sum due immediately after the inquiry which had resulted in the pursuer's conviction for refusal to pay. [*His Lordship then dealt with the question of damages.*]

LORD GUTHRIE—I agree with your Lordships both as to the question under the Statute of 1911 and as to the amount of damages awarded by the Lord Ordinary sitting as a jury. In regard to the statute I agree with Lord Salvesen that the proceedings were not only regular but that they were conceived with a direct reference to the fair interests of the pursuer. Whether under the Statute of 1911, section 69 (2), a previous notice was necessary, or whether a minute was imperative, may be a question, but in any case both occurred here, and the procedure thus followed was very convenient, and all in favour of the defaulter.

I agree with your Lordship in the chair that the Lord Justice-Clerk's opinion in the case of *Rintoul*, dealing with the matter before us, although it may have been *obiter* in that case, was well founded. [*His Lordship then dealt with the question of damages.*]

LORD DUNDAS was not present.

The Court adhered.

Counsel for Pursuer and Reclaimer—Chree, K.C.—Ingram. Agents—Mackenzie & Fortune, S.S.C.

Counsel for Defenders and Respondents—Blackburn, K.C.—W. T. Watson. Agent—James Watt, W.S.

Thursday, March 1.

SECOND DIVISION.

[Sheriff Court at Jedburgh.

TAIT *v.* ROBERT TROTTER & SONS.

Road — Reparation — Negligence — Locomotive — Duties of Drivers of Traction-Engines—Locomotives Act 1865 (28 *and* 29 *Vict. cap.* 83), *sec.* 3.

The Locomotives Act 1865, sec. 3, enacts—"Every locomotive propelled by steam or any other than animal power on any turnpike road or public highway shall be worked according to the following rules and regulations, viz.—"... *Thirdly*, The drivers of such locomotives shall give as much space as possible for the passing of other traffic: ... *Sixthly*, Any person in charge of any such locomotive shall provide two efficient lights to be affixed conspicuously, one at each side on the front of the same, between the hours of one hour after sunset and one hour before sunrise."

Held that rule 3 applied at all times, not merely when there was passing traffic, and that rule 6 required the two lights to be placed sufficiently near to the sides as approximately to indicate the width of the vehicle.

Reparation — Negligence — Contributory Negligence—Road—Motor Cycle—Duties of Driver of Motor Bicycle with Side-Car Attached.

On a dark and wild night the driver of a motor bicycle with side-car attached saw traffic approaching in the middle of the road, which was narrow, and showing two lights about two feet apart. Not realising that the approaching vehicle was a traction-engine which projected much beyond the lights, he continued on, in the belief that there was room to pass, but reduced his pace to six miles per hour. When, at seven or eight yards off, he realised the obstruction, owing to the slippery state of the surface of the road he did not attempt to stop. He carried a single cycle lamp on the head of the motor bicycle. He failed to get past.

Held that there had been no contributory negligence on the part of the driver of the motor bicycle, either in his conduct or his lighting.

Robert Tait, West Port, Selkirk, *pursuer*, brought an action in the Sheriff Court at Jedburgh against Robert Trotter & Sons, Newtown St Boswells, *defenders*, for damages resulting from a collision between a motor cycle with side-car attached, which the pursuer was riding, and a traction-engine belonging to the defenders.

The pursuer pleaded, *inter alia*—"1. The pursuer having suffered loss, injury, and damage through the fault and negligence of the defenders or of those for whom they are responsible as condescended on, is entitled to reparation therefor."

The defenders pleaded, *inter alia*—"6. Pursuer not having been injured through any fault or negligence of defenders or their servants, the defenders are entitled to be assoilzied. 7. In any event pursuer having by his own fault or negligence materially contributed towards causing the injuries and damage he sustained, is consequently barred *personali exceptione* from insisting on a claim for compensation therefor."

The *facts* are given in the note (*infra*) of the Sheriff-Substitute (BAILLIE), who, on 14th December 1915, assoilzied the defenders, finding the pursuer guilty of contributory negligence.

