and so on. The pursuer says that the event has occurred, and, confining his attention to the Lanemark Colliery only, he says in his condescendence —[*reads condescendence* 10].

Now, I fancy "rates considerably less" means lower rates than those stipulated in the agreement. It would not require any definition to reach that conclusion, the tables of rates for carriage to Troon being lower than those stipulated. Then in condescendence 12 an instance is given, being the instance taken by the Sheriff-Substitute, and on which his judgment proceeds. The rate charged to Lanemark Colliery for 31 miles was 1s. 9d. per ton. That must be reached by a calculation at a certain rate per mile. If it is not less than 1¼d. for the first ten miles, ¾d. for the next ten, and so on, then the rates are not lower than those stipulated in the agreement. If a calculation on those sums does not give you the rates charged to Lanemark, but higher rates, then the Lanemark rates must be lower than the rates stipulated in the agreement. The Sheriff-Substitute has, as your Lordship says, presumably made a calculation, and he says you get 2s. 6d. for 31 miles. It is thus too clear for argument that the event stated in clause 9 has occurred. The company is charging other traders lower rates than those stipulated in the agreement, for if they were charging the same rates they would be charging them 2s. 6d. instead of 1s. 9d. for 31 miles.

The event has then occurred. What is the consequence? Clause 9 specifies it. The first party shall give to the second party—that is, to every individual coalmaster signing the agreement—and these are numerous—a corresponding reduction in the rates charged for their traffic. Now, the object of the present action is to claim such a reduction. The coalmasters say, We aver that you are charging other traders lower rates, and we ask you to fulfil the agreement by making a corresponding reduction in our rates. I cannot conceive a simpler case. The defenders' counsel contended that the agreement as to rates has nothing to do with the rate per ton per mile, but means merely that the railway company undertook not to charge a larger sum to any person for any distance, however long, than they charged the coalmasters with whom they made the agreement, and that so long as they do not do that the coalmasters have nothing to complain of. I think that is an extravagant contention. I do not think nonsense is too severe a term to characterise it.

The only other argument advanced by the defenders is founded on clause 11. I am of opinion that in the facts as stated on record clause 11 has no application. It was plainly not intended to express the whole agreement between the parties and to strike out all the rest of it. According to any argument which has been advanced on it, that should be the effect of it. But sensible men would not make one clause the agreement, cancelling the rest. The meaning of it is this—if the Eglinton Company shall be satisfied that their traffic cannot be carried by the railway company without loss, it is not reasonable to ask them to continue to carry it at the rates stated in the agreement, which are the same as those stipulated in the agreement with the Eglinton Company. But there is a curious manifestation of want of confidence in the integrity of the railway company here by a provision that if they offer an inducement in any form—money or otherwise—to the Eglinton Company to consent to raise the rates payable by them, then the same thing shall be given to the parties to this agreement. But the Eglinton Company do not see their way to pay higher rates than those which they had contracted for, being the same as those stipulated in this agreement, and so clause 11 has no application here. It might have been averred that the Eglinton Company had consented to pay higher rates, and the fact might have been appealed to to compel the parties to this agreement to consent to the same thing. But it was frankly assented to by the defenders' counsel, when I put it, that the only occasion for appealing to this clause was that the Eglinton Company had taken no action under the clause in this contract corresponding to clause 9 in this agreement—that is to say, to enforce a reduction so as to make them equal to other traders from whom the company were exacting lower rates. I do not think that was the meaning of clause 11—to prevent the parties to this agreement enforcing clause 9, if the Eglinton Company were not enforcing the clause in the contract corresponding to clause 9 here.

On the whole matter, then, I concur in the judgment of the Sheriff-Substitute.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Craighill was absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuer (Respondent)—Sol.-Gen. Robertson, Q.C.—Graham Murray. Agents—Gordon, Pringle, & Dallas, W.S.

Counsel for Defenders (Appellants)—Dean of Faculty Balfour, Q.C.—C. J. Guthrie. Agents—John C. Brodie & Sons, W.S.

Thursday, July 16.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

CLYDE *v.* THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY.

