clyde), Lord Mackenzie, Lord Skerrington, and Lord Cullen.

With reference to the law applicable to such cases I desire to express my concurrence with the judgment of the Lord President. He gives a masterly outline of the law of Scotland and of the law of England as to the user of highways so far as relevant. The two systems appear to me not to differ in any particular material for the purposes of this case.

Roads are made to be used, and no road authority can complain of fair wear and tear. The question in the present case is whether the damage caused by the defenders was in the nature of fair wear and tear, or was caused by abuse of the roads by bringing over them weights of an unusual and excessive description. There are, of course, very different descriptions of traffic and some roads are constructed for use only with light traffic, and to bring a heavy motor or traction engine upon such a road would be to destroy it. The streets in Glasgow with which we are concerned must be taken to have been constructed to carry heavy traffic, heavy, that is, within reasonable limits. It is alleged that the defenders transgressed these limits. The Lord Ordinary and all the Judges who sat on the appeal in the Inner House were of the opinion that the pursuers had failed to establish their case upon this point.

The case resolves itself into questions of fact, and I propose shortly to examine the evidence.

The first witness for the Corporation was Mr Somers, a civil engineer and chief assistant to the Master of Works in Glasgow. In his cross-examination occurs the following passage with reference to the boiler traffic:—"(Q) This traffic is not confined, I understand, 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. (Q) In the present case the boilers with which we are particularly charged with having taken over the streets to the damage of the fabric appear to have weighed 55 and 55½ tons on the occasion on 22nd April 1918, and on 27th April 71 tons and 72 tons, and on 30th April and 1st May 55 tons. These weights are not at all out of the ordinary, are they?—(A) They are excessive weights as far as the streets are concerned. (Q) They are not out of the ordinary for boiler traffic?—(A) No. (Q) And to that kind of traffic you say your streets have been subjected for the best part of half-a-century?—(A) Yes."

There is a considerable volume of evidence bearing upon this point. Mr Todd of the firm of Messrs David Rowan & Company, boilermakers, a witness for the defenders, said that the weights of the defenders' traffic are not exceptional at all. "These weights," he says, "have been taken over the streets of Glasgow for many many years." From time to time complaints were made by the Corporation with regard to the defenders' traffic. Mr Somers himself says that when the matter first came before the Corporation in 1904 the negotiations dragged out a considerable length of time and there was a strong indication given to the Corporation committee by the shipbuilders generally that the Corporation should avoid doing anything that would entail restricting the engineering industry. The witness adds—"The committee of the Corporation at that time was somewhat sympathetic to that view, and the general feeling was just to let the thing drift for a little bit." The Tramway Department of the Corporation were always willing to raise the wires to facilitate the passage of the boilers. "They" (the defenders) "used to ask whether the street was open and ask for a safe passage, and the general reply was that they must take the road as they found it and we would do what we could to see that they got safe through."

The evidence on this point is summarised by Lord Ashmore in his judgment. He begins by making an observation, the correctness of which cannot be disputed, that in judging of the reasonableness or unreasonableness of the weights sent over it is proper to keep in view the general and long-continued practice in the industrial

parts of the city in transporting heavy traffic over the streets. He then gives particulars from the evidence showing that traffic of this sort, quite as heavy as that carried by the defenders, had been carried on in Glasgow from the year 1900 onwards.

Novelty is certainly an important element in determining that any particular kind of traffic is so much out of the ordinary course as to amount to an abuse of the streets. If there has been toleration of such traffic for a quarter of a century, it would in my opinion be a very strong thing for any Court to regard its continuance now as a nuisance which entitles the Corporation to treat as wrongdoers those engaged in it. The acts complained of in this action are far from being anything in the nature of a new departure. Indeed, it appears that the Corporation themselves sent on some occasions traffic of a similar description over the streets. As time goes on traffic in a great centre of business like Glasgow may increase both in volume and in weight, and what is complained of in this action is not in excess of what has gone on for the last twenty-five years or so in these streets.

