Thursday, November 29.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MURRAY *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Railway—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 83—*Rates—Undue Preference.*

The Railway Clauses Consolidation Act 1845 provides that all tolls, &c., charged by a railway company shall be charged equally to all persons, "in respect of . . . all goods . . . of the same description, and conveyed . . . only over the same portion of the line of railway under the same circumstances." *Held* that this provision only applies to cases in which the traffic is over precisely the same distance, and therefore does not prevent the railway company from lowering the rate per mile in favour of goods which pass over the same portion of the line as those of another trader for whom no reduction is made, but are carried for a greater distance than the goods of that trader.

Undue Preference — Recovery of Alleged Overcharge—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *secs.* 3 *and* 6—*Regulation of Railways Act* 1873 (36 *and* 37 *Vict. cap.* 48), *secs.* 1 *and* 6.

A railway company for many years carried goods of the same class over the same line for A and B, B's goods being carried further than A's. The rates charged to each were within those allowed to be charged by the company, but that charged to B was less than that charged to A. After this course of dealing had ceased an action was brought against the company by the assignee of A to recover the difference between the sum which he would have paid had he been charged at the same rate as B and that actually paid. The Court *assoilzied* the defenders, *holding* that on the pursuer's statement the case was one of illegal preference to B, for which the only remedy provided by the statutes was an application, during course of dealing complaint of, for interdict against its being continued.

By section 83 of the Railways Clauses Consolidation (Scotland) Act of 1845 it is provided, on the narrative that it is expedient that the company should be enabled to vary the tolls so as to suit the circumstances of the traffic, but that such power should not be used so as to prejudice or favour particular parties, or unfairly create a monopoly in the hands of the company or particular parties—"That it shall be lawful for the company, subject to the conditions and limitations herein, and in the Special Act contained, from time to time to alter or vary the tolls by the Special Act authorised to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway, under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

The Railway and Canal Traffic Act 1854 provides, by sec. 2, that no railway or canal company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice in any respect whatsoever," &c. Sec. 3 provides—"It shall be lawful for any person complaining of . . . any contravention of this Act to apply in a summary way . . . in Scotland to the Court of Session . . . and if it be made to appear to such Court . . . that anything has been done or omission made in violation or contravention of this Act by such company, . . . it shall be lawful for such Court to issue a writ of injunction or interdict restraining such company from further continuing such violation or contravention . . . and in case of disobedience of any such writ of injunction or interdict . . . such Court may, if they shall think fit, make an order directing the payment . . . of such sum of money as such Court . . . shall determine, not exceeding for each company the sum of £200 for every day after a day to be named in the order that such company . . . shall fail to obey such injunction or interdict." . . . Section 6 provides that "no proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law."

The Regulation of Railways Act 1873 provides, sec. 4—"For the purpose of carrying into effect the provisions of the Railway and Canal Traffic Act of 1854, and of this Act, it shall be lawful for Her Majesty . . . to appoint not more than three commissioners . . .;" and sec. 6 provides that "Any person complaining of anything done . . . in contravention of section 2 of the Railway and Canal Traffic Act 1854, or of section 16 of the Regulation of Railways Act of 1868, or of this Act . . . may apply to the commissioners . . . and they shall have and may exercise all the jurisdiction conferred by section 3 of the Railway and Canal Traffic Act 1854 on the several courts and judges empowered to hear and determine complaints under this Act . . . and the said courts and judges shall, except for the purpose of enforcing any decision or order of the commissioners, cease to exercise the jurisdiction conferred on them by that section."

This was an action raised in the Sheriff Court of Lanarkshire at Glasgow by Alexander Murray, cement merchant, Glasgow, as assignee of John Wilkie, lime-burner, Greenock, to recover payment of £664, 15s. 4d. from the Glasgow and South-Western Railway Company, which sum it was alleged the defenders had charged Wilkie in

excess of the rates charged to other similar traders, and had thereby constituted an illegal and unjustifiable inequality of charge against him.

It was admitted that Wilkie carried on business as a lime-burner and cement merchant at Thirdpart, Gatehead, Ayrshire, from 1872 to 1880, and that for the purposes of his trade he imported from Ireland and elsewhere large quantities of limestone, which he delivered to the defenders to be carried from the railway stations at Troon, Ardrossan, Irvine, and Ayr to his works at Thirdpart, a distance of eight miles. During the time in question the quantity of limestone so carried amounted to more than 30,000 tons, of which that carried from Troon amounted to 26,590 tons. The works to which the lime was conveyed were connected by a private branch railway with the line of the Kilmarnock and Troon Railway, which formed part of the defenders' system. The rates charged were 2d. per ton per mile. The distance from Troon to the point at which Wilkie's private railway joined the defenders' line was eight miles. The cost of carriage was thus 1s. 4d. per ton, and adding 1d. per ton for the working of the private railway, the total rate was 1s. 5d. per ton. It was further admitted that during part of the same period the company carried quantities of limestone for the Eglinton Iron Company from Troon to that company's Ironworks at Hurlford, near Kilmarnock, a distance of twelve miles, and that the rate charged was 1¼d. a-mile for each ton, or 1s. 3d. per ton for the whole twelve miles. This traffic passed over the same line as Wilkie's for the distance from Troon to the commencement of Wilkie's private branch.