Note.—"A collision took place on 11th February last at 7·15 o'clock p.m. on a dark sleety night near to St Mary's Loch between a motor cycle with side-car attached, ridden by the pursuer, and a traction-engine drawing two waggons of coal belonging to the defenders. The actual *facts*, as to which there is not in reality much dispute, are these—The lights of the motor cycle and traction-engine were visible to one another about half a mile or more apart and were then lost sight of, and as it appears from the Ordnance Survey that there was another road during the time they were lost on which the motor cycle might have travelled, I think this first point may be disregarded, as it does not follow that the engine-driver could know that the light was necessarily coming towards him. Thereafter the respective lights came into one another's vision at a

distance of about 400 yards along a straight road. I may here remark that the cycle was lighted by one lamp and the engine by two hurricane or storm lamps hanging low down in front of the axle and about 2 feet apart from one another. These lamps all appear to have been efficient and have given a good light. The cycle was travelling at the rate of 10 to 12 miles per hour and the traction-engine at about 3 to 4 miles, so that these two approaching vehicles were bound to meet in about 1¼ minutes. The road at the point of the collision was 14 feet 9 inches wide, of which 10 feet was macadam or metalled road, about 3 feet 6 inches on the loch side was ribbing with some grass growing through it, and composed of a hard surface, while on the other or hillside there was another 15 inches of ribbing. The traction-engine was travelling along the centre or macadam portion with its rear near side wheel about 3 feet 6 inches from the extreme edge of the road on the loch side, thereby leaving only about 3 feet 6 inches on its offside for approaching traffic to pass. The width of the traction-engine was 6 feet 5 inches across the front wheels and 7 feet 9½ inches across the rear wheels, in each case outside measurement. The width of the cycle with side-car attached was 4 feet 6 inches. When the lights respectively came into sight at a distance of 400 yards the drivers of the two vehicles mutually formed erroneous impressions. This they frankly admit, and it is the keynote of the cause of the accident. The engine driver concluded from the single light he saw that an ordinary bicycle was approaching, which would have ample room to pass on the 3 feet 6 inch space available, while the pursuer concluded that the two lights, which he saw to be about 2 feet apart, were those of a cycle car, which he further assumed would be duly proceeding on its own side of the road, and would leave him 6 feet to 6 feet 6 inches to pass. He therefore continued at his original pace of 10 miles or so per hour till he got nearer the traction-engine, and when about 6 or 8 yards from it he was running at a pace of 6 miles per hour. He then discovered its true nature and position, but being unable to pull up in time ran the wheel of his side-car on to the slope of the hill. He managed to pass the front wheels of the engine, but his handlebar was caught some 4 or 5 inches by the near wheel, and he and the cycle suffered certain injuries. At the actual moment of the collision I am satisfied that the traction-engine had stopped. The driver says he stopped it when he recognised some 30 yards away that he had to deal with a motor cycle and not an ordinary bicycle, and this fact of stopping is proved by the fact that he and the steerer both heard the sound of broken glass when the cycle lamp was broken by the collision. This they would not have done if there had been the noise of a traction-engine in motion. Further, I think that the pursuer's injuries would have been seriously aggravated if the rear wheel had been in revolution at the actual moment of impact. I lay stress on this fact because I think it is important to note that in my opinion it was the motor cycle that ran into the traction-engine, and not the traction-engine that ran into the motor cycle. The pursuer founds his claim of damages on two grounds—(1) that the defenders were not travelling on their own side of the road, and (2) that they had not conformed to the proper regulations as to lighting, and had deceived him by the position of their lamps. The defenders on their side plead contributory negligence. Now on the first ground I think it is clear from the evidence, which I do not propose to analyse, that at the actual spot of collision there was hard roadway on the loch side on which the traction-engine could have drawn. At the same time this side, 200 yards further back, had been of a nature doubtful for engine traffic, and there was nothing inherently wrong in the engine travelling along the centre of the road, in view of the fact that this was a country road with a narrowish centre portion metalled and used by traffic, and two sides somewhat overgrown by grass, and either not metalled, or at any rate less perfectly metalled, and that the night was a dark one, and owing to the falling sleet one in which it was difficult to see. This, however, was always subject to the proviso that the engine should draw aside to its left or near side to allow approaching traffic to pass—*Scott* v. *Glasgow Police Commissioners*, 21 R. 466, *per* L.J.-C. at page 468, 31 S.L.R. 370, at page 371. Now it is undoubtedly the fact that the engineman — there were, as is required, two on the engine, the driver on the right, looking out and stopping, &c., the engine, and the steerer on the left—did not attempt to draw to the side when they saw the cycle light, supposing that it was an ordinary bicycle, which would have room to pass. It must, however, be borne in mind that any such attempt would not have averted the collision as the two vehicles met within about 1¼ minutes after sighting one another, and it is in evidence and is apparent that some considerable time must elapse before a traction-engine and its two waggons can be drawn safely to the side. The engine has to be stopped, the gear changed, and on a dark night one of the men would have to descend so as to guide the steerer to enable him to draw close up to the rib or edge along a somewhat grass grown surface. I dismiss entirely defenders' contention that a minute and lengthy examination of the road's surface would have been requisite. To uphold this would render traffic on roads of this description almost impossible by night, and there is no sufficient warrant for it in the evidence. In any case, however, the operation would have taken some considerable time, probably from 4 to 5 minutes, and during this period the rear waggon would have been projected further across the road, and being unlighted would have constituted a greater danger to the approaching cycle. I am therefore satisfied that there was no time for the traction-engine to draw across to the left, and that its failure to do so was not the cause of the accident. In my opinion the true cause was that the pursuer,