It is quite impossible to lay down with precision any line separating traffic which is reasonable and lawful from that which is unreasonable and unlawful. Each case must be judged upon its facts. I think that the effect on the whole of the evidence in this case is to lead to the conclusion that the traffic now in question is in the nature of that use of highways which is lawful, and that the damage resulting is in the nature of fair wear and tear. It has made necessary the more frequent repair of the roads, but this is an incident of all increase of traffic. There has been no destruction of the road by these heavy weights. The same sort of traffic has gone on at other centres where the industry of boilermaking is carried on. In Glasgow the trolleys now said to be dangerous have been in use for many years, and they are the same as those generally used elsewhere, with the one exception of Dundee.

At Dundee a bogie has been used which is said to be much safer than that generally in use. It has been said for the Corporation in the present case that the defenders are in fault for not having adopted the Dundee bogie with its beechwood tyres and the locks or swivels which facilitate turning. If this type of bogie is so much superior to the Glasgow trolley as has been contended, it is somewhat remarkable that its use appears to be confined to Dundee. This is explained by the evidence given on behalf of the defenders as to possible dangers incident to the use of the Dundee trolley, particularly in Glasgow. I may refer to the evidence of Mr Kerr, whose firm does a great deal of haulage, and of Mr Brodie, a civil engineer conversant with traffic conditions in Glasgow. Mr Gilchrist, one of the directors of the defenders' company, says that he does not consider that the Dundee bogie is safe, and that in working it would be unsuitable for Glasgow traffic.

In my opinion the Courts below were right in refusing to condemn the defenders in the present action for not using a form of bogie which is used nowhere except in one town in Scotland, and the merits of which are very much in controversy.

It is clearly established that the defenders took all care to avoid damage to the streets. They communicated with the Corporation and arranged for the hours most suitable for such traffic. They lightened the load as far as was possible, and put steel plates over manholes and other spots requiring protection. I cannot agree with the position taken up by some of the defenders' witnesses when they seem to say that in taking such precautions the defenders were, so to speak, conferring a favour upon the Corporation. On the contrary, there was an imperative obligation upon them to take all possible precautions to minimise the danger that might arise from this heavy traffic, but in fact they did take such precautions.

I desire to make it clear that I repudiate any idea that the defenders had a right to go on increasing the weights sent over the pavement to any extent that suited their business without regard to the effect upon the streets, leaving it to the Corporation to alter the structure of the streets so as to support these new burdens. The Lord President says in this connection—"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." I cannot think that an attitude so unreasonable as this represents the permanent views of the defenders, and if they tried to act on any such view of the law in practice they would certainly have reason to regret it.

It was strongly contended for the defenders that the damage was the result of the defective paving of the streets by the Corporation. It was said that the crushing of the setts was caused by the irregular surface which they presented. I am not prepared to differ from the conclusion of the Lord President upon this point when he says—"I should add that while it is true that any inequality in a causewayed surface exposes the setts in its vicinity to exceptional stress, I do not think the defenders were successful in making out that the damage done was substantially due to the deficient repair of the street."

It is no doubt true, as Mr Frew, C.E., a witness for the pursuers said, that from the engineering point of view it is possible to construct a street which would carry any weight of traffic. But Mr Frew went on to add—"It would be useless for other users, and also for getting at all the pipes that are laid in a street. It would have to be constructed of ferro-concrete or something like that;" and being asked whether that would be unsuitable for ordinary traffic he said—"It would be dangerous for ordinary traffic. It would be prohibitive from a financial point of view, not only in its initial cost, but also in the expense of getting at gaspipes, waterpipes, drains, and so on."

All the five Judges in the Courts below before whom this case has come have taken substantially the same view on what is really a question of fact. The law applicable to the consideration of such questions has, I think, been stated by the Lord President with perfect correctness, and on the facts proved in evidence it appears to me that the pursuers have failed to establish any legal case for recovering damages.

I agree with the view taken in the Courts below, and think that the appeal should be dismissed with costs.

