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

continued to carry on the appellant company's business until the year 1921. In 1921 the liquidator sold the business (including lands and works, fixed and other plant, and good-will) to the Eglinton Magnesite Brick Company, Limited. The business was taken over by that company on the 5th October 1921 and was thereafter carried on by it. The business of the appellant company ceased at that date. (2) The profits of the business were assessed to income tax under Schedule D for the year ended the 5th April 1922 on the sum of £6282 less £1017 wear and tear, and this assessment was apportioned under Rule 9 of Cases i and ii of Schedule D between the two companies, the appellant company being charged on the sum of £3141 less £508, 10s. wear and tear, and the Eglinton Magnesite Brick Company, Limited, being charged on a like sum. The appellant company having made a loss in trading for that year, the amount on which it was charged was reduced to nil under the provisions of Rule 3 of the Miscellaneous Rules applicable to Schedule D which provides for the adjustment of an assessment in the case of a person who ceases to carry on business. (3) The appellant company had been assessed to excess profits duty from time to time under the provisions of Part 3 of the Finance (No. 2) Act 1915. The appellant company's accounts were brought to a close each year on 30th April, and during the final accounting period of the appellant company, which ended on the 30th April 1921, the appellant company made a loss and claimed a repayment of excess profits duty under the provisions of section 38 (3) of that Act. (4) On the 30th March 1922 after the appellant company ceased to carry on business the liquidator received a repayment of excess profits duty amounting to £7224, and on the 20th December 1922 he received a further repayment of excess profits duty amounting to £1150. (5) Rule 4 (1) of the rules applicable to Cases i and ii of Schedule D of the Income Tax Act 1918 enacts that—'Where any person has paid excess profits duty the amount so paid shall be allowed as a deduction in computing the profits or gains of the year which included the end of the accounting period in respect of which the excess profits duty has been paid, but where 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.' That rule is a re-enactment of section 35 (1) of the Finance (No. 2) Act 1915. It was under the latter part of this rule that the assessments under appeal were made in respect of the repayments of excess profits duty referred to in paragraph 4. (6) According to the notices of assessment issued to the appellant company the amount of the assessment for 1921-22, viz., £7224, was entered in a column having the following printed heading:—'In respect of profits of trade, profession, employment, or vocation,' and the amount of the assessment for 1922-23, viz., £1150, was likewise entered in a column having the following printed heading:—'In respect of profits of trade, profession, or vocation.' The notice of assessment for 1921-22 also contained in writing the following heading:—'Repayment of E. P. D.,' while the notice of assessment for 1922-23 contained in writing the following heading:—'Profits arising from E. P. D. repayt.' Copies of these notices of assessment marked 'A' and 'B' are annexed to and form part of this case.

"2. It was contended on behalf of the appellant company—(1) That the mere receipt of the payments of money did not amount to carrying on a trade; that the appellant company had ceased to carry on trade on 5th October 1921, and that thereafter the business was carried on by the Magnesite Company. (2) That as the appellant company had ceased to carry on any trade before the repayments were received, it could not be assessable therefor under Case i of Schedule D. (3) That as the assessment under Case i of Schedule D made upon the appellant company in respect of the profits of its trading for the year ended the 5th April 1922 had already been discharged, it could not be assessed again under Case i for that year, or if it could be so assessed it could only be assessed on the average of its profits for the three preceding years, and not on the actual amount received within that year. (4) That as the provision as to the treatment of repayments of excess profits duty was to be found in the rules applicable to Cases i and ii of Schedule D, the repayments could only be assessed under one or the other of these two cases, and could not be assessed under Case vi. (5) That as the notices of assessment showed that the assessments purported to be made under Case i or Case ii of Schedule D, it was not open to the Crown to argue on this appeal that the liability was under Case vi of Schedule D; and (6) that the said repayments of excess profits duty were not in any event annual profits or gains, and were not assessable under Case vi of Schedule D.

"3. It was contended on behalf of the Crown—(1) That the excess profits duty repaid was a profit assessable under Schedule D, whether the trade had ceased or not. (2) That the provision for assessing repayments of excess profits duty was originally contained in section 35 (1) of the Finance (No. 2) Act 1915 which was not a rule of Cases i and ii of Schedule D, and that therefore an assessment in respect of such a repayment was not necessarily made under either of those cases; and (3) that if the repayment was not assessable under Case i of Schedule D, it was assessable under Case vi of Schedule D, and that the assessment was made under Schedule D generally and not under any particular case.