acting under his erroneous impression, rode forward at a pace which in view of his knowledge of the approaching vehicle was excessive, as it rendered him unable to stop when he fully appreciated the position of matters. Further, in this context it must be remembered that the traction-engine had stopped so that no question arises of the traction-engine by being in motion itself reduced the space which the pursuer had to pull up in. Here the pursuer himself ran into it through his belief that there would be a clear roadway in front of him. His second contention is that the lamps on the traction-engine were not affixed in due conformity with the Statute 28 and 29 Vict. cap. 83, sec. 3 (6), which requires the lamps to be affixed conspicuously at each side on the front of the engine, and that he was deceived thereby. Now it is palpably impossible to affix these lamps outside the wheels, and it is common knowledge that in the case of motor cars where similar regulations exist the lamps are placed well within the extreme edge of the car, as the mudguards project considerably beyond the lamps. At the same time it does not appear to me that, given a width between the front wheels of 6 feet 3 inches, these lamps in front of the axle can be said to be affixed one at each side when they are only two feet apart, and it is a question, though not specified by the statute, whether lamps on each side of the smoke-box would not be a more full compliance therewith; even though it may entail one or more further lamps in front of the axle to enable the engineman to see the road. Whether that be so or not the pursuer, as I have stated before, knew of the existence of the vehicle; the latter was stationary; he approached it at a pace too great to enable him to stop; and all this on a dark sleety night involving extra caution. It is therefore not necessary to come to any definite conclusions further than those I have expressed as to whether any blame may be attached to the defenders for their action in remaining on the centre of the road and for the position of their lamps. They may or may not have been to blame, but in any case the pursuer himself was guilty of contributory negligence, and that is sufficient for the decision of the case. There was on his part 'rashness or want of the care which he was bound to exercise which also directly contributed to the injury,' so that he cannot recover damages—*M'Naughton* v. *Caledonian Railway Company*, 21 D, *per* L. Wood, at p. 167. *Cf.* also *Gibb* v. *Edinburgh and District Tramways Company*, 1913 S.C. 541, 50 S.L.R. 347. On the remaining point of pursuer's alleged defective vision I agree with Dr Traquair that his vision was sufficient to enable him to ride with safety."

The pursuer having appealed, the Sheriff (CHISHOLM), on 28th January 1916, found that the defenders were guilty of negligence, and that the pursuer was guilty of contributory negligence, sustained the seventh plea-in-law for the defenders, and assoilzied them from the conclusions of the action.