Railway—Statutory Powers—Obstructing Traffic—Statutory Penalty—Competency of Ordinary Action—Reparation—Glasgow City and District Railway Act 1882 (45 *and* 46 *Vict. cap. ccxvi*).

A railway company whose lines were to be carried through a large town were bound by their Act to restore portions of the carriageway of any street to be from time to time closed by them for traffic for the purposes of their works within three months from the day on which they should be so closed, under a penalty of £20 for each day for which such portions remained unrestored beyond that period, which penalty should be recoverable in the Sheriff Court on summary application by any proprietor

or tenant in that portion of the street. In course of construction of a line of railway, the company kept the carriageway of a street closed for traffic beyond three months. *Held* that the provision for penalty to be recovered by summary application did not exclude a common law action for damage, caused to the business of an occupier of premises in the portion of the street closed, by the closing of the street for more than the period allowed by the statute.

This was an action of damages raised by John Clyde, licensed broker, 39 Nicholas Street, Glasgow, against the Glasgow City and District Railway company. He averred as follows:—For ten years previously he had carried on business in different premises in Nicholas Street. In May 1883 the defenders commenced the construction of a line of railway, for which they had obtained Parliamentary powers, from the Stobcross Branch of the North British Railway to the Glasgow and Coatbridge Branch. On 1st September they closed the carriageway of Nicholas Street and erected barricades across the street beside the pursuer's premises. On 12th October the street was closed for traffic of every kind.

By section 39th of the Act 45 and 46 Vict. cap. ccxvi., being the Act by which the defenders are empowered to make the said railway, it is provided—"In constructing the railways the company shall restore the portions of the carriageway of any street to be from time to time closed by them for traffic for the purposes of the works, within three months from the day upon which such portions shall respectively be so closed, and they shall be liable to a penalty not exceeding £20 for every day after the expiration of the said period during which such portions respectively shall not be restored, and such penalty shall be recoverable with costs in the Court of the Sheriff of the county of Lanark on summary application by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored."

"(Cond 5) In violation of said section, and in contravention thereof, and notwithstanding that they were not entitled to occupy and close the traffic of said street for a longer period than three months, the defenders illegally and unwarrantably closed, either wholly or partially, for traffic the said street from the said 1st day of September 1883 till the 17th day of March 1884, during which the said portion of the carriageway was not restored. (Cond. 6) In consequence of the defenders having illegally and unwarrantably closed for traffic the said street, and erected a barricade thereon across said street, and beside the premises occupied by the pursuer, for a much longer period than three months, the pursuer has suffered great loss and damage in his business of a licensed broker, and he is still suffering great loss and damage, and he believes his business has been permanently ruined."

He estimated his damage at £50.

The defenders admitted the closing of the street, but denied that it had been kept closed onger than their Act permitted. They also denied that they were liable in reparation to the pursuer.

The pursuer pleaded—"The pursuer having sustained loss and damage by and through the illegal and unwarrantable operations and actings of the defenders, or those for whom they are responsible, and the sum of £50 being a fair and reasonable sum in name of compensation and damages, decree should be granted in terms of the petition."

The defenders stated the following preliminary pleas—"(1) The action is incompetent. (2) As proceedings founded on section 39 of the company's Special Act can only be taken summarily under the provisions of the Summary Jurisdiction (Scotland) Acts 1864 to 1881, the present action is inept and unwarranted, and falls to be dismissed with expenses."

The Sheriff-Substitute (LEES) sustained these two pleas for the defenders, and dismissed the action.

"*Note.*—If this is an action for statutory penalties, then it must be brought under the Summary Jurisdiction Acts, under which the inquiry is of a summary character without record of evidence, or appeal to Sheriff, Court of Session, or House of Lords, but only to the Court of Justiciary on some point of law.

