by another woman whom she asked to go along with her, as she seems to have been afraid to go by herself. I should myself have hesitated to say that there was no contributory negligence on the part of the pursuer, but the question was one eminently for a jury, and as they have taken a different view I do not think the verdict should be disturbed upon that ground.

Lord Adam—Before the formation of the new railway there was only one house in the neighbourhood of this cutting, viz., Brae Cottage. There were two accesses to it, one from the north leading from Hope Street straight down to it, and another which led by a circuitous route turning first south and then north again before it reached the cottage. In August 1887 the contractor took possession of the field in which the cottage was situated, and built a hut in it for the accommodation of their workmen. Buxton became tenant of it and took in lodgers. "Sometimes," he says, "there is a considerable community of us." There would, therefore, be a good deal of traffic to the hut in consequence. The railway cutting was commenced in September. About the end of October the road from the north which formed the direct access to the hut was interrupted, and a new access came to be formed by the constant passage of the workmen, message boys and others, across the field from the other road to the hut. This was a short cut to prevent the necessity of going round three sides of the field. As the railway cutting which shut off the access from the north progressed, a fence was erected along the sea brae road from north to south, fencing it off from the cutting, and which was originally prolonged across the entrance to the new path, but about the end of December or beginning of January the end of the fence to the extent of 7 or 8 feet was removed and turned round along the cutting so as to leave the access to the new path again open. The use of the new path had gone on until at the time when the accident in question occurred a distinct, definite, and well-worn track had been formed, and was being used to the knowledge of the defenders by many persons having legitimate business at the Buxtons' house.

The question is, whether or not, that being the origin or genesis of the footpath, there was an obligation upon the contractors to look after and be responsible for the safety of those using the road. They knew of its existence—they were daily on the ground, they permitted it to go on, and the footpath passed close by the unfenced cutting, which was some 30 feet deep. There was, I think, an implied invitation to passengers to use it, and in these circumstances I think there was a duty upon the defenders either to stop the use of the road, or to see that it was properly protected against the chance of accident. Accordingly I concur.

I also agree in thinking that there was no contributory negligence such as would disentitle the pursuer to recover damages. The question is a jury one, and I do not think there is any ground for disturbing their verdict.

Lord Wellwood—I agree in the result to which your Lordships have come, but not exactly on the same grounds.

I confess that I should not myself have taken the view which the jury did, although I say so with diffidence after hearing the opinions which have now been expressed by your Lordships. I thought at the trial, and I think still, that the pursuer has not succeeded in establishing that there was an obligation upon the defender to fence the pathway in question. The proper and legitimate access to the hut was undoubtedly the circuitous road which led round to it by the shore, and the footpath which formed the short cut was not as alleged on record originally formed or sanctioned as an access by the defenders. Now, although it appears to me that if the footpath had been used for a considerable time there might have been a duty on the part of the defenders to protect it, I think that the use which has been proved here was not sufficient to impose such an obligation upon them.

On the other hand, there are, I think, certain elements in the case sufficient to support the verdict. In the first place, there is evidence to show that the footpath was used to some extent as an access to Brae Hut. In the second place, there is little, if any, evidence of the use of the circuitous route to the hut as an access to and from Hope Street, although as I have said it was the legitimate route. In the third place, there is evidence that after a fence had been put across the entrance to the footpath it was removed by Buxton in the knowledge of the defenders and not replaced. I think the jury were of opinion that there was thus a kind of recognition of the footpath by the defenders, and an invitation by them to people like the pursuer to use it. Accordingly I think that the verdict which was returned cannot be held to be contrary to evidence.

In regard to the question of contributory negligence, I think there was not sufficient evidence to disentitle the pursuer on that ground to recover damages.

The Court discharged the rule.

Counsel for the Pursuer—Guthrie Smith—J. A. Reid. Agent—P. H. Cameron, S.S.C.

Counsel for the Defenders—Comrie Thomson—M'Lennan. Agents—Reid & Guild, W.S.

Tuesday, February 26.

SECOND DIVISION.