The pursuer alleged that this limestone carried for the Eglinton Company was of the same description as that carried for Wilkie, and was carried in trucks of the same kind, and that the services performed were the same as those performed for Wilkie. He also averred that Wilkie discovered in 1877 the arrangement with the Eglinton Iron Company and objected to it, and claimed repetition of overcharges, but the defenders having refused to consider his complaint, he was forced, under protest and reservation of his claim, to continue to pay the rate charged; further, that the rates charged constituted an illegal inequality of charge against Wilkie and an undue advantage to the Eglinton Company, and that if defenders had charged him for the distance his lime had to be conveyed at the same rates at which they charged the Eglinton Iron Company, 11d. (including 1d. for the private branch) per ton, and not 1s. 5d., would have been the amount payable by him. A deduction of this alleged overcharge of 6d. per ton from the price paid for the carriage of 26,590 tons was, the pursuer brought out, a sum of £664, 15s. 9d. as the total amount of the overcharge, being the sum sued for.

He pleaded—"(1) The defenders not being entitled to vary their rates so as to prejudice or favour particular parties, or to charge unequal tolls or rates for similar traffic over the same railway, or to make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor to subject any person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, were not justified in charging to the said John Wilkie higher rates per ton per mile than they charged to the Eglinton Iron Company."

The defenders averred, that whereas Wilkie received the limestone for burning and re-selling as lime, the Eglinton Iron Company received the limestone for calcining iron, and that thus the parties were not in any way in competition.

They pleaded—"(1) It being incompetent for the Sheriff Court to declare that the rates charged by the defenders constituted an undue or unreasonable preference or advantage in favour of the Eglinton Iron Company, or an undue or unreasonable prejudice or disadvantage to the said John Wilkie, the action should be dismissed with expenses. (4) The pursuer's statements are irrelevant, and insufficient to support his plea."

On 20th June 1883 the Sheriff-Substitute repelled the defenders' first plea-in-law, and allowed a proof.

"*Note.*—It is difficult to understand the plea which has been repelled. The defenders are surely aware that the jurisdiction created by the third section of the Railway and Canal Traffic Act, and now vested in the Railway Commissioners, in no way interferes with the common law right of the lieges to claim repayment of moneys which they have been wrongfully compelled to pay.—See *Sutton* v. *Great Western Railway Company.*, L.R., 4 H. of L. 446, 38 L.J. Ex. 177; *Lancashire Railway Company* v. *Gidlow*, L.R., 7 H. of L. 517, 45 L.J. Ex. 625; *Evershed* v. *London and North-Western Railway Company*, L.R. 3 App. Ca. 1029, 48 L.J. Q.B. 22."

The defenders appealed to the Sheriff, who on 30th October 1883 issued the following interlocutor:—"For the reasons assigned in the subjoined note, recals the interlocutor appealed against: Repels the pleas for the defenders in so far as preliminary, reserving their effect on the merits; and before further answer allows parties a proof of their averments, and to each a conjunct probation, and remits to the Sheriff-Substitute for further procedure.

"*Note.*—Many, probably all, the pleas stated for the defenders can only be dealt with in a satisfactory way when the whole facts are before the Court. I have therefore thought it safer to leave the legal question undetermined until the facts are ascertained."

The defenders appealed to the Court of Session, and argued—If the action were brought under the Act of 1845, then it was irrelevant, because the provisions of that Act only applied in cases where under identical circumstances different rates were charged by the railway company, which was not the fact in the present case. If, on the other hand, the action was brought under the Act of 1854, then the proper tribunal to go before was the Railway Commissioners, to whom by the Act of 1873 the jurisdiction was transferred from the courts of law. The goods of the two parties were not carried "only over the same portion of the line," nor were they carried the same distance, and this precluded the pursuer from the benefit of the statute of 1845. The right to get repayment of alleged overcharge was a statutory and not a common

law right, for the offence was statutory. It might be necessary subsequently to get an order of the Commissioners enforced by courts of law, but it was necessary in the first place to go before the Commissioners and make out a case of undue preference—See Hodge on Railways, 471; Deas on Railways, 432 and 502; *Finnie* v. *Glasgow and South-Western Railway Company*, March 10, 1853, 15 D. 522—*aff.* 2 Macq. 177; *Birmingham Railway Company*, August 8, 1840, 2 Rail. Ca., 124; *in re Caterham Railway Company*, November 20, 1857, 1 C.B. (N.S.) 410. The present action was clearly irrelevant, because these statutes were for the benefit of traders, while the present pursuer was not a trader, but only held an assignation to a money claim.