"If, on the other hand, this is an action for damages at common law, I cannot give damages against the defenders for doing what Parliament has allowed them to do. The Legislature has allowed them, in what is supposed to be the public interest, to do what they are doing, but it has said that if they obstruct the streets beyond a certain period, then certain persons (the frontagers) may crave the imposition of a penalty of limited amount. The pursuer asks that I shall extend to him a remedy which Parliament has withheld, and a remedy which, of course, might be, if his plea is sound, of indefinite amount. It is no use to say he is entitled to damages if the defenders do something which their Act does not sanction, for their Act does sanction what they are doing, and if they unduly protract what they are doing the Act has provided what may follow."

The pursuer appealed to the Sheriff, who adhered.

"*Note.*—The penalties can only be sued for by the proprietors or tenants, the very persons who otherwise would claim damages. It seems therefore very difficult to suppose that the Legislature intended that they should recover both under the statute and at common law."

The pursuer appealed to the Court of Session, and argued—The obligation of the defenders to restore in three months was absolute—*Glasgow City and District Railway Company* v. *Hutchison's Trustees*, March 20, 1884, 21 S.L.R. 527; *Idem* v. *Meldrum's Trustees*, July 15, 1884, 21 S.L.R. 778; *Idem* v. *Magistrates of Glasgow*, July 18, 1884, 21 S.L.R. 754;—beyond that time they were in unlawful possession of the street, and he was therefore entitled to reparation for the loss caused by an illegal act on their part. The right to sue for damages at common law and for a penalty under the Act were entirely distinct, and the creation of the latter by the Act could not abrogate the former without express words to that effect. None of the cases relied on by the other side decided the point involved here. In all of them the claim was for compensation for lawful obstruction, and none of them (except

Wilkes v. *The Hungerford Market Company*, November 19, 1838, 2 Bingham's New Cases, 281, which was in pursuer's favour) were at common law, but under clause 6 of the Railway Clauses Consolidation Act.

The defender replied—If none of the authorities directly decided the question here raised, they at least contained distinct expressions of opinion against the pursuer's contention. Where a statute empowered a public company to carry on operations involving the temporary obstruction of a public thoroughfare, and directed a mode of action for damage thereby caused, that necessarily excluded any other form of action. The right to obstruct the thoroughfare was not a common law right, but the creature of the statute, and the remedy which was thereby given for the wrongful use of such a right was equally the creature of the statute, and could only be exercised as therein conferred—*Ricketts* v. *Metropolitan Railway Company*, L.R., 2 Eng. and Ir. App. 175; *Caledonian Railway Company* v. *Walker's Trustees*, March 29, 1882, 9 R. (H. L.) 19; *Metropolitan Board of Works* v. *M'Carthy*, L.R., 7 Eng. and Ir. App. 243; *Scottish Central Railway Company* v. *Cowan's Hospital*, June 12, 1850, 12 D. 999; *Caledonian Railway Company* v. *Ogilvie*, March 30, 1856, 2 Macq. 229. The present action was therefore incompetent. The decision in *Wilkes* was condemned in *Ricketts*.

At advising—

Lord Justice-Clerk—In this case I do not entertain any doubt. I think the action is relevant, and that it should be remitted to proof. Mr Johnstone has brought forward a weighty mass of authority in support of his view, and he maintains that in cases of this kind it is enough if the party in right of the Parliamentary powers is executing them in a *bona fide* manner, even although his occupation of the land may continue beyond the time stipulated and conditioned in the Act of Parliament under which he is acting. I do not quite comprehend on what principle that proposition is established, but it does not appear to me that in the present case there is any room for its application at all. There is no doubt that this railway company has a right to obstruct the carriageway of the streets of Glasgow, but it is provided in regard to that that they shall restore any portion of the carriageway of any street to be from time to time closed by them for traffic for the purpose of their works, within three months of the date in which such portion shall respectively be so closed; and the Act goes on to provide that they shall be liable to a penalty not exceeding £20 for every day beyond the period for which they shall fail to do so.