"4. Following previous decisions of the Special Commissioners in similar cases, we held that these repayments were in the circumstances of this case assessable under Case vi of Schedule D, and that as the assessments were made under Schedule D generally, the form of the notices of assessment did not preclude our holding that the assessments were properly made. We accordingly confirmed the assessments...."

The *question of law* for the opinion of the

Court was—"Whether the appellant company was properly assessed in respect of the said repayments of excess profits duty?"

Argued for appellants—This assessment should have been made, if at all, upon appellants' successors in the business—*Wankie Colliery Company, Limited* v. *Inland Revenue*, [1922] 2 A.C. 51; *Armitage* v. *Moore*, [1900] 2 Q.B. 363. Further, repayment of excess profits duty should be treated as a capital accretion and not as income. In any event such repayments were not ascertained profits, but merely items to be taken into account in computing the profits on the average of the three preceding years.

Argued for respondents—The terms of rule 4 (1) should be construed as meaning that the repayments of excess profits duty were to be treated as ascertained profits for the year of repayment and not merely as items in computing such profits. The assessments fell to be made either under Case i or Case vi of Schedule D, and had been made under Schedule D generally and not under any particular case.

LORD PRESIDENT (CLYDE)—This is an appeal against the assessment to income tax of a company in liquidation in respect of (first) a sum of £7224 for the year ending 5th April 1922, and (second) a sum of £1150 for the year ending 5th April 1923. The business of the company was sold in 1921, and was taken over by the purchaser on the 5th of October in that year. Accordingly the year ending 5th April 1922 was the last income tax year in which the company actually carried on business. In that year it was assessable to income tax on the profits of that year, calculated in accordance with the Income Tax Act of 1918—that is to say, on the basis of the average profits which it had made in the three preceding years. In settling with the Revenue for that year the company in liquidation availed itself of Rule 3 of the Miscellaneous Rules applicable to Schedule D. It convinced the Revenue that in its last year it had not in fact made any profits but a loss, and it secured accordingly immunity from income tax on its trading profits for that year.

On the 30th March 1922, however, the larger of the two sums which are concerned in this appeal, and on the 20th December 1922 thereafter the smaller of the two sums in question, were received by the company in liquidation. These sums were repayments by the Inland Revenue of excess profits duty levied on the company some years earlier, and the question is whether these two payments do or do not constitute assessable profits of the company for the purposes of the Income Tax Act of 1918.

It is obvious that the adjustment of the excess profits duty to the general scheme of the income tax is attended with some difficulty both in the matter of its exaction and in the matter of repayment. At the best this difficulty was, as might be expected, capable of solution only in a more or less rough fashion. The solution adopted by the Legislature was that which is contained in the enactment which now forms paragraph (1) of Rule 4 of the Rules applicable to Cases i and ii of Schedule D of the Income Tax Act 1918. That paragraph consists of two parts. By the earlier part it is provided that where anybody has paid excess profits duty the amount so paid is an allowable deduction "in computing the profits or gains of the year which included the end of the accounting period." The second part begins with a "but," and is in the following terms:—"But where 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."

It will be observed that in accordance with the nature of excess profits duty no assessment to that duty could be made except in respect of ascertained and assessable profits. Excess profits duty was simply a share of the net balance of profits and gains—in other words, of the actual profits computed by methods familiar under the Income Tax Acts—of certain defined kinds of business or trades. A share of that net profit corresponding to the excess of such profit over and above the "standard profit" was appropriated by the Revenue under the name of excess profits duty. But in the computation of profits for the purposes of excess profits duty there was this peculiarity, that regard was had to the "accounting period," and not to the three years' average characteristic of the assessment of trading profits to income tax. This was what made it difficult to harmonise the two systems of taxation. With perhaps rough justice the first part of paragraph 1 of rule 4 allowed the excess profits duty to be deducted in computing (for income tax purposes) the profit of the year which included the end of the accounting period. The principle is obvious. It is that if a taxpayer has made profits assessable (directly, or indirectly through the operation of the three years' average) to income tax, and the Revenue takes a share of those profits in name of excess profits duty, it is only fair that the profits actually assessed to income tax should suffer some corresponding deduction. I say "some corresponding deduction," because to make the deduction exactly and precisely correspondent was exceedingly difficult if not practically impossible.