MURRAY AND OTHERS (THE DALMELLINGTON IRON COMPANY) *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Condictio indebiti—Error in Payment—Repetition—Knowledge.

Where a person makes a payment in the knowledge that the sum paid is not due, he is presumed to have waived all inquiry and to have admitted the debt. In order, however, to bar his right to repetition of the payment it must be established that the knowledge that the sum was not due was, or should have been, present to his mind at the time of payment.

An iron company and a railway company

entered into an agreement by which the railway company, *inter alia*, undertook "not to carry traffic for any other party at lower proportionate rates than those charged to the iron compay, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line. Troon traffic . . . alone excepted from this condition."

The iron company regularly paid for fifteen years the rates charged by the railway company on their traffic.

In an action by the iron company against the railway company, founded on this clause, for repetition of certain sums which they averred they had paid in excess of sums charged and paid by two other traders, the railway company pleaded that the pursuers were barred from repetition in respect they had paid the alleged overcharges in the knowledge (possessed by their manager and secretary) that the two traders were being charged less for their traffic.

Evidence on which the Court *held* that the pursuers were entitled to repetition in respect that (1) they neither knew nor ought to have known of the overcharges; (2) in respect that the defenders must be held to have known they were violating their own agreement.

Carrier—Railway—Agreement—Construction.

A railway company entered into an agreement with an iron company to carry upon their railway system the whole mineral and other traffic (under a certain exception) which the iron company might send, of the description and at rates and charges specified in the third article of the agreement. In that article the traffic was divided into two classes, of which Class A included "pig iron, coke, hewing stone, bricks, and tiles," and Class B included "rubble stone, iron ore, coal," &c. The railway company further undertook not to carry traffic for any other party at lower proportionate rates than those charged to the iron company, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line.

Held, on a sound construction of this agreement, (1) that it imposed an obligation on the railway company not to carry traffic, inwards or outwards, for any other traders at lower proportionate rates per ton per mile than those charged to the iron company, irrespective of the terminus to which the traffic was carried; (2) that in the case of lower rates being charged to other traders, the iron company was entitled to a reduction only on the same kind of traffic comprised in the class to which the particular traffic belonged.

On 30th March 1868 The Dalmellington Iron Company, Limited, having their registered office at 109 Hope Street, Glasgow, entered into an agreement with the Glasgow and South-Western Railway Company, under which the former bound themselves that the whole mineral and other traffic of the description specified in the third article thereof, which they might have occasion to send along the latter's railway to or from their works or mineral fields, should be sent and be conveyed by the railway company over their railway system, and that the iron company should pay in respect of the conveyance of such traffic the rates and charges therein specified. By the third article of the agreement it was set forth—"The mineral and other traffic referred to in article second shall be held to embrace all traffic falling under the descriptions following, excepting therefrom all traffic to or from the port and harbour of Troon:—Class A. Pig iron, coke, hewing stone, bricks, and tiles. Class B. Rubble stone, calcined or raw ironstone, iron ore, coal sent to or by the second party in the capacity of ironmasters, but not as coalmasters, shale, lime, limestone, sand, and fire-clay."