LORD DUNEDIN—I think this action fails. It fails first on the ground that the appellants have, in my judgment, been unable to prove with the precision required that the respondents owe the sum of money which is demanded in name of damages. This is an action of an admittedly unprecedented character so far as the experience of Scotland is concerned. There is no recorded instance of an action at common law by a road authority for damage done to the road by traffic. This does not prove that such an action is incompetent. But as heavy traffic has existed and has certainly to a greater or lesser extent worn and therefore injured the streets of Glasgow for many years, it was, I think, incumbent on the appellants, if they proposed to claim damages in respect of the respondents' operations by an action of which the respondents could have no hint or expectation, to have given fair notice of their intention and not to do as they did to take the passage of a certain boiler as a test case, make their own observations, give no hint to the respondents, and then months afterwards, when a careful and contemporaneous examination of the results of the transit of the boiler was no longer possible, to raise action. Even on the appellants' proof as it is the actual amount of damages is brought out by a mere rule of thumb calculation as to what proportion of total damage done is due to the operations of the respondents.

Further, I think it fails on much broader grounds. That a person who by his action did something which made the highway impassable and so destroyed the use of that highway by others could be interdicted at the instance of a road authority I do not doubt, even though what I have denominated his action was connected with the use of the highway by himself. And though suits for damages in respect of such action may be sought for in vain in the books, I do not doubt that they would lie. But in order that such interdict or damage should be made good, it would be necessary to show that the person against whom the suit was directed had been guilty of some negligence which had resulted in the destroying or restricting that right of passage on the highway which others besides himself enjoy. I agree entirely with what the learned Lord President said in the Court of Session as to common law rights in this matter. Now when I look at the facts I find no such evidence of negligence. The weights dealt with are no greater than weights that for many years have been taken along these highways. The precautions taken have been the usual precautions, nor have the respondents omitted to do anything which the appellants have suggested to minimise injury to the streets. The Dundee bogie was, I think, a complete afterthought, and looking to the fact that the type of bogie used by the respondents is no new invention of their own but is the recognised type ,which has been used in Glasgow and in other cities for many years, I cannot think that the mere suggestion of what has been practised at Dundee can be held to show a negligent want of precaution on the part of the respondents. As to interference with the use of the streets by others there is not a tittle of evidence to show that anyone has been damnified or has complained. No doubt heavy traffic will cause damage. That is one of the necessities of the situation, and in other cases it has been recognised and dealt with by the Legislature. I refer to the provisions of the Locomotives Acts and still more to the extraordinary traffic section of the Roads and Bridges Act. The very insertion of that section is, in my view if I may so phrase it, a statutory condemnation of the common law doctrine as the appellants would have it.

I should have examined the evidence at greater length had it not been that I have had the advantage of perusing the opinion which will be delivered by my noble and learned friend Lord Shaw. Except that I do not share his doubts, that opinion so exactly expresses what I think is the just result of the evidence that I feel it would be useless for me simply to reiterate what he has said. The unanimous judgments of the Lord Ordinary and of the First Division are, in my opinion, right, and I think the appeal should be dismissed.

LORD ATKINSON—The principal facts of this case have been already stated.

The action out of which this appeal has arisen was brought by the Corporation of Glasgow to recover the sum of £460, the cost of repairing the injury alleged to have been done to three streets in the city, namely, Kelvinhaugh Street, Argyle Street, and Finnieston Street, by the transport over these streets on bogies from the works of the respondents to the quay of boilers of the very heavy weight of, in some instances, 90 tons. It was not disputed that these three streets with others and the tramway laid upon them are vested in the Corporation. I do not think the precise provisions of the statute or statutes so vesting the streets were opened to the House on the argument of the appeal, but the rights they confer can scarcely be more extended than those conferred upon urban authorities in England by the 149th section of the Public Health Act of 1875. That section provides that within an urban district highways repairable by the inhabitants at large and the pavements stones and other material thereof, and all building implements and other things provided for the purpose thereof, shall vest in and be under the control of the urban authority. Yet it was

