this lease as if the said buildings, plant, and machinery had been erected by him after the date hereof in virtue of the powers herein contained." This provision refers forward to another clause in the lease, which runs as follows — "And further declaring that at the termination of this lease the first party shall have right, if he think proper, to purchase the whole or any part of the buildings, plant, or other apparatus belonging to the second party at a valuation to be made by two men of skill mutually chosen, or by an arbiter appointed by the Sheriff of Stirlingshire for the time being. In the event of the first party not electing to purchase any or all of the said buildings, plant, or apparatus, then the second party shall be allowed a period of six months beyond the termination of the lease to remove same within three months thereafter," &c. Now I do not think I am concerned to inquire or speculate as to how the lease came to be framed in such terms. The fact is, that for one reason or another the lease is so conceived as to invest the tenant with a large amount of buildings, fittings, &c., as by way of tenant's fixtures, removeable by him if not paid for by the landlord, for which he paid no price or gave any consideration apart from the royalties exigible on the output of minerals.

The next matter founded on is a clause which gives the tenant right to work minerals of other lands from pits made in the first party's lands, and to use any tramways or railways made by himself above or below ground for the conveyance of such other minerals. No wayleave or payment of any kind is stipulated for in respect of this right. Such a right is, of course, not uncommonly given in mineral leases, but it is quite out of ordinary course to give it gratuitously. No doubt the tenant's obligations, generally, might in a particular case be such as to be adequate to cover the granting of the right without any specific payment in respect of it. But that cannot be said here.

The next matter is a clause relating to surface damage, which binds the tenant to pay to the landlord "for the rights of himself and his tenants the farm rental per acre for any land damaged or required beyond that already taken up." It is objected, and I think justifiably, that the amount of the farm rental does not represent reasonable compensation in respect of such damage.

The last matter specially founded on is a clause which gives the tenant right to use whatever sand or freestone he may find in the workings, or rather the bounds of the lease, for his own use in connection with the erection of dwelling-houses or other buildings on the estate, and that without paying any lordship therefor. The previous lease gave right to the tenants to take sand and freestone, but that from places to be pointed out by the landlord, and the taking was to be only "for the use of the colliery." Both of these limitations are omitted from the present lease with the result of giving the tenant right to take sand and freestone wherever he pleases, and to any extent, and for the purpose of putting up buildings or erections of any kind, whether connected with the colliery or not. He might thus obtain without payment sand and freestone for erecting, say, rows of miners' houses to be let to miners working at adjoining collieries.

Such being the features of the lease to which exception is specially taken, the question for determination is whether, viewing them all together, they do not take from the lease the character of being a fair exercise of the ordinary power of administration which, *ex hypothesi*, the proprietor retained notwithstanding his having disponed the lands in security to the bondholder. The parties are agreed on the character of the test to be applied. In my opinion the lease, having regard to these various features in it, does not answer to the description of fair ordinary administration, but is one which unfairly trenches on the bondholder's security. The provisions of the lease, as I have already remarked, were not conceived with any actual regard to the conservation of the bondholder's interest, but mainly, I think, with the object of making it a favourable and attractive one from the point of view of outsiders who might be solicited in one mode or another to take up the tenant's interest under it. And it appears to me that the result has been to make a lease which it would be an injustice to the bondholder to support against him. On the assumption of this view being right, it is agreed that the conclusions of the summons at Mr Reid's instance formulate suitably, in the circumstances, the remedy to which he is entitled. I shall accordingly grant decree in his favour in terms of these conclusions.

Counsel for the Pursuer—Wilson, K.C.—Wilton. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender — M'Lennan K.C.—Lippe. Agents—Wishart & Sanderson, W.S.

Wednesday, July 10.

OUTER HOUSE.

[Lord Cullen.

THOMSON *v.* THOMSON.

Process — Divorce — Adultery — Intimation of Action to Person with whom Adultery Alleged—Act of Sederunt, 17th July 1908, *sec.* 1.