The fourth article of the agreement was in the following terms—"The rates and charges which shall be exacted by the first party in respect of the conveyance over their railways of the mineral and other traffic falling under the said respective classes shall be as follows:—Class A. When carried six miles or under, the sum of ninepence per ton; when carried any distance beyond six miles, and not beyond sixteen miles, the sum of one penny half-penny per ton per mile; when carried any distance beyond sixteen miles, the rate above prescribed for the first sixteen miles, and for every mile thereafter the sum of one half-penny per ton per mile. Class B. When carried six miles or under, the sum of sevenpence half-penny per ton; when carried any distance beyond six miles, and not beyond sixteen miles, the sum of one penny farthing per ton per mile; when carried any distance beyond sixteen miles, and not beyond twenty-six miles, the rate above prescribed for the first sixteen miles, and for every mile thereafter the sum of three farthings per ton per mile; when carried any distance beyond twenty-six miles, the rates above prescribed for the first twenty-six miles, and for every mile thereafter the sum of one half-penny per ton per mile: Declaring that, in addition to the rates stipulated in this agreement, the second parties shall be bound to pay to the first party on all their traffic one penny per ton for the use of waggons on their private branches to and from their iron furnaces: Provided also that the first party shall carry or charge for the second parties' traffic by the shortest ordinary and usual route between the sending and receiving points by which the first party are carrying traffic of the like description, and not by any longer or unreasonably circuitous route: But it is also hereby provided and declared, notwithstanding anything herein contained, that for the period from the date hereof to the 1st day of February 1870, but no longer, the charges made by the first party against the second party under Class B before mentioned, shall be one penny half-penny per ton more than the charges specified under Class B, whatever distance the said articles may be conveyed: As also declaring that the rates and charges in this agreement shall not apply to traffic going to or coming from the port and harbour of Troon, but the first party shall be entitled to charge for such traffic such rates and charges within the powers of their Acts as they may think proper."

This agreement came into operation on 1st January 1868, and was to continue for ten years.

It was acted upon for some years, but was

modified and altered by a supplementary agreement dated 24th December 1872 and 14th and 15th February 1873, which was to come into force from and after the 31st August 1872, and which extended the time during which the original agreement was to continue in force till 1st October 1890. The second article of the agreement was in these terms—"The restriction or limitation in article third of the said agreement, which limits the coal traffic coming under Class B to coal sent to or by the second party in the capacity of ironmasters, but not as coalmasters, shall be, as the same is, hereby removed; and it is hereby declared that the traffic coming under Class B shall include all coal sent to or by the second party, whether in the capacity of ironmasters or coalmasters." The third article was as follows—"The first party also undertake to reconsider article third of the said agreement with reference to the exception from the operation thereof of traffic to or from the port and harbour of Troon, and to endeavour to make some arrangement by which the exception may be removed." The fifth article provided—"The first party undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line; Troon traffic, unless arranged for as above, alone excepted from this condition."

On 16th June 1887 James Murray and others, the surviving partners of the Dalmellington Iron Company, raised this action against the Glasgow and South-Western Railway Company generally, on the ground that the defenders had carried, in violation of the above agreement, traffic for other persons and firms at rates lower than those charged to the pursuers, and that they were entitled to repetition of the amount paid by them in excess of what was charged to and paid by others.

In Cond. 7 the pursuers averred that they had since 1868 paid to the railway company in respect of carriage of coals, iron, limestone, &c., under the agreement at the following mileage rates—"Class A, when carried 6 miles or under, 9d. per ton; beyond 6 miles and under 16 miles, 1½d. per ton per mile; beyond 16 miles the above rates for the first 16 miles and thereafter ½d. per ton per mile. Class B, 6 miles or under, 7½d. per ton; 6 miles and under 16 miles, 1¼ per ton per mile; beyond 16 miles and under 26 miles, ¾d. per ton per mile; beyond 26 miles the above rate for the first 26 miles, and ½d. per ton per mile thereafter. These rates were duly paid by the pursuers in the erroneous belief that they were the same proportionate rates as were demanded from other parties and traders on the system for traffic as enumerated and defined under Tables A and B, and relying on the defenders fairly and honestly fulfilling their part of the said agreement, and without the pursuers knowing the fact that there were more favoured traders in the matter of mineral traffic rates."

In Cond. 8 the pursuers set forth that in 1884 they discovered for the first time that the defenders had entered into an agreement dated 3rd and 13th April 1866 with the Earl of Eglinton, under which traffic was conveyed by them to Ardrossan from Hurlford, a distance of twenty miles, for 1s. 7d., while the rate according to the pursuers' agreement was 1s. 11d., and also that under it the defenders carried pig-iron from the Portland Iron Works, Hurlford, to Ardrossan at lower rates than those charged to the pursuers.