held by Jelf, J., in the case of *Lodge Holes Colliery Company, Limited* v. *Mayor, &c., of Wednesbury* (1905, 2 K.B. 823) that the proprietary right of the urban authority in the highways within their district was a limited right only, and was confined to what was necessary to maintain them as a highway. The defendants in that case were mineowners. In the working of their mines they had let down a highway vested in the urban authority, and had also let down lands adjoining it. The urban authority had spent a sum of £400 in raising the highway to its former level, which sum they sought to recover from the mineowners. The latter pleaded that the urban authority could have made the highway as reasonably commodious to the public as it was before at a cost of £80 and brought that sum into Court. This defence was held by Jelf, J., at the trial to be a good defence. On appeal to the Court of Appeal that decision was reversed (1907, 1 K.B. 78), and on a further appeal to the House of Lords the decision of the Court of Appeal was reversed and the decision of Jelf, J., restored. That case undoubtedly decides that for certain kinds of injury to a highway within an urban district the urban council may recover damages from the person who or body which inflicts that injury, but I think the injury must be different from that necessarily caused to all highways by traffic of a kind and character which it has for many years been the well-established custom of the people of the locality to carry over them, at all events provided it is conducted without negligence.

The Dean of Faculty in opening the appeal defined ordinary wear and tear of a thing, as I understood him, as the wear and tear sustained in the use to which it may lawfully and without negligence be put. But even so, in deciding what is wear and tear with regard to any highway situated within a city or town one must have regard to the situation of the city or town, the prevailing climate there, the trade and business carried on in it, the necessities of that trade or business, and the mode in which it is the habit of the population to meet those necessities. What might be ordinary wear and tear of streets in Bath or Leamington or Oxford would be very different, I should think, from what would fairly come within that description in Glasgow, Liverpool, or Leeds. Now in the first place, this user of those streets by the respondents does not admittedly amount to a nuisance. Injury, inconvenience, danger, or obstruction to the general public is a necessary ingredient of a nuisance. Traversing a highway with loads of excessive weight may cause a nuisance if these ingredients be present—see 3 Salkeld 183, and *R.* v. *Leech*, 6 Modern 145, 15 Cox C.C. 725. I concur with my noble friend Lord Finlay in the opinion that the Lord President has in a judgment with which I entirely concur given a masterly summary of the laws of both Scotland and England as to the user of highways so far as is relevant to this case. I think, however, he has done more than that. I have carefully read through all the evidence, and it appears to me that the Lord President has summed up its effect and result with perfect accuracy in the following passage in his judgment:—"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."

Further on he says—"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."

There is no proof that the respondents did not conduct this traffic with all proper care and caution; and I think the appellants have failed to establish that the respondents were under any duty to the Corporation to discard the kind of bogies they had for many years been in the habit of using and to use in their stead Dundee bogies. The respondents made many objections to the Dundee bogie. They alleged it would be dangerous, unsuitable to their traffic, and ineffective in use, and I do not think the appellants established that these objections were groundless.

In the cross-examination of Mr Thomas Somers, the chief assistant to the Master of Works in the city, and the first of the witnesses examined on behalf of the Corporation, the following facts were elicited;—

That this class of traffic, *i.e.*, boiler traffic, has been traversing the streets of Glasgow for probably half-a-century. His evidence ran as follows:—From 1879 to the date of the trial 800 heavy boilers were taken over the streets from the defendants' works. He said in 1879 boilers of 53 tons weight were carried over them from the defendants' works. In subsequent years boilers of greater and some of lesser weight were carried over them. In 1890 boilers up to 60 tons were manufactured by the respondents and carried over these streets. In 1903 boilers up to 84 tons, and later up to between 90 and 100, were similarly transported. The boiler traffic is not confined to the three streets named. It is found in other industrial parts of the city in streets parallel to the river. It has been going on there for a long time. The boilers the transport of which by the respondents by their usual method is alleged to have caused the injury and damage complained of were carried thus—Two of 55 and 55½ tons respectively on the 22nd April 1918, two others weighing 71 and 72 tons respectively on the 30th of the same month, one on the 1st May 1918. These, the witness admitted, are not out of the way for boiler traffic. The streets have been subjected to that kind of traffic for half-a-century. The weights the respondents have transported are not out of the ordinary as far as this boiler transport is concerned. They are not exceptional. He said it was not possible to take traffic of this weight over them with the present type of bogie without causing damage. If the vehicle was altered he thinks the present damage would disappear or be lessened considerably.