Note.—". . . In failing to be on their proper side of the road when it became necessary for the pursuer to pass, and in taking no step to warn the pursuer timeously of their position, I think the defenders were in fault. But their fault was aggravated by the position in which the lights were placed on their engine. Being only two feet apart, and therefore not near the extremities of a width of 7 feet 10 inches, they were sure to mislead, and in fact did mislead, the pursuer as to the dimensions of the vehicle he was to pass. Consequently the pursuer was deceived as to the amount of space available for his passage between the edge of the road and the side of the engine. It may be, as contended, that the situation of these lights on the engine conforms with the regulations in relation to the matter. It seems to me that it does not. But even assuming that they comply with the letter of the regulations it by no means follows that this would free the defenders from liability to a member of the public if in fact he was misled by the position of the lights. And when the misleading position of the lights is taken along with (1) the monopolising of the middle of the road, and (2) the absence of any attempt to warn or stop an approaching vehicle, and the lack of any means of doing so, I cannot but hold that the defenders were guilty of negligence on the night in question.

"Here, however, the plea of contributory negligence on the part of the pursuer comes in.

"The pursuer, who founds on the misleading character of the defenders' lights, was himself riding a vehicle lighted in a way which was calculated to deceive, and which in fact did deceive, the driver of the defenders' engine as to the nature and dimensions of that vehicle. The pursuer carried one light in front of his bicycle; there was no light on the side-car—nothing to indicate that there was anything of greater width than a bicycle It was argued that there is in the county where this accident happened (Selkirkshire) no regulation requiring a light to be placed on a side-car. In this case also I say that I do not think that it follows from this that the pursuer is freed from the consequences of failure to indicate in the dark the width of the vehicle with which he is approaching. The statement of the driver of the engine (which I see no reason to doubt) is that he judged the character of the pursuer's vehicle by the light it bore—just as the pursuer had done in regard to the engine—that he thought at first that it was an ordinary bicycle, but, later, owing to the pace, he concluded that it was a motor bicycle and nothing else. For the passage of a bicycle of either kind there was sufficient space on the proper side, and the driver of the engine, having stopped did nothing more. There was nothing to announce the presence of a side-car; indeed, I think the single light practically amounted to an intimation that there was nothing but a bicycle. As matter of fact this absence of any light to indicate that there was a side-car attached contributed materially to the cause of the accident. It is not apparent from the evidence what different course the driver of the

engine would have taken, or could have taken, had he been warned in time that it was not a bicycle alone but something of much greater width that was approaching—had he not, in other words, been deceived by the pursuer's single light. Perhaps he could not have done anything to retrieve his negligent position in being in the middle of the road. But I cannot assume that this is so. Nor does it, as I think, relieve the pursuer from the legal consequences of his own negligence. If, instead of a heavy locomotive, the vehicle he was meeting on this narrow road had been an ordinary motor car which could have been moved quickly to a side, and if the driver of it, deceived by the single light, had yielded space ample for the passage of a bicycle but insufficient for the case of a bicycle with a side-car attached, I think the pursuer would have been fortunate if a court took the view that his negligence was contributory only.

"I am of opinion that the pursuer was guilty of contributory negligence in another respect. On a dark night, and on a narrow road, and with this misleading mode of lighting his vehicle, it was incumbent on him to have his bicycle under such control as to be able to stop short of any vehicle he met, since it was not improbable that the amount of space he required for his passage might be misjudged. . . ."

The pursuer appealed, and argued—The defenders acted contrary to the duties imposed on them by statute in occupying the centre of the road, and thus not giving to passing traffic "as much space as possible"—Locomotives Act 1865 (28 and 29 Vict. cap. 83), sec. 3 (3)—and also by not having its lights "one on each side" of the traction-engine—Locomotives Act 1865, sec. 3 (6). The defenders had been negligent at common law. The pursuer was not guilty of contributory negligence.

The defenders argued—If the statute exhausted the defenders' duty they performed it and were not at fault, as the phrase in the Act of 1865 "as much space as possible" applied only when there was passing traffic and not when the road was clear. If there was any fault it was the fault of the road authorities for not making the road sufficiently wide. The lights on the traction-engine were sufficient according to statute. The pursuer was guilty of contributory negligence.

LORD JUSTICE-CLERK—In this case I agree with the Sheriff that the defenders were in fault, and I adopt the grounds on which he puts this part of his judgment. I think the defenders were in fault in two respects. In the first place, they were not on their proper side of the road. Their traction-engine and the two cars attached to it were in the centre of the road, and it was explained to us that while the width of the road varied at the place in question it was wider than at a point 100 yards further back, so that the engine could safely have been substantially further over to its proper side.