The Act of Sederunt of 17th July 1908 enacts—Sec. 1.—"In every action of divorce on the ground of adultery in which appearance has not been entered, and in which the person with whom the defender is stated to have committed adultery has not been cited as a co-defender, the Lord Ordinary before whom the action depends shall, before fixing a diet of proof, unless cause be shown to the contrary, appoint intima-

tion to be made to such person in the form, or as nearly as may be in the form, contained in the schedule hereto annexed. . . ."

Intimation was dispensed with by the Lord Ordinary where the woman with whom adultery was said to have been committed was not cited as a co-defender, but where a letter from the woman was produced acknowledging the truth of the charges contained in the summons and intimating her intention not to defend.

This was an action of divorce raised by a wife against her husband, in which she alleged adultery with a woman who was not called as co-defender. The husband did not lodge defences to the action. A letter was produced, written by the woman, in reply to a letter enclosing a copy of the summons, in which she acknowledged the truth of the charges contained therein and intimated her intention not to defend the action.

The Lord Ordinary (CULLEN), on the motion of counsel for the pursuer, dispensed with the formal intimation required by the Act of Sederunt, and fixed a diet of proof.

Counsel for the Pursuer—A. R. Brown. Agents—J. C. & A. Steuart, W.S.

HOUSE OF LORDS.

Tuesday, February 27.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* AYR MAGISTRATES.

(In the Court of Session, December 21, 1910, 48 S.L.R. 211, and 1911 S.C. 298.)

Burgh—Police—Street—Railway—Private Street—Road "Forming Part of Any Railway"—Railway Lines Forming "Obstructions" in a Street—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 4 (31)—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, cap.* 33), *sec.* 104 (2) (*d*).

The Burgh Police (Scotland) Act 1892, sec. 4 (31), enacts—"'Street' shall include any road, highway, bridge, quay, lane, . . . thoroughfare, and public passage, or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station. . . ."

The Burgh Police (Scotland) Act 1903, sec. 104 (2) (*d*), enacts—"Where any private street or part of such street has not . . . been sufficiently levelled, paved, . . . and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof . . . to be freed from obstruction, and to be properly levelled, paved. . . ."

Held (*aff.* judgment of the First Division) (1) that a strip of ground in a burgh adjoining a railway, consisting of an unformed road along which existed a public right-of-way for traffic of all descriptions, which had been acquired by the railway company in 1889 for "extraordinary purposes," but never used till 1908, when the company laid a set of rails on it, did not form "part of any railway," and fell within the definition of "street" in the Burgh Police (Scotland) Acts; and (2) that the rails laid by the company might form "obstructions."

[This case is reported *ante ut supra.*]

The Glasgow and South-Western Railway Company, pursuers and reclaimers, appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—This is an appeal from two interlocutors dated respectively the 13th of January 1910 and 21st December 1910, the first pronounced by the Judge Ordinary who tried the case, and the second pronounced on appeal by the First Division of the Court of Session confirming the first.

The controversy between the appellants and respondents out of which the appeal arises relates to a strip of ground, 30 feet in width, situated formerly within the burgh of Newton-upon-Ayr, now within the extended boundaries of the burgh of Ayr, and forming part of what has come to be known as Oswald Road. One Mr Oswald, of Auchencruive, was in 1837, when the appellants obtained their first Act authorising the construction of their railway, owner of this land. How he got it, or to what purpose he intended to devote it, are in my view irrelevant. He was admittedly seized and possessed of the full proprietary right in it.

In the year 1889 the appellants purchased the strip of land from Oswald for the sum of £3500. They acquired it under the powers conferred upon them by the Railways Clauses Consolidation (Scotland) Act 1845 for extraordinary purposes, which purposes are, by section 38 of that statute, defined to be "making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving and depositing, loading, or unloading goods, &c. And for the purpose of making convenient roads or ways to the railway or any other purpose which may be requisite or convenient for the formation or use of the railway." Whether as between the company and the vendor the strip of land was subject to any right in him over the land is irrelevant. The proprietors of the land abutting on the eastern side of this strip, that is, the side furthest away from the appellants' railway, at some remote time added a strip of about 10 feet