Peter Anderson, the foreman of the Glasgow Corporation Station Labour Department, proves the damage done, and on cross-examination he says that when boiler traffic passes over the street it leaves the street quite safe. It does not make the road dangerous. All that happens is that the part so traversed goes out of repair much sooner than other parts of the road. It is a question of having to repair these parts oftener than other parts of the road. Mr John Conway, a civil engineer, a member of the Institute of Civil Engineers, who has practised his profession in Glasgow for twenty-five years, was also examined on the part of the Corporation. On cross-examination he proved, amongst other things, that the vehicles in use for carrying all boilers have been the same for more than twenty years. They have been regularly used in Glasgow for all that time, and the roads have borne the traffic though probably they have cost more. The matter is no better and no worse than it has been for twenty-five years.

From this evidence even if it stood alone, which it does not, it is, I think, clear that this boiler traffic, as it has been styled, is a section of the ordinary traffic of the city which has passed over these streets in different parts of Glasgow for the last twenty-five years. There has been little, if any, difference in that time in the make or action of the vehicle on which the boilers were carried, and no very great difference in the weight of the boilers carried. The injurious consequences of the traffic are invariable in character and substantially invariable in degree. The result, no doubt, is that the Corporation have to repair the roads over which the traffic is carried more frequently and at greater cost than they would have been obliged to do if this traffic did not exist, but as the boiler traffic has been long established, is invariable in its character, nature, and mode of conduct, is permitted and apparently assented to if not encouraged by the appellants, I fail to see how the unchanging effects upon the street which invariably result from it must not now be regarded as ordinary wear and tear incident to the use of the streets over which it passes. I think it is ordinary wear and tear, and that therefore the appeal fails, but I do not desire for a moment to give any countenance to the respondents' contention that they are entitled to transport over the Glasgow streets whatever weights they please irrespective of the results to the streets.

I think the appeal should be dismissed with costs.

LORD SHAW—I do not conceal from your Lordships that I have had serious difficulties in regard to this case. The result that I am now about to state has been arrived at after very anxious consideration of the reciprocal rights and duties upon an accurate balancing of which the true principle regulating the relations of the parties can be arrived at. Put briefly and brusquely, the appellants say that the respondents' operations unjustifiably tend to ruin the well made and maintained streets of the city and should therefore be stopped. The respondents reply that the stoppage of their operations will unjustifiably tend to ruin the well and carefully conducted traffic of the city.

It is, in the first place, important to state exactly the legal position of the appellants the Corporation of Glasgow with regard to these streets. In the view which I take of the case, it is unnecessary to go into the ancient history of those particular road ways.

It is admitted that the streets are "public streets" and that they are duly and properly on the list of such kept under statute by the Corporation. By the Glasgow Police Act, section 289, such streets were vested in the Corporation. It is unnecessary to quote that section, because it has been repealed by the Glasgow Buildings Regulation Act 1900. By section 16 of that Act, namely, 63 and 64 Vict. cap. 150, it is provided that—"Every public street for the objects and purposes thereof and of the Police Acts and the public sewers for the drainage thereof shall vest in the Corporation, but the proprietors of lands and heritages adjoining any such street whose title extends beyond the wall of the building adjoining such street may with the consent of the Corporation construct cellars . . ."

This section is substantially a repetition of section 289 of the Glasgow Police Act of 1866 already mentioned. And that section

was under construction in the case of *The Glasgow Coal Exchange Company* v. *The Glasgow City and District Railway*, reported in 10 R. 1283. *Qua* ownership, Lord President Inglis stated the law, which is very familiar, in these brief sentences—"I think the magistrates under the Police Act have right to the surface for all the purposes of the statute, and that they have also right to the subsoil immediately below the surface to such a depth as is necessary for the purpose of constructing sewers and laying gas and water pipes, and that everything beyond that remains the property of the owners under their infeftments."

So far as to ownership. As to maintenance, the section of the Glasgow Police Act governing that is 310. It is in the following terms:—"Subject to the obligations hereinafter imposed on the proprietors of land and heritages the Corporation shall make provision for maintaining, and so far as thought expedient for causewaying, the public streets in a suitable manner, and for altering, repairing, and renewing the said causeway."