Now, it follows from this that the time is specific during which that occupation is to be allowed. The provisions of the Act afford no grounds—which there may have been in some of the cases referred to—for saying that the time was indefinite, and that the legal occupation shaded so imperceptibly into the illegal that it was impossible to draw the line sharply between them. Here, on the contrary, the line is quite sharply drawn; they are to be allowed to occupy for three months, and after that a penalty attaches to their act of obstruction, and if a penalty attaches to the act, then the act is illegal. Therefore we start with this, that they, the railway company, were not in legal but illegal possession or occupation, and if they were obstructing the highway by an act of illegal occupation, the obstruction was one which the law did not sanction. That being so, what the pursuer says is this—[*reads articles 5 and 6 of condescendence, ut supra*].

The pursuer's shop is situated in a part of the street which is obstructed in this way. He says the obstruction operates so that his shop is partially closed to the public, the result being that he has suffered personal loss and damage. He believes that his business has been permanently ruined. In these circumstances the question is, whether he is entitled to bring an action to recover for such damage.

Now, I see no reason why, if the company have done an illegal act, the man who suffers thereby should not be entitled to redress. Nor do I think here, any more than I did in the case of *Walker*, which has been referred to, that the fact that other persons may also have suffered can make the slightest difference in the claim of the pursuer for the redress which he himself seeks. I think that is no answer to the pursuer's claim, and it would be very strange if it were. There is no doubt that proximity and ease of access, and the like, are elements in all such questions, and although little heed would probably be given to a claim by an ordinary wayfarer because he was obstructed in going by a particular passage, whereas he might have gone another way, yet I think, that those who have business premises in the street the access to which is obstructed stand entirely in a different position. Nor do I say what the result might be if the injury were more remote. All I say is, that the personal injury having been suffered by the pursuer here in consequence of an illegal act on the part of the defenders, I see no reason whatever why that illegal act should not have the ordinary result in liability on the part of the defenders to make good the damage which may be shown to have been suffered.

I do not think it necessary to say any more. The authorities which have been cited to us are not all consistent. On the contrary, one may with accuracy say that they are perplexing. But I have stated the result to which I propose in the circumstances of this case we should come.

Lord Young—I entirely agree, and I do not think the case attended with any considerable difficulty. Indeed, my difficulty is to follow the learned Sheriffs in sustaining these two pleas of the defenders. The first of these pleas is that the action is incompetent, and apparently the case that is pleaded is, that the action is one for penalties, and should be brought under the Summary Procedure Act. But it is not an action for penalties at all, and would have been incompetent under the Summary Procedure Act. I have no hesitation in repelling that plea.

The next plea which the Sheriffs have sustained is—[*reads*]. A claim of damages could not have been brought under the Act, and how is it incompetent either in its own nature or because it should have been brought under the Act I do not understand. But the Sheriff-Substitute says—"I cannot give damages against the defenders for doing what Parliament has allowed them to do. The Legislature has allowed them, in what is supposed to be the public interest, to do what

they are doing, but it has said that if they obstruct the streets beyond a certain period, then certain persons (the frontagers) may crave the imposition of a penalty of limited amount. The pursuer asks that I shall extend to him a remedy which Parliament has withheld, and a remedy which of course might be, if his plea is sound, of indefinite amount. It is of no use to say he is entitled to damages if the defenders do something which their Act does not sanction, for their Act does sanction what they are doing." Now, the Act, so far from sanctioning it, prohibits what they are doing, for the averment is that the railway company obstructed by partially closing this street from the beginning of September, and entirely closed it from 12th October to 17th March.

Now, does the Act of Parliament sanction that? Not at all. It sanctions it for three months, but beyond that it not only does not sanction it, but prohibits it very emphatically. It says the closure is not to continue more than three months. Beyond that the authority of the statute is withdrawn. But it enjoins something besides; it enjoins restoration within or at the end of the three months. Now, the prohibition was violated, and the injunction to restore was set at naught. Therefore the statute does not sanction what has been done. It is an illegal act which they have done, subjecting the wrongdoer to a penalty. To say that the Act of Parliament sanctions what it prohibits, and subjects to a penalty for the doing of it, is a very strange proposition. The Legislature, I repeat, sanctions the obstruction for three months, and there is no action for that time, but beyond that time the Legislature declared the doing of that thing to be illegal.