The respondent argued—A relevant case for inquiry had been stated upon record. The rates had been paid at first in ignorance, and it was not until after the overcharge had long been exacted that the rates paid by the Eglinton Iron Company had become known. The goods carried by the company for both traders were over the same line of railway, but they were carried four miles further for the Eglinton Iron Company. There was no decision under the Act of 1845 as to equality of tolls or rates for goods carried over the same extent of rail, for *Finnie's* case was not under the Act of 1845 but under a Special Act. The malpractice having been given up for some time rendered it impossible to go before the Railway Commissioners, who could only deal with existing contraventions, and who could only grant interdict, and not a declarator. In *Eversheď's* case there was a continuing contravention, and therefore the parties went before the Commissioners. The present action was competently brought in the Sheriff Court—Ersk. i. 11, 7. It was brought under both statutes, but especially under the Act of 1854. The words "no proceedings" in section 6 of that Act clearly meant no proceeding of the kind referred to in the previous sections, but by the following clause all rights to redress are plainly reserved.

Authorities—Cases cited by Sheriff-Substitute; *Hozier* v. *Caledonian Railway Company*, 17 D. 302.

At advising—

Lord President—The pursuer in this case is the assignee of John Wilkie, lime-burner, Greenock, who in the course of his business imported large quantities of limestone, which were carried by the defenders over a portion of their line of railway between 1872 and 1880, and the allegation of the pursuer is, that during this period Wilkie paid rates for carriage in excess of those charged to rival traders to the extent of £664, for which sum he now seeks in the present action to obtain repayment.

His claim is rested upon two Acts of Parliament, namely, the Railway Clauses Consolidation (Scotland) Act 1845, and the Railway and Canal Traffic Act of 1854.

These two statutes require to be considered separately, because the grievances which they were severally intended to redress, and the remedies which they provide, are materially different. Thus section 83 of the Act of 1845 enacts that the company may alter or vary tolls, "provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all . . . goods of the same description . . . passing only over the same portion of the line of railway under the same circumstances." . . . Now, the pursuer's averments on this matter are as follows—"(Cond. 5) The said traffic passed over the same line of railway as the said John Wilkie's traffic passed over as far as the point of connection with the private branch leading to the said John Wilkie's works, and a distance of about four miles further, the distance from Troon Station to the said point of connection with the said John Wilkie's private branch railway being about eight miles, and to the said ironworks being about twelve miles. The limestone of both parties was of the same description, conveyed by trucks and engines of the same kind, and the services rendered by the defenders to the said Iron Company and to the said John Wilkie were precisely similar." Now, that is a perfectly relevant averment if the meaning of this section of the Act of 1845 is to be held to be that the traffic carried for the different parties is to be conveyed under the same circumstances and over the same portion of the line, but if the meaning of the Act is that the traffic must be for the same distance, then the averment is not relevant.

I think that the latter is the true construction of the statute, and I come to this conclusion from the use of the word "only" in this section, for the traffic must be "only" over the same portion of the line — over indeed precisely the same distance. Now, no doubt the effect of such a construction is to narrow the scope of the statute, and perhaps in some degree even to destroy its usefulness. It was in these circumstances that the Act of 1854 was passed, because it was felt that there were so many varying conditions, trifling in themselves, in which it might be made out that there was irregularity, and thereby admitting of a variation of tolls.

But when we come to consider the effect of the Act of 1854 in a case such as this, the question before us becomes one of considerable importance. The grievance which was sought to be remedied by section 2 of that statute is called "undue preference in receiving and forwarding traffic"—a designation in many respects somewhat vague, and accompanied by legislation both new and anomalous. The provisions of section 2 are—"That no railway or canal company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice in any respect whatsoever."

Now, I am not prepared to say that the pursuer has not stated a case that is capable of being remedied under this section; on the contrary, I think that he has stated a relevant case to go to proof upon, and has disclosed sufficient to show that the effect of what the railway company did in exacting the rates complained of was to put Wilkie at a disadvantage in competing with the Eglinton Iron Company.