Looking to the enormous traffic over these streets and to its great weight as well as volume, I regard it as well established by the evidence that the Corporation have discharged over a long course of years their responsible task not only of construction but of maintenance of the streets in a manner which must be reckoned most highly satisfactory. So far as construction goes, the laying of a concrete bed 6 inches thick covered with causeway setts laid in a thin stratum of sand has been such that although wear and tear and occasional damage has been caused to the setts, the great and sometimes exceptional weight of traffic spoken to has in no instance punctured the concrete bed. The damage has been entirely confined to the wearing and alleged destruction of the setts.

It was argued on behalf of the respondents that the Corporation was proved to have insufficiently and negligently allowed the surface of the street, more particularly the setts adjoining the tramway lines, to be out of repair. I cannot say that I was impressed by the argument. I hold it to be established by the proof that, considering the enormous traffic carried, no charge of neglect in upkeep can be established against the Corporation. Setts must get loose occasionally and must be destroyed occasionally, and the heavier the traffic the oftener this must happen. This involves a constant and watchful care in the matter of repair against such tear and wear. I do not think it to be established that the Corporation have failed in discharging this duty.

On the other hand, it appears to me to be also established that the respondents Messrs Barclay, Curle, & Company have conducted their traffic in the mode accepted as proper for about half-a-century, and have done so with due regard to the interests of the users of the street so as to avoid either destruction, interruption of traffic, or the production of such disrepair as can be characterised as in excess of that tear and wear to which both the past history and the present requirements of the traffic show that the streets must submit. They have arranged with the Corporation to conduct the traffic mostly overnight, to have the overhead wires removed so as to be safe from injury, and to lay over the manholes in the streets steel plates to prevent possible injury at those points of weakness for superincumbent weight. In the result, accordingly, the case stands to my mind in the position that on the one hand the Corporation is not open to the charge of having constructed or maintained the streets badly, nor are Messrs Barclay, Curle, & Company open to the charge of having used the streets badly.

The whole of this is in the region of fact, and I am happy to be able to place myself in complete accord with the carefully and deeply considered judgments thereon come to by the learned Lord Ordinary and the Judges of the First Division. There are, however, two questions of law which were submitted to this House. The one was maintained as a simple doctrine flowing from the rights of property. It was said on behalf of the Corporation, "We have causeway setts in these streets; the respondents have broken them and therefore must pay." I cannot agree with this argument, which would have been quite the same if the respondents were charged with having stolen the stones or bombed the streets. The argument on property completely loses sight of the limited and fiduciary nature of the surface of the streets vested by Act of Parliament in the Corporation. These streets are constructed and the stones are laid in order to be used as of right by the inhabitants and traders. That use is a question of degree far from easy to settle, but if in the exercise of that use the line between permissible and non-permissible tear and wear has been exceeded, any argument from property does not help to a solution of the question of degree of use. I put the argument from property accordingly entirely to one side.

The other legal argument is that mere wear and tear cannot be predicated of the operations of the respondents, which are proved to have actually broken and in some cases pulverised several of the stones over which their traffic passed. This argument is of course in the region of fact. But assuming the physical consequences of the traffic to have been what I have just stated, the question of law is whether the respondents—producing these occasional results of breakage and pulverisation—have thereby put their traffic beyond the category of tear and wear.

In such questions of decree it is difficult to lay down a principle, but the first consideration appears to me to be one arising from the history of the roads in question and the traffic thereon. It is acknowledged, as I have already observed, that upon the two occasions which are the subject of challenge the weights of the single boilers drawn across the street upon four-wheeled bogies preceded by locomotives were 55 tons and 72 tons respectively. These are heavy weights, but since 1879 weights

as high as 53 tons each were carried, and the later unchallenged figures are put thus:—In 1900 single weights of 89 tons were carried; in 1909, 103 tons; in 1911, 104 tons; in 1915, 122 tons; and in 1917, 111 tons."

It seems plain enough accordingly that on the two occasions libelled Messrs Barclay, Curle, & Company were doing no more than had been done as occasion required for very many years past. On the occasions challenged they had lightened the weight by removing all spare and detachable parts, and this had been done, no doubt, as a matter of practice as on former occasions. If this was a nuisance, I do not suggest to the House that any prescriptive right could be set up to commit it, but the fact that it occurred, and occurred publicly and over this long space of years—the streets being maintained by the same authority—seems conclusive against the idea of nuisance as such.