The pursuer is a shopkeeper in the immediate vicinity of the obstruction, and he says he has suffered damage by this illegal act. Now, I think it is a general proposition, from which there is no exception, that if a party avers damage resulting to him from the illegal act of another he is entitled to compensation. The damage may be too remote. It is hardly suggested that it is too remote here; it is indeed so close as this, that the damage results to a shopkeeper from preventing his customers having access to his shop. That is not remote or consequential damage in the sense in which that expression is generally used. You illegally stop the access to a man's shop; that is a wrong, and the expected, natural, and immediate consequence is that his business is injured. This pursuer avers that, and offers to prove it. I think that is a perfectly relevant action of damages, and I am of opinion that the pursuer is entitled to prevail at this stage of his case. I do not think that we have much to do with cases about railway compensation, which are somewhat perplexing. I expressed at some length my own view in the case of *Walker*, which went to the House of Lords. There compensation was allowed to be ascertained in a manner prescribed by statute for the lands being injuriously affected by the operations conducted under the statute. The operations are quite lawful and authorised by the statute, but they are authorised upon the condition that compensation should be paid to those whose lands or properties are injuriously affected thereby. The first occasion of stumbling in dealing with these cases arose from the case of *Ogilvy*, but, as I endeavoured to point out in the case of *Walker*, and in the course of the argument to-day, the difficulty which that case presented arose from the House of Lords affirming that Ogilvy's land was not injuriously affected by a railway crossing a public road upon the level in the immediate vicinity of his entrance gate. I should hardly have said that was a legal proposition at all. I should have thought it a question of fact. But if that is a question in law—and the House of Lords found in point of law that the estate was not injuriously affected—then the case of *Ogilvy* goes no further than that in point of law a man's estate is not injuriously affected by an interruption to his access which diminishes the market value of his property. Beyond that it is no more than this, that the man whose estate is not injuriously affected shall have no claim for damages. But we have really no concern with that class of cases here, and I only notice it because of some *obiter dicta* suggesting a test—a partial test at the best—in the opinion of Lord Cranworth, of a right of action at common law, if the statute had not authorised the thing occasioning the damage alleged. I do not think that is a useful test at all. I do not see the utility of that test. Lord Cranworth, who had suggested it, plainly thought it a useful one on some views which I have failed to apprehend, but he intimated, on the contrary, a very clear opinion that if a public road or street was illegally obstructed—that is, without the authority of statute—every member of the public who is obstructed in his passage would have an action of damages at common law, and I really cannot for a moment doubt that. To say that a man may be illegally obstructed in his passage along a public road without having any claim for compensation against the obstructor is to my mind extravagant. For instance, a wall may be put across a public road which interrupts a man in a journey, on the completion of which his fortune may largely depend; it may be done on purpose. It is not an assault, but he is obstructed and cannot get on. Now, the man who has done that is surely liable to him in damages. Lord Cranworth has no doubt of it whatever. He says, as often as you have the obstruction, as often will you have the action of damages, and the wrongdoer cannot plead that there were others besides you who suffered. Because he has injured them all it is no answer to say that he is not liable to any one of them. I should have thought it a typical case that a shopkeeper in a street has his business damaged or destroyed by illegal operations in the street which compel him to shut his shop by preventing access to it. It is only a sum of £50 that is asked here, and one would not suppose the amount of business damaged to be very large. But that is the pursuer's own estimate of it, and people do not generally under-estimate claims of this kind. That, however, is not the point. Upon the principle of the thing, to say that a shopkeeper whose business is destroyed by illegal obstruction on the street has not a claim against the wrongdoer is a proposition which I cannot for a moment entertain.

I am therefore clearly of opinion that these pleas which the Sheriffs have sustained ought to be repelled, and the case remitted to them to proceed as accords of law.

Lord Rutherfurd Clark—I concur. I must

say I was a good deal instructed by the amount of authority cited against the competency of this action, but however much I may be moved by that authority, I must look upon the opinions we have had quoted to-day as mere *obiter dicta*. I am on that account inclined to follow the opinions which have been delivered by your Lordships.

Lord Craighill was absent.