But it was said there was no traffic approaching, and therefore there was no obligation whatever upon the driver to have his engine at the side of the road, especially in view of the fact that it had two waggons behind it. It was further argued that if the traction-engine had gone to the side, which it could not have done in a shorter period than seven or eight minutes, the unlighted waggons would have been left standing or at least moving slowly in the middle of the road, and being unlighted would have caused a more dangerous obstruction of the road than would have been the case had the engine remained in its original line. I do not agree with that view. The 3rd section of the Locomotives Act 1865 provides—"Thirdly, the drivers of such locomotives shall give as much space as possible for the passing of other traffic."

It was argued to us that that provision only applied when there actually was passing traffic. I do not think that is the true meaning of the section. I think it means that so far as practicable, whether there is passing traffic or not, the drivers of such locomotives shall give as much space as is reasonably possible for the passing of other traffic. When I use the word "reasonably" I mean that the space should not be measured with mathematical accuracy. One must have regard to the ordinary incidents of traffic and the capacity of the roadway, but in my opinion the provision is not restricted only to the condition of things which exist when there is actually traffic passing. Otherwise it would mean that all other traffic might be held up for a considerable time until this unwieldy traction-engine was removed from the centre of the road to its proper side. Therefore I think the defenders were at fault in respect that their traction-engine did not comply with that provision of the statute.

I am also of opinion that the defenders did not comply with section 3 (6) of the same statute, which says—"Any person in charge of any such locomotive shall provide two efficient lights to be affixed conspicuously, one at each side of the front of the same, between the hours of one hour after sunset and one hour before sunrise." I think the words "one at each side" were intended to bring about this result, that during the hours of darkness approaching traffic would be able to form an approximate idea of the width of the vehicle they were meeting, and so be able to appreciate the character of the vehicle as well as how much free roadway was open to them. In this case the lights in question were fixed on the front axle of the traction-engine at about a foot from the centre of it and about 18 inches from the outside of the engine. I do not think that arrangement could be held to be compliance with the requirements of the words "one at each side." Again, I do not say that there must be mathematical accuracy in having the lights at the extreme outside measurement of the width of the engine, but they must be approximately or practically at the sides. There is to be one light on each side, and the only purpose of that provision is to convey to those approaching reasonable information as to the character and width of the vehicle they are going to pass.

It is said that in this case the statute would not achieve its object, because the traction-engine in question—apparently in conformity with, I do not say a universal but a common practice—was wider at the rear wheels than at the front wheels. That undoubtedly is a difficulty that would not be overcome upon any construction of the statute, but that is no reason, as it seems to me, for giving a different construction to the statute from the one I have suggested, which carries out the actual intention of the statute so far, although it may not have the effect of carrying it out completely in respect of the different breadth of the front and back of the traction-engine. I agree with the Sheriff in his finding that there was negligence on the part of the defenders.

But then it is said that there was contributory negligence on the part of the pursuer, and, as I understand it, the ground upon which that averment is based is firstly that he did not carry the proper lights. The Sheriff put it thus—"As matter of fact this absence of any light to indicate that there was a side-car attached contributed materially to the cause of the accident." I am not prepared to say that that statement is made out. It may be that in certain circumstances the question might arise as to whether a side-car attached to a motor cycle like the present, if it were unlighted, might not be one of the contributory causes of an accident, but in the present case there is no evidence to establish that. There is in my opinion neither common law nor statutory requirement that the side-car should be lighted.

The other ground of fault alleged against the pursuer was that he did not stop sufficiently soon, or that he had not his motor-bicycle under sufficient control. The only evidence we have as to that is given by the pursuer himself and his witnesses, and is to the effect that to have stopped when it is said he should have done would have been very dangerous, and might have resulted in increasing instead of diminishing the damage. I cannot find in the proof anything sufficient to make out that the failure to stop did in any way contribute to the accident.

I am therefore for recalling the interlocutors of the Sheriff and the Sheriff-Substitute, and pronouncing findings to the effect that the defenders were in fault, and that it has not been established that the pursuer by any fault on his part in any way contributed to the accident. The result is that our judgment will be for the pursuer, and I think in the circumstances a reasonable sum to award is £70, for which I propose we should decern.