The problem which arose in the case of repayment of excess profits duty was different. Nobody knew or could know how soon or how late repayment might fall to be made; nor whether the business whose profits were assessed to excess profits duty would be in the same hands when repayment, if any, came to be made. By that time the business might have ceased to be in existence. Repayment might therefore have to be made to a person who was not carrying on the original business. The original trader might have given up business, died, and an executor might have come in his place. The solution provided for all these cases is that contained in the second part of the paragraph, according to which the amount repaid to any person is

to "be treated as profit for the year in which the repayment is received." It is obvious that the amount of the former trading profits so repaid could not actually be trading profits for such year. None the less, the amount repaid is to be treated as if it were that which—in fact—it is not, and cannot be. The amount repaid consists of trading profits which reach the taxpayer out of their proper time. However belated his fruition of them, they have not lost their original character as trading profits. In my opinion this is what explains the position of paragraph (1) of Rule 4 as part of the Rules under Cases i and ii of Schedule D, which are concerned with the profits of trades and vocations. That some artificial rule should be formulated was in the circumstances inevitable, and the highly artificial character of the rule adopted is shown by the words in which it is expressed—"the amount repaid shall be treated as profit for the year in which the repayment is received." In short, the amount repaid is deemed to be something that it is not, and could not in the actual circumstances possibly be. Nor is this in any way unreasonable or contrary to what might be expected, if regard be had to the subject-matter. For, as has been seen, the excess profits duty was itself a part of the trading profits computed by methods familiar under the Income Tax Act. It was not merely a part of something which entered into the computation of profit; it was actually computed profit. And, but for the disparity between the "accounting period" and the three years' average, it would have been directly assessable to income tax. At any rate it was indirectly assessable to income tax (but for its withdrawal for excess profits duty) through the medium of the three years' average. When it is repaid, it is no more than fair and reasonable that it should be repaid subject to some corresponding liability for income tax to that which it originally escaped solely on account of its withdrawal for excess profits duty. Paragraph (1) of Rule 4 therefore subjects the repaid trading profits to income tax. It does so by requiring them to be treated as if they were profits of that year, and by that I understand that the sums repaid are to be regarded as sums assessable to income tax as profits of the year in which they are received—apart altogether from the question whether, in that year, the business (if still in the hands of the recipient) has been profitable or not, and equally apart from the question whether, in that year, the recipient is still carrying on the business or not. The repayments, in short, are deemed to be ascertained and assessable trading profits in the year of repayment—not merely an element in the computation of the trading, or other, profits of that year.

It was remarked that in settling with the revenue for its last trading year the company did not seek (either by re-opening the arrangement with the revenue or otherwise) to bring into computation of its assessable profits for that year the sum of £7224, although it was actually received a few days before the end of that year. I think they were right not to do so. I do not think they would have been entitled to do so. As I read the rule, the original taxable character of the trading profits attached to them as and when repaid; and it would not have been permissible to treat them as an item in computing the profit for the last year in which the company continued to trade.

If I have correctly interpreted the rule, then it would appear that the only question of law put to us in the case ought to be answered in the affirmative.

LORD SKERRINGTON—The language of Rule 4, sub-head (1), of Schedule D, Cases i and ii, is ambiguous, but looking to the subject-matter of the enactment I think that it should be construed in the sense contended for by the Inland Revenue rather than in that contended for by the appellants. When it was enacted that the amount of excess profits duty repaid "shall be treated as profit for the year in which the repayment is received," I think that the Legislature intended that the sum so repaid should be deemed to be part of the ascertained and taxable profits of that year, and should not merely be regarded as a factor for ascertaining the amount of the taxable profits of a subsequent year different from the year in which the repayment was received.

LORD CULLEN—I concur.

LORD SANDS—I have felt some difficulty in this case and my difficulty arises in this way, that the statute directs that "the amount repaid shall be treated as profit for the year in which the repayment is received." One must I think presume that what was primarily in view when this section was framed was not special circumstances such as have here arisen, but the case of a firm that had carried on and was continuing to carry on business. Now what is the effect of such a direction? *Prima facie* I would have said that it meant that the repayment was to be treated as if it were actual profit of the year of repayment. Now this would seem to be in favour of the Crown, but really it is not, because the income tax is not levied on actual profits of the year; it is levied on notional profits made up on the average of the three preceding years, and accordingly to reach the result at which your Lordships have arrived we must read this repayment as an actual profit that is not to be treated as such in the ordinary way but is to be added to the notional profit of the year in order to ascertain the amount of income tax for that particular year. I have some difficulty in that construction and I have doubts whether it is the construction that has hitherto been adopted in practice in the ordinary case of a going business, for I apprehend that if the matter had been regarded in this way by the revenue authorities they would simply have deducted the income tax from the repayment. I appreciate, however, the considerations which your Lordship in the chair and Lord Skerrington have urged and I am not prepared to dissent.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—D. P. Fleming, K.C.—Patrick. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Respondent—Lord Advocate (Macmillan, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Friday, July 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BROWN *v.* CAMPBELL.