This agreement provided for reduction of rates on coal traffic from Hurlford, Springorde, and Fergushill districts to Ardrossan Harbour, which reduction was to continue in force for twenty-one years from 1st January 1866. The fourth article provided—"It is hereby agreed that the rates for the conveyance of coal and pig-iron to Ardrossan from collieries and works in the Hurlford district . . . shall not, during the said period of twenty-one years, exceed the rates for the time-being charged for the conveyance of coal and pig-iron from such collieries and works respectively to Troon Harbour by more than twopence per ton; and on the other hand, the second party (the railway company) may during the foresaid period, if they see fit, charge for the conveyance of pig-iron and coal (from works and pits which are specified, not within the Hurlford district) to Troon Harbour, rates of any amount not less than twopence per ton higher than the rates for the time-being charged for the conveyance of such pig-iron and coal to Ardrossan Harbour."

In Cond. 11 and 12 the pursuers averred that they had ascertained in June 1886 that the defenders had been in use for many years past to grant special reductions to, *inter alios*, the Lanemark Coal Company, under an agreement entered into with the latter in 1874, in terms of which they had for the period from 25th August to 17th August 1885 carried coals from Lanemark Collieries, a distance of thirty-one miles, to and from Troon, at the rate of 1s. 9d. per ton, and to Ayr, a distance of twenty-four miles, at the rate of 1s. 7d. per ton, while the rates, according to the pursuers' agreement with them, should have been for these distances—2s. 6d. to Troon, and 2s. 2d. to Ayr.

The conclusions of the summons were for payment of the four following sums in name of overcharges—(1) £2767, 14s. 4d. as the difference between the amount the pursuers had paid under Schedule B of their agreement from 31st August 1872 to 31st December 1874, and what they should have paid had they been charged during that period at the Eglinton rate from Hurlford to Ardrossan; (2) £16,356, 6s. 9d. as the difference between what they had paid under the same schedule from 31st December 1874 to 25th February 1885, and what they should have paid during that period if charged at the Lanemark Coal Company's rate or their coal carried from Lanemark to Ayr; (3) £2784, 2s. 2d. as the difference between what they had paid under the same schedule from 25th February 1885 to 31st October 1886, and what they should have paid during that period if they had been charged at the Lanemark rate; (4) £14,837, 15s. 9d. as the difference between payments made between 31st August 1872 and 31st December 1886 under Schedule A for pig-iron, and what they should have paid had they been charged at the Eglinton rate for coal and pig-iron between Hurlford and Ardrossan, and in particular from Messrs W. Baird & Company's Portland Iron Works at Hurlford. As regards this latter conclusion, the pursuers averred in Cond. 17 that applying the distance rate charged against the pursuers for a

distance such as that between Hurlford and Ardrossan Harbour, Messrs Baird & Company should have paid 2s. 1d. for their pig-iron traffic, whereas they had, since the Eglinton agreement, been charged at a rate on that traffic of 1s. 8d. only.

The defenders answered that the terms of Lord Eglinton's agreement were all along known to the pursuers and to the late John Hunter, their manager, as also were the rates charged to the Lanemark Coal Company, Mr Hunter being at the time a partner of the latter company. They further averred that it was in consequence of Lord Eglinton's agreement that the Troon exception was inserted in the agreement founded on. As regards the sum first concluded for the defenders answered—"Explained that the pursuers are claiming a reduced rate on articles which are not embraced within the table of rates charged under the agreement with Lord Eglinton, which agreement provided for a reduction on the rates for coal traffic only. Explained that the said sum of £2767, 14s. 4d. bears to be made up on the footing of the pursuers being entitled to a deduction from their rates to all places whatever, proportionate to the amount by which the rate of 1s. 7d. charged for traffic from Hurlford to Ardrossan, being 20 miles, falls short of the scheduled rate under pursuers' agreement for that distance. Of said sum of £2767, 14s. 4d. only £6, 1s. 9d. bears to be in respect of traffic carried from the pursuers' works. Further, only £39, 5s. 1d. bears to be in respect of traffic between the pursuers' works and Ardrossan, the balance, £2728, 9s. 3d. bearing to be in respect of traffic beween their works and other places to which the rates charged against them are as low as those charged against any other traders. Only £711, 10s. 2d. of said sum of £2767, 14s. 4d. bears to be in respect of coal traffic."