Lord Salvesen—I am entirely of the same opinion. I think I never saw a clearer case of fault against anyone than the case we have here. Traction-engines of this kind are only licensed to use the roads at all on condition that they conform with the statute 28 and 29 Vict. cap. 83. The terms of the statute are most carefully framed so as to give a maximum of protection to other traffic on the roads against such unwieldy vehicles as this appears to be. One of the provisions is that a traction-engine shall keep as near to the side of the road as possible. Apart from the evidence in this case I should not have understood the significance of that provision, but when it appears that these traction-engines take seven or eight minutes to pass from the centre to the side of the road so as to bring all their attached waggons into line, then I see very clearly that it was a wise provision of the Legislature to impose upon them that condition as a condition of their using the road.

I find from the defenders' own admission that in daylight they conform to that condition as far as they can. To depart from it at night may be convenient for the traction-engine, because it is more difficult to steer along the side of the road in an imperfect light or when the only light afforded is that of their own lamps; but this practice occasions very great danger to approaching traffic, and all the more so when the vehicle is not lighted so as to indicate what its true width is.

In this case my opinion is that there was a flagrant breach of the statute. Instead of the lights indicating approximately the width of the vehicle, which was 8 feet, they indicated a vehicle 2 feet in width. I cannot imagine anything more misleading or more likely to cause an accident than the interpretation of the statute which Mr MacRobert stoutly maintained. According to his construction of the statute it would be complied with if there were two lights—one on each side of the centre line of the vehicle, at any position on the vehicle apparently in his view as far down as possible. If that were the true construction I really cannot understand how a wise Legislature should have provided that there should be two lights.

I do not say whether it would have been a compliance with the statute if the traction-engine had even had its lights in what appears to be a usual place—on brackets at each side of the smoke box—but, assuming that would have been right, approaching traffic at all events would have known that there was a width of 4 feet, possibly somewhat more, in the vehicle which was coming forward, and from the position and height of the lights might have got some idea that it was not an ordinary vehicle, but a vehicle of an unusual and unwieldy description.

So far I am in agreement with the Sheriff, but I entirely disagree with him when he holds that there was contributory negligence on the part of the pursuer. I do not think it is really pleaded on record that he ought to have carried a light on the side-car in addition to the light upon his bicycle. There is a statement to the effect that in the side-car which was unlighted there was a passenger. I should assume for my own part that the substance of that statement was that there was a passenger in the side-car, and that it was only incidentally mentioned that the side-car was itself unlighted.

I do not find any evidence that it is the practice to have side-cars lighted, nor that this is made a point at all until it occurs to the learned Sheriff, who on his own initiative seems to think that a person driving along a road is entitled to assume when he

sees only one light that it is the light of some form of bicycle. I do not think he is justified in making that assumption. The statute provides that even a motor-car need only carry one light on the extreme off-side, and apart from whether at common law, looking to the usage of carrying two lights, there might not be a case where one would think that the absence of the near light might constitute fault, it is quite obvious that there can be no provision for carrying three lights on a tricycle. And the Sheriff seems to have been entirely unaware that the statute, which primarily applies to the lighting of all motor vehicles, only prescribes one light. It is true that the driver of the traction-engine says that he assumed that the light indicated a bicycle and nothing else. I think he was wrong in so assuming.

The other ground of fault is that the pursuer approached too quickly. The evidence of the pursuer is that when he saw the lights a-head he thought they were those of a small car which could easily keep its own side of the road. He is supported in that by the expert. He slowed down and got to a pace of about six miles an hour when this monster loomed upon him out of the dark. His evidence is that he could not have stopped without great risk, and that if he had attempted to apply his brakes suddenly within seven yards he might have been thrown headlong and injured himself. I can quite believe that, for he had not merely the weight of the motor bicycle to contend with, but the weight of the heavy passenger in the side-car, who would have given considerable additional momentum. I think the evidence negatives fault on the part of the pursuer, who is supported by the expert in the view that he acted rightly in the circumstances.