But the question comes to be, whether the present process is competent under the Act of 1854—that is to say, whether this is not an action for rates paid to a railway company, and levied by

them under their statutory powers, and whether the overcharge which is here alleged can be recovered by an action at law? The remedy provided for any contravention of the statute is detailed in section 3, which makes it lawful for anyone complaining against any railway company contravening this Act to apply summarily, in Scotland, to the Court of Session, and if it appears to the Court that the Act has been contravened an injunction or interdict is to be issued restraining the company from continuing the contravention under a penalty not exceeding £200 a-day. Now, this is a very special remedy, which is provided for the wrong contemplated by the second section. The ordinary mode of procedure in such a case would undoubtedly be by means of an action of suspension and interdict, and in the event of a breach of interdict, a petition, with the concurrence of the Lord Advocate, which would be followed if necessary by fine and imprisonment. But by the provisions of this statute any company contravening is to be charged a pecuniary amount for every day which they continue the contravention. Now, this is a statutory and not a common law remedy, and the question accordingly comes to be, whether there is to be any other kind of redress than that which the Act provides? It is the redress of a pecuniary wrong committed by a railway company against a trader, and there can be no doubt that he can put a stop to the wrong in a very summary manner, but if he does not choose to avail himself at the time of the remedy provided by the statute, but goes on to pay, can he, some time after the alleged overcharge has ceased, bring an action for repayment of the amount which he maintains he has been overcharged? It may be observed in passing that there are various other modes in which undue preference may be granted by a railway company to one trader over another than the charging of different rates for the conveyance of goods over the same portion of the line. There might, for example, be greater facilities in the transport of goods given to a favoured trader, and the question would really come to be, whether an action of damages will lie for all undue preferences under section 2? But are the payments which have been exacted here really overcharges? I do not think so. They were, I think, quite within the rates which the company were entitled by statute to charge, and accordingly the question would rather seem to be, whether the Eglinton Iron Company were not undercharged, and thereby unduly favoured, and therefore it is a fallacy to call this a *condictio indebiti*. The goods were carried by the railway company within the statutory rates, and that being so, there can be no overcharge, but it is said that somebody has been undercharged, and has thus got an undue advantage.

If, then, the matter had stood entirely upon sections 2 and 3, I do not think that we could have entertained this action, but reference has been made to section 6, which provides that "no proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway company . . . under the existing law." An ingenious argument was maintained to us founded on this section, but I think that an action of damages or pecuniary redress for contravention of section 2 of the Act of 1854 will not lie.

The only difficulty which I have had in the matter arises from the case of *Evershed* v. *London and North-Western Railway Company*, to which we were referred. There it was held that gratuitous carting by a railway company of goods belonging to three firms of brewers was an undue preference, and that the plaintiff, who was a rival brewer, was entitled to recover the amounts paid by him to the company for cartage of goods between his premises and the company's station. In this case the complaint was laid under both statutes, and it was the opinion of all the Judges that both statutes had been violated. In the subsequent stages of the case there is considerable confusion caused by the mixing up of the two statutes which we are here dealing with, and especially in the House of Lords—the two first noble and learned Lords who delivered opinions in the case humbly appear to me to confuse the two Acts, while the other two base their judgment upon the Act of 1845. In these circumstances I cannot consider the case of *Evershed* as an authority upon the present question. I have already explained why I think this action cannot lie under the Act of 1845, and I think it is also precluded by the sixth section of the statute of 1854.

Lord Deas concurred.

Lord Mure—I am of the same opinion. This action is for the repetition of overcharges which the respondent alleges were made by the appellants on goods of his carried by them over their line of railway, and we have the whole facts of the case very distinctly narrated in the condescendence. It is not alleged that the rates charged by the railway company were in any way in excess of their statutory powers, but rather that in carrying goods over a certain portion of their line they considerably undercharged the Eglinton Iron Company, and thereby gave that company an undue preference over the respondent's cedent, Wilkie. The question which we have to determine is, whether the remedy which is here sought is one competent under the Act of 1854, and if not competent under that statute, whether it is competent under the Act of 1845? I think that under the Act of 1854 a relevant case has been stated on record, but under sec. 3 of that statute a special remedy is provided for all grievances arising from a contravention of its provisions, and in this respect the Act materially differs from sec. 83 of the statute of 1845. The only competent mode of redress is to go to the appointed tribunal while the grievance complained of is still continuing. That tribunal was formerly the Court of Session, which was empowered by the Act of 1854 to issue an interdict restraining any contravention of it by giving undue preference, but the Court of Session has no longer any jurisdiction to entertain such a question, for by sec. 6 of the Regulation of Railways Act of 1873 the jurisdiction of the courts of law is transferred to the Railway Commissioners. A question still remains, whether the present action of repetition is competent under the Act of 1845? Now, as regards the Act of 1845, I agree with your Lordships in

thinking that the provisions in sec. 83 that there must be equality of rates when the goods are conveyed "only over the same portion of the line of railway" excludes the respondent from any right of action under that statute.