Process — Sheriff — Removal to Court of Session for Jury Trial—Remit to Sheriff—Small Value of Cause — Averments — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

An action raised in the Sheriff Court concluding for £300 as damages for personal injury having been remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907, the Court *remitted* the case back to the Sheriff-Substitute as unsuitable for jury trial in respect that the averments did not disclose a claim which could reasonably be entitled to a verdict of more than £50.

The Sheriff Courts (Scotland) Act 1907, section 30, which provides for the removal to the Court of Session for jury trial of cases originating in the Sheriff Court where the claim is in amount or value above £50 contains this proviso — "Provided, however, that the Court of Session shall if it thinks the case unsuitable for jury trial have power to remit the case back to the Sheriff. . . ."

John Brown, 50 M'Nair Street, Glasgow, with consent of his father, *pursuer*, brought an action in the Sheriff Court at Glasgow against Adam Campbell, 51 Mill Street, Glasgow, *defender*, for payment of £300 as damages for personal injuries.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 10th January 1924 the pursuer was in the employment of Messrs James Reid & Company, firewood merchants, 56 M'Nair Street, Shettleston, Glasgow, as a lorryman on a horse-drawn lorry. (Cond. 3) About 5 p.m. of that day the pursuer was driving his horse and lorry westwards along Shettleston Road, Shettleston, Glasgow. When near Culross Street, which is a side street off Shettleston Road, the pursuer's lorry was suddenly and without warning struck on the rear end by a heavy motor lorry, No. G.A. 7236, owned and at the time driven by the defender which was proceeding in the same direction as the horse and lorry driven by pursuer. (Cond. 4) As a result of the collision the pursuer was thrown from his lorry and rendered unconscious. He was at once medically attended to and was thereafter taken home. It was then found that his head was injured front and back, his face being swollen and bruised and cut. His body and legs were bruised, and he sustained a severe shock to his nervous system and slight concussion."

The Sheriff-Substitute (BLAIR) having allowed a proof the pursuer required the cause to be remitted to the Court of Session for jury trial in terms of section 30 of the Sheriff Courts (Scotland) Act 1907.

When the case appeared in the Single Bills the defender moved that the case should be remitted back to the Sheriff as unsuitable for jury trial in respect it was clear from the averments that no reasonable jury could award the pursuer £50 of damages—*Monaghan* v. *United Co-operative Baking Society, Limited*, 1917 S.C. 12, 54 S.L.R. 211; *Greer* v. *Corporation of Glasgow*, 1915 S.C. 171, 52 S.L.R. 109.

Argued for pursuer—Defender had tendered £40 which amounted to an admission that the injuries were not trivial. Pursuer's averments if proved would justify an award of more than £50—*Duffy* v. *Young*, 7 F. 30, 42 S.L.R. 40; *Sharples* v. *Yuill & Company*, 7 F. 657, 42 S.L.R. 538; *Greer* v. *Corporation of Glasgow* (*cit.*), *per* Lord Skerrington at 174.

At advising—

LORD SKERRINGTON — Lord Dunedin's observations in the case of *Sharples* v. *Yuill & Company* (1905, 7 F. 657) in regard to appeal for jury trial are in my judgment applicable *mutatis mutandis* to the removal of causes for jury trial in terms of section 30 of the Sheriff Courts (Scotland) Act 1907. In particular, in deciding whether a case is or is not suitable for jury trial as regards the amount involved, the Court ought, I think, to "be guided by the standard fixed by the Legislature, viz., £40 [now £50], so that unless the action on the face of it discloses a claim which in the opinion of the Court could not reasonably be entitled to a verdict amounting to more than £40 [now £50], it will not refuse a jury trial to an otherwise appropriate case."

It is in my opinion adding nothing new to Lord Dunedin's criterion, but, on the contrary, merely interpreting it and carrying it into effect, to say that if a pursuer unreasonably refrains from giving information in his pleadings in regard to the nature and extent of his injuries so as to leave it doubtful whether a verdict for more than £50 would or would not be legitimate, his claim should be regarded as one which so far as its amount is concerned is of a trifling character and not suitable for jury trial. Thus in the present case every word in condescendence 4 might be deponed to as true by the most eminent physician and surgeon in Glasgow who, I shall suppose, happened to be an eye-witness of the accident and immediately attended to the pursuer. He might explain, however, that the visible injuries to the head and legs were trifling and would leave no mark, but that the shock was a serious one and accompanied by slight concussion as averred. He might then add that for twenty-four hours it remained doubtful whether the effects of the accident would be serious or trifling,