If the pursuer's quite natural assumption that this was a small car had been well founded he was in perfect safety to approach it at six miles an hour, because there would have been ample room for each to pass the other. He had no reason to assume that these two lights, 2 feet apart, indicated an obstacle extending to 8 feet across the road, and occupying something like two-thirds or three-fourths of the whole width of the road at the place. Accordingly I am quite clearly of opinion that no case of contributory negligence is made out, and that the pursuer must succeed.

On the question of damages I have nothing to add to what your Lordship has said. I think the award your Lordship proposes is a fair one.

LORD GUTHRIE—We must take the evidence as we have it. Mr MacRobert assumed and suggested a great deal of judicial knowledge as to the kinds and dimensions of motor vehicles, and as to their powers, under certain conditions, of rapid stoppage, which if it were to be made a ground of judgment would require to be contained in the evidence.

In regard to the case against the defenders, both Sheriffs seem to me to have failed to notice the special statutory position of traction-engine traffic. The Sheriff-Substitute deals with such traffic as ordinary road traffic, and in that view he refers to the case of *Scott*, 21 R. 466, and especially to the opinion of the Lord Justice-Clerk at page 468, which dealt with ordinary cart traffic. Similarly, the Sheriff discusses the question in view of what he calls the "rule of the road." that is to say, the ordinary rule in regard to road traffic; but for a very obvious reason the statute has dealt differently with traction-engine traffic, the reason being, as the evidence brings out, that such traffic cannot rapidly alter its position in relation to approaching cart and motor traffic. The foundation of the Sheriffs' judgments seems to me in that view to be accounted for by their failure to notice that radical distinction.

With regard to contributory negligence, I agree with your Lordships that the foundation of the Sheriffs' judgments again is mistaken, because in both cases they talk of the pursuer not being entitled to recover damages in respect that his vehicle was lighted in such a way as to be misleading to any approaching vehicle. It was actually lighted by one light on the off-side of the driver of the motor-cycle. It is difficult to see why that should have misled the traction-engine driver. Had it been proved that motor-cycles which have side-cars attached to them always have or usually have the side-cars lighted, then the traction-engine driver might well have said—"I have been accustomed to those vehicles; I have always found they carry a light on both sides, and I knew that this could not be a motor-cycle with a side-car, because it had only a light on one side." But the practice and known custom is to have no more lights than the pursuer had in this particular case. Therefore I think the whole case against him as made by the Sheriffs disappears.

LORD DUNDAS was not present.

The Court recalled the interlocutors of the Sheriff and the Sheriff-Substitute: Found in fact—"(1) That on 11th February 1915 at 7·15 p.m., on a dark night, with sleet falling, the pursuer was riding a motor bicycle with side-car attached, and at a point on the road running along St Mary's Loch collided with a traction-engine belonging to the defenders and driven by their servants, which engine was drawing two waggons of coal; (2) that the traction-engine had been proceeding along the centre of the road, and that there was only a space of 3 feet 6 inches or thereby for the pursuer to pass, while his motor cycle with side-car attached measured 4 feet 6 inches in width; (3) that the traction-engine might have safely travelled on a further 3 feet 6 inches of roadway which lay on the loch side at the point of collision, but that 200 yards further back this side was of doubtful nature for traction-engine traffic; (4) that pursuer had been proceeding at a rate of 10 to 12 miles per hour, but that when approaching the said traction-engine his speed did not exceed 6 miles per hour; that he was unable, owing to the wet surface of the roadway, to stop his motor cycle when, at a distance of 7 or 8 yards from the traction-engine, he first noticed the character

of the vehicle and the extent to which it obstructed the road; and that he accordingly tried to pass by running the side-car along the hill side but failed to clear the traction-engine and collided with its rear off wheel, whereby injuries were caused to himself and his motor cycle and side-car; (5) that pursuer was carrying on the head of his motor-cycle a single cycle lamp in efficient condition, and that defenders were carrying on the front axle of the traction-engine two hurricane lamps placed 2 feet apart, and both within the front wheels; (6) that pursuer's light was in conformity with statutory lighting regulations, but that defenders' lights were not, and that the lights on the traction engine gave no warning as to the projection of both front and rear wheels beyond the body of the engine, and that defenders have failed to prove that pursuer by any fault contributed to the accident": Found in law that the defenders were guilty of negligence and that the pursuer was not guilty of contributory negligence, and that the defenders were liable in damages: Assessed the damages at £70, and decerned against the defenders for payment thereof.