The Court pronounced this interlocutor:—

"The Court sustained the appeal and recalled the interlocutors of the Sheriffs, repelled the two pleas for the defenders above quoted and remitted to the Sheriff with instructions to proceed as accords."

Counsel for Pursuer (Appellant) — Rhind — Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defenders (Respondents)—R. Johnstone—R. V. Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, July 16.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

AULD *v.* GLASGOW WORKING-MEN'S PROVIDENT INVESTMENT BUILDING SOCIETY.

Building Society—Withdrawal from Membership—Rules—Casus improvisus—Ultra vires.

A registered building society, which consisted, *inter alios*, of investing members who were entitled under the rules to withdraw from the society and receive payment of the sums at their credit on giving certain notice, found itself exposed to the risk of losses owing to serious depreciation in the value of the properties held by it in security for advances made in the course of its business. The rules of the society contained no provision for such an event. The society at an annual general meeting adopted by a majority a resolution to make a deduction from the shareholders' accounts at the rate of 7s. 6d. in the pound, which was carried into effect by debiting each shareholder at that rate on his account, and carrying the amount so brought out to a suspense account. Thereafter a shareholder who objected to this course claimed to be paid out under the rules, on the footing that the resolution was *ultra vires*, and that the deduction could not therefore be made. *Held* (*diss.* Lord Justice-Clerk) that the course adopted was not *ultra vires*, and that the pursuer was entitled to payment only of the sum at his credit under the deduction.

The Glasgow Working-Men's Provident Investment Building Society was a building society incorporated under the Building Societies Act 1874, having its office in Glasgow. The object of the society, as stated in its rules, was to afford a safe and ready medium for the investment of the savings of the middle and working classes, and to make advances on heritable security and to provide means to enable members to improve, erect, or purchase dwelling-houses and acquire heritable property. The shares were of two kinds, £10 shares and £25 shares, which were paid up at 6d. per week till realised, or which might be paid up in one sum. The society also received deposits from members or others in accordance with certain provisions specified in its rules. Members were either "advanced" or "unadvanced," the liability of the former being fixed by the rules as the amount actually paid or in arrear on his shares, and that of the latter being the amount payable on his shares under any bond granted to the society or under the rules.

Rule 8 provided that each member should be furnished with a copy of the rules and a pass-book, in which all payments should be entered and initialed by such persons at the head office as may be authorised to receive the money, and that these entries so initialed should be binding on the society.

Rule 10 was as follows — "*Withdrawal of Members and Payment of Interest.* — Any member holding a share or shares upon which no advance has been made, may withdraw the whole or any portion of the sum at his credit twenty-eight days after he shall have given notice of his intention to do so, and left his pass-book at the office. On funds being realised, such members shall be paid in rotation according to the priority of their notices, and interest shall be allowed at the rate of four per cent. per annum, or such other rate as may be fixed from time to time by the directors from the last division of profits up to the date of such notice. On withdrawing in full the pass-book shall be given up."

"Rule 12. *Payment of Realised Shares.*—Members shall be entitled to receive payment of their shares when realised, as the funds of the society permit, in rotation, according to the dates of their applications therefor, provided no unpaid advance has been made thereon; and the society shall be entitled any time after the shares have been realised to pay them off."

"Rule 44. *General Meetings.*—A general meeting of the members shall be held annually in the month of March or April, for ordinary business, and a report and statement of accounts, with a balance-sheet for the year ending 18th Feburary preceding, shall be submitted; such report and balance-sheet having been previously printed and a copy sent to each member four days at least before the meeting." . . .

Rule 45 made provisions for the calling of special meetings.

"Rule 49. *Appropriation of Surplus.*—If at the annual balances a surplus profit remains after providing for expenses of management and interest on the accounts of investing members and depositors, such surplus shall be carried to the account of a general reserve or guarantee fund, which fund shall be available for the purposes of the society." . . .

James Auld, engineer in Glasgow, was an investing or unadvanced member of the society. After the failure of the City of Glasgow Bank in 1878 the society began to get into financial difficulties from many of the investing members withdrawing their money, and the society having to assume the management of the properties of borrowing members who had become bankrupt.