As regards the sum second concluded for the defenders answered—"Explained that the said sum of £16,356, 6s. 9d. bears to be made up on the footing of the pursuers being entitled to a deduction from their rates to all places whatever, proportionate to the amount by which the rate of 1s. 7d. charged for coals carried from Lanemark to Ayr falls short of the rate for a similar distance under the pursuers' schedule, which the pursuers state to be 2s. 1½d., but which, in point of fact, is only 1s. 11¾d. Of said sum of £16,356, 6s. 9d. only £243, 12s. 3d. bears to be in respect of traffic carried from the pursuers' works, and less than half bears to be in respect of traffic carried between the pursuers' works and Ayr. More than half the sum sued for bears to be in respect of traffic between the pursuers' works and places other than Ayr, to which the pursuers' rates are as low as those charged against any other traders. Further, although the Lanemark rate applies only to coal traffic, less than one-fourth of the sum sued for bears to be in respect of such traffic."

As regards the sum third concluded for the defenders answered—"The said sum of £2784, 2s. 2d. bears to be made up as explained in the previous article. A considerable proportion of said sum bears to be in respect of traffic between the pursuers' works and places other than Ayr. Further, although the rate founded on applies solely to coal traffic from Lanemark, only £373, 18s. 11d. of the sum sued for bears to apply to traffic carried from the pursuers' works, and only £378, 7s. 4d. bears to apply to coal traffic."

As regards the sum fourth concluded for the defenders answered—"Explained that said sum of £14,837, 15s. 9d. bears to be made up on the footing of the pursuers being entitled to a deduction from their rates to all places whatever, proportionate to the amount by which the rate of 1s. 8d. charged for pig-iron traffic from Messrs William Baird & Company's Hurlford works to Ardrossan Harbour, falls short of the rate under the pursuers' schedule for a similar distance, which they state to be 2s. 1d. Explained that said rate of 1s. 8d. is made up of the rate from the Hurlford works to Troon, being twelve miles, with 2d. added, in terms of the agreement with Lord Eglinton before referred to."

The defenders also founded on an alteration made by Mr Barr, solicitor for the pursuers, on the draft agreement which they maintained showed knowledge on his part of Lord Eglinton's agreement as regards the Troon traffic.

The pursuers pleaded—"(1) Under the several agreements mentioned the pursuers were entitled to have their whole traffic specified in said Classes A and B carried during the period in question at the lowest rates either to Lord Eglinton or the Lanemark Coal Company for any of the goods or materials mentioned in the said classes respectively. (2) The pursuers having been overcharged by the defenders, are entitled to repetition of the sums so overcharged."

The defenders pleaded—"(1) The pursuers' statements are irrelevant. (2) *Mora* and acquiescence. (3) The payments in question having been made by the pursuers voluntarily in full knowledge of the whole facts now alleged, so far as material, they are not entitled to demand repetition of the said sums. (4) The pursuers' averments, so far as material, being unfounded in fact, the defenders are entitled to absolvitor. (5) On a sound construction of the agreements, the defenders are not indebted to the pursuers, and are entitled to be assoilzied. (6) In any event, the pursuers are only entitled to a reduced rate on articles carried under Lord Eglinton's agreement, or for the Lanemark Coal Company at a lower rate than that charged against the pursuers. (7) In any event, the pursuers are only entitled to a reduction on their rates for coal traffic to Ayr, and pig-iron and other traffic to Ardrossan; *et separatim*, they are not entitled to have their rates to any places reduced below those charges to the same place against those traders on a comparison with whose rates to other places the pursuers' claim for reduction is based."

A lengthy proof was led upon the first question raised as to whether the pursuers had paid the charges complained of as overcharges in the knowledge that others were being charged less than they were for their traffic. The result of the proof will be found in the Lord Ordinary's opinion.