Counsel for Pursuer and Appellant—Watt, K.C.—D. R. Scott. Agents—Alex. Morison & Co., W.S.

Counsel for Defenders and Respondents—MacRobert. Agents—Pringle & Clay, W.S.

Friday, March 2.

SECOND DIVISION.

GARIOCH AND ANOTHER (GARIOCH'S TRUSTEES) AND OTHERS.

Succession—Testamentary Writings—Husband and Wife—Mutual Settlement—Power of Survivor to Revoke.

A husband and wife executed a will in favour of the survivor. They subsequently by a codicil provided that in the event of the survivor dying without leaving lawful issue the whole means belonging to the survivor should be equally divided between a relative of the husband and a relative of the wife. The wife having died, the husband executed a will in favour of persons other than the beneficiaries designated in the codicil. *Held* that as there was nothing in the will and codicil to constitute it a contract the husband was not restricted in his testamentary powers, and his will was valid.

Peter Grant Garioch, 74 Clifton Road, Aberdeen, and Alexander Wood, Stonehaven, as trustees and executors appointed by a mutual settlement and codicil of James Garioch and Agnes Wood or Garioch his wife, both deceased, and John Grant Garioch, 16 Roslin Street, Aberdeen, and John Wood, 44 Jasmine Terrace, Aberdeen, the beneficiaries thereunder, *first parties*, and William Gordon Garioch and Peter Adam Garioch, both of 150 Victoria Road, Torry, Aberdeen, as executors appointed by the last will and testament of the said James Garioch, and as individuals, *second parties*, brought a Special Case to decide the question whether the deceased James Garioch was entitled to defeat by his will the destination set forth in the codicil to the above-mentioned mutual settlement, or whether that mutual settlement and relative codicil was irrevocable.

The Case set forth—"1. The said James Garioch and Agnes Wood or Garioch, his wife, executed a mutual settlement dated 25th April 1894, under which they left and bequeathed in favour of the longest liver of them their whole property, means, estate, and effects heritable and moveable, and appointed the survivor of them to be executor or executrix On 22nd October 1894 the said James Garioch and his wife executed a codicil to the said mutual settlement. By that codicil they directed that on the death of the survivor of them without leaving lawful issue, their whole means and estate, heritable and moveable, belonging to the survivor, should be divided equally between their nephews John Grant Garioch, apprentice builder, residing at 20 Broadford Place, Aberdeen, and John Wood, residing at Menzies Road, Torry, there. By that codicil they further appointed Peter Grant Garioch and Alexander Wood to be trustees and executors for carrying out the provisions of the mutual settlement and codicil with respect to the estate of the survivor. The said Peter Grant Garioch, Alexander Wood, John Grant Garioch, and John Wood are the parties of the first part. The said Peter Grant Garioch, one of said executors, and John Grant Garioch, one of said beneficiaries, are brothers of each other and nephews of the said deceased James Garioch, and the said Alexander Wood the other executor and John Wood the other beneficiary are also brothers of each other and nephews of the said deceased Agnes Wood or Garioch. 2. The said Mrs Agnes Wood or Garioch died on 25th September 1915, being survived by her husband but leaving no issue. On her death the said James Garioch, in virtue of the mutual settlement and codicil, uplifted the free residue of the estate of his wife which was wholly moveable, amounting to £83, 9s. 10d. He died on 8th February 1916 without issue, leaving estate wholly moveable amounting to £139, 15s. 9d. 3. The said James Garioch on 6th January 1916 executed a will under which he nominated and appointed William Gordon Garioch, labourer, and Peter Adam Garioch, patternmaker, both residing at 150 Victoria Road, Torry, Aberdeen, 'to be his executors or executor and legatees or legatee.' The said William Gordon Garioch is a nephew of the said James Garioch, and the said Peter Adam Garioch is a son of the said William Gordon Garioch. They are the parties of the second part. . . . 4. Questions have arisen as to the validity and effect of the last-mentioned will, and particularly as to whether the deceased James Garioch was entitled to defeat and has defeated the destination in favour of John Grant Garioch and John Wood set forth in the codicil