I will now, however, mention what appears to me to be a striking fact in the case. This great Corporation, which has had its streets frequently the subject of private bill legislation, has not up to the present seen occasion to make any application to Parliament to have the subject dealt with under the head of extraordinary or exceptional damage. I say so having in view particularly the Roads and Bridges (Scotland) Act 1878, which contains clauses on that topic. That statute does not extend to Glasgow, and no private Act of Parliament applicable in this sense to Glasgow has yet been passed. One reason of this is no doubt the exceptionally good construction and maintenance of the streets by the Corporation, and the other the willingness of those conveying heavy traffic to do all in their power to lessen the burden of their operations. But the point is relative to what may be considered in the whole circumstances and with such a traffic as reasonable tear and wear.

After much consideration I have come to the opinion that both parties stand committed to the traffic, of which the two instances given are examples, as being within this category.

Before, however, giving my final determination upon this point, I desire specially to note that in my opinion the gravamen of the charge made by the appellants against the respondents is that the bogie used on the two occasions libelled was imperfect, and such in its construction as to cause undue pressure and pulverisation. I do not pass by the instance given of what I think must be considered to be a better bogie from Dundee. But how do the facts stand with regard to that? It does not seem to have been suggested by the Corporation until the proof in this case had begun. No doubt the respondents will consider the matter now that the idea has been put before them, and they may have grave responsibilities if they do not do so, but so far as anything anterior to this case is concerned I am of opinion that the Corporation stands committed to the view that the bogies employed upon the occasions challenged were reckoned to be the ordinary and suitable bogies. I refer in particular to a letter addressed by Mr Thomas Nesbitt, the experienced Master of Works of the appellants, dated 21st March 1916. It is addressed to the respondents, beginning—"I have your letter of the 18th inst. intimating that you purpose hauling the four main boilers and auxiliary boiler . . . from your boiler works . . . to-night, Tuesday, and asking me to arrange that no opening of the roadway is in operation at that time. So far as this department is concerned, there are no operations being carried on in the line of the streets to be traversed."

Mr Nesbitt then proceeds to say that his assistant reports that he made an inspection of the ground, and that the flanges of the wheels of three of the bogies being 13 inches and 12¼ inches broad are badly broken, reducing the breadth of the flange "in one case from 13½ inches to 11⅛ inches, and in another case from 12¼ inches to 8⅛ inches in breadth. This is most unsatisfactory in view of the weight being carried, which, I understand, is about 70 tons, and is likely to increase any damage that may be done by taking boilers over the streets." He then adds these two sentences—"My assistant further reports that the causeway where the boilers are standing at the head of Kelvinhaugh Street has subsided owing to the boilers standing there, which will necessitate the street being repaired. Probably this could have been avoided if steel plates had been placed on the causeway for the wheels to rest upon. I shall be glad to hear from you that in future you will see that the bogies employed to take such boilers over streets are in a proper state of repair."

In view of that letter, and of the fact that there is no complaint whatsoever that the necessary steel plates had not been supplied or that the bogies were not in a proper state of repair, I must decline to accept the view that as between these two parties, both of them highly skilled and well advised, the conduct of this traffic fell within the category of nuisance, or secondly, that the mode of conduct by bogies such as had been so long employed was one to be condemned. It was upon the contrary accepted, and I must take it accordingly so far as my judgment goes to be the case that the ordinary wear and tear of these streets of Glasgow did include this heavy traffic in this particular manner.

The *onus probandi* would in any view have lain upon the appellants to prove in the circumstances an excess over ordinary and understood tear and wear. But I ground my judgment on the broader facts of the history and practice to which I have alluded.