LORD SHAND—I think that both the Sheriff-Substitute and the Sheriff have by their judgments not only omitted to draw any distinction between the two statutes in question, but seem to have concurred in sending the case to inquiry under both Acts. I am of opinion that under neither Act will any action lie against the company on the questions raised in this record. If under the Act of 1845 a relevant case had been stated, it could undoubtedly have been dealt with in the Sheriff Court, but I am clearly of opinion that by the language of that Act the jurisdiction of the Court is excluded in a case like the present. The words of the Act of 1845 are—[*His Lordship here read sec.* 83 *of Act* 1845 *above quoted*]. Now, the true meaning of these words undoubtedly is, that the goods must be carried on precisely the same journey from the same place and to the same place, and if the distance is at all greater, then the provisions of this section do not apply. The word "only" leaves the company quite free, I think, to reduce the rates per ton, if they feel so disposed, whenever the distance is greater, and under the Act of 1845 it is only when the distance is precisely the same that no advantage is to be given to one trader over another. Now, in the present case the works of the Eglinton Iron Coy. were four miles further from the starting point than those of the respondent, and in that state of the facts I cannot see how the provisions of sec. 83 of the Act of 1845 can have any application.

Then as to the Act of 1854. In it the Legislature give wider enactments as to what is meant by undue preference, but the nature of the remedy is also very precisely defined. It is limited in its character, and consists of staying alleged contravention in a summary method by way of interdict and penalties, which are fully detailed in its different sections.

The 6th section, which is of importance here, provides that "no proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law." Now, while this section authorises proceedings by way of interdict, it does not, as far as I can see, allow of or provide for any action for overpayments, and any doubt upon this point is removed by what follows in the latter part of the section. I think therefore that it comes to this, that by the Act of 1845 certain remedies were provided for cases falling under the conditions therein specified, and these remedies remain still in force, and that certain other remedies were provided by this statute for the contravention of any of the provisions detailed in it, but that no provision was made for a case such as that now presented to us, and therefore that neither under the one statute nor the other has the respondent any remedy.

With regard to the case of *Evershed* referred to by your Lordship, I think it sufficient for its disposal to say that I hold that it was decided under the Act of 1845.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and assoilzied the defenders.

Counsel for Appellants—Lord Advocate (Balfour, Q.C.) — Mackintosh — Guthrie. Agents — John Clerk Brodie & Sons, W.S.

Counsel for Respondent — Trayner — Lang. Agent—Thomas Carmichael, S.S.C.

Friday, November 30.

FIRST DIVISION.

[Exchequer Cause, Lord Fraser, Ordinary.

LORD ADVOCATE *v.* EARL OF FIFE.

Revenue — Succession—Succession Duty—Policies of Insurance——Consideration in Money or Money's Worth—Succession Duty Act 1853 (16 *and* 17 *Vict. c.* 51).

The heir-presumptive to entailed estates who would have been entitled on succeeding to the estates to acquire them in fee-simple, entered into an agreement with the heir in possession, whereby the estates were disentailed, and the debts of the heir in possession, which had been secured by policies of insurance on his life, were charged upon the fee-simple, the policies being conveyed to trustees. By a subsequent agreement the heir-presumptive took over the estates under burden of the debts of the heir in possession, of payment of an annuity to him, and of the upkeep of the mansion-houses. On the other hand, he received, besides the conveyance to the estates, an assignation to the insurance policies over the life of the heir in possession, without any obligation to keep them in force, which, however, he elected to do. The heir in possession having died, the Crown claimed succession duty on the amount recovered under the policies, on the ground that the sum contained in them formed a succession within the meaning of the Succession Duty Act 1854. *Held* that the transaction must be taken as a whole, and that the heir-presumptive had given valuable consideration for the policies in consenting to the disentail and allowing the debt to be charged on the estate, and *therefore* that no succession duty was exigible.

This was an action in which the Crown sought to recover the sum of £4750 from the Earl of Fife in name of succession duty, at one per cent. on £475,000. The claim was made in the following circumstances:—The late Earl (the father of the defender), who died in 1879, was heir of entail in possession of large estates in the counties of Aberdeen and Banff, but he had incurred a very considerable amount of personal debt, and a variety of arrangements were entered into at different times by which that debt might be liquidated, while the interests of all parties were preserved.