Had, however, the facts been otherwise, and had it been established that the use of the streets had so far exceeded tear and wear as to amount to abuse by reason of impropriety in method or of excess, I must in consequence of the shape which the arguments at the Bar took altogether disclaim the view that such abuse would not have sounded in damages under the law of Scotland. There is nothing in precedent or the absence of it, and certainly there is nothing

in principle, against that. The respondents in their case very properly admit that "an individual . . . is not entitled to use the highway in such a manner as will result in the destruction of separate private property subjacent to the road or otherwise, or in causing material inconvenience or obstruction to the free passage of other users." If to this had been added the further consideration that the estimate as to material inconvenience or obstruction must not be minimised by reason of quite abnormal expenses having to be promptly defrayed after the passage of the respondents' traffic so as to restore the ordinary users against the destruction or waste caused, then I think the admission would have been complete and would have been in accord with sound law.

Whether it may be expedient or proper to adopt the relevant provisions of the Roads and Bridges Act I do not know. But the case does appear to be eminently one for mutual arrangement, possibly to be ratified by private statute so as to avoid the mutual danger that a change in facts—after all the point is almost entirely a question of degree—might be followed by a change in legal result. This case, however, must depend upon its own established facts, and on these the appeal fails.

I concur.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants — Dean of Faculty (Condie Sandeman, K.C.)—Graham Robertson, K.C. — Crawford — Chalmers. Agents—Campbell & Smith, S.S.C., Edinburgh—Martin & Company, Westminster.

Counsel for the Respondents—Macmillan, K.C.—Gentles, K.C.—Gilchrist. Agents—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—Beveridge & Company, Westminster.

Friday, July 6.

(Before the Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

WESTVILLE SHIPPING COMPANY, LIMITED *v.* ABRAM STEAMSHIP COMPANY, LIMITED.

(In the Court of Session, June 17, 1922, S.C. 571, 59 S.L.R. 539.)

Contract—Rescission—Title to Sue—Restitutio in integrum—Assignation of Contract to Sub-assignee — Assignation Repudiated but not Reduced at Date when Action Raised—Pursuers Reinvested in Contract at Date of Closing Record.

A assigned his rights under a shipbuilding contract to B on certain representations as to the stage of construction reached by the vessel which were in fact false. B thereafter subassigned his rights to C, making practically the same representations to C as had been made to him by A. On C discovering that the representations were false, and intimating that he repudiated the contract, B was advised that he had no defence, and it was arranged that judgment should be allowed to go against him in the English Courts. B then brought an action against A for reduction of his contract with A and for damages, but at the time of raising his action judgment had not been pronounced by the Court in England annulling the sub-assignation, though such judgment was obtained before the record was closed. In the action by B against A objection was taken that B had no title to sue in respect that at the date of raising the action he had not been reinvested in his right to the contract, and therefore was not in a position to make *restitutio in integrum*. *Held* (*aff.* the judgment of the First Division) that B had a good title to sue.

Contract—Rescission—Misrepresentation—Assignation of Contract to Sub-assignee — Whether Assignors Barred from Rescinding the Original Contract by their Actings with Sub-assignee — Failure to State Competent Plea when Sued by Sub-assignee — Homologation — Consent to Alteration in Contract in Knowledge of Misrepresentation.

The sub-assignees of a shipbuilding contract, after discovering the falsity of the representations on which they had bought, requested the shipbuilders to make a slight alteration in the design of the ship. Thereafter in an action at their instance the sub-assignation was annulled. The assignees having thereafter sued the original cedents for rescission of their contract with them on the ground of misrepresentation and for damages, *held* (*aff.* the judgment of the First Division) that the act of the sub-assignees in agreeing to the suggested alteration on the design of the ship did not bar the assignees from insisting in their action, and that the unimportant character of the alteration did not make *restitutio in integrum* inequitable.

Contract — Rescission — Restitutio in Integrum — Personal Bar — Mora — Fall in Value of Subject of Contract.

Circumstances in which *held* (*aff.* the judgment of the First Division) that in an action for the rescission of a shipbuilding contract on the ground of misrepresentation, a fall in the value of the subject of the contract owing to a slump in freights did not render *restitutio in integrum* inequitable, and appeal *dismissed*.

The case is reported *ante ut supra*.

The Abram Steamship Company, Limited, appealed to the House of Lords.

At delivering judgment—

EARL OF BIRKENHEAD—[*Read by Lord Dunedin*]—I have had the advantage of reading the judgments herein of my noble and learned friends Lord Dunedin and Lord Atkinson. I agree with them, have nothing