It appeared that in 1859 Mr Hunter, the manager of the pursuers' company, became a partner of the Lanemark Company, in which he held an interest till his death in 1886. From 1846 he managed the pursuers' firm. In 1872 he became a partner therein. Mr Gavin, secretary of the pursuers' company, deponed—"I was aware that Mr Hunter was a partner of the Lanemark Coal Company. . . . He did not take anything to do with the management of the company to my know-

ledge. . . . Mr Hunter always signed the railway accounts as long as he was alive. In saying that he did not go into the details, I mean that he did not go into the figures and additions of the accounts. He could see the rates charged if he chose to look at the accounts. Mr Hunter's practice was simply to sign the accounts if he saw the check clerk's initials at them. He signed the accounts up to his death. He had been signing them from 1852. . . . The first time I discovered anything about the Lanemark railway rates was in 1882. We had a small contract at that time with the Ayr District Asylum to supply dross and gas coal. The Asylum is situated convenient to a coal siding which we had at Belmont, near Ayr, about 11 miles distant from the works, between Ayr and the works. We had no gas coal ourselves, and we bought it from the Lanemark Coal Company in order to fulfil our contract. Having purchased it from them we applied to the railway company for a rate from Lanemark to Belmont. Our application to the railway company for the rate and their answer were in writing. The company quoted a rate of 2s. 4¾d. This was on 1st July 1882. On getting that quotation I compared it with our own rate of 2s. 3d. or 2s. 3½d. from the works to Lanemark. We had a right with reference to a short distance route. . . . I wrote objecting to the rate, and mentioned our rate, and also that I had heard that the Lanemark Company had a considerably lower rate to Ayr, which is close to Belmont. I cannot recollect from whom I heard about the Lanemark rate, but it was not what I considered any reliable source. The railway company adhered to their rate. I submitted the matter to Mr Hunter, and mentioned that I had been asking a rate for the coal. I told him the difference between the rates, and drew his attention to Lanemark having a rate of 1s. 9d. to Ayr—that I had heard a rumour of that. I said I wondered if the Lanemark people would tell us the truth of it, and he said I might write if I liked and ask them. I wrote to the Lanemark Company on 7th July 1882, and received no answer. I had occasion to write them again on the 1st August with reference to an account, and in a postscript I reminded them that they had not replied to my enquiry. I received a reply after that telling me what their rate was. I laid the reply before Mr Hunter."

Mr Brunton, the solicitor of the railway company, deponed—"Shortly stated, the reason for the Troon exception was, that we had to carry between Troon and Ardrossan for 2d. per ton, and if we had given the Dalmellington Iron Company schedule rates to Troon and 2d. per ton additional to Ardrossan we would have been charging them less than schedule rates to Ardrossan, which would have caused a conflict with the Eglinton Iron Company and Merry & Cuninghame. . . . We understood that Mr Barr and Mr Hunter were quite conversant with the terms of Lord Eglinton's agreement under which the difficulty arose, because we explained that that was the arrangement under the agreement with Lord Eglinton. The discussion proceeded on the assumption that they knew all about it. They must have known of it, because Mr Hunter in his letters to Mr Johnstone refers to that difference between Troon and Ardrossan; he calls it 2½d. instead of 2d. I have no doubt he and Mr Barr were distinctly told, and that it was discussed, that we could not charge more as between Troon and Ardrossan than 2d. a ton."

The following correspondence and documentary evidence was produced:—"Letter, David Barr to John Hunter. *Glasgow, 24th July* 1867.—My dear Sir,—I now send you copy of agreement between the Glasgow and South-Western Railway Coy. and the Eglinton Iron Coy., and will be glad to have it back, with your remarks, as soon as convenient."

"Letter, Mr Hunter to Mr Johnstone. *Dalmellington Iron Works, by Ayr*, 27 *Sept.* 1870.—My dear Sir,—I am in receipt of a letter from Mr Wainwright informing me that you had submitted to the directors my letter regarding the high rate charged for the carriage of limestone from Troon, and that they could not see their way to make the reduction asked; I fear therefore that they cannot understand the true position of the matter in question, otherwise they would not have so decided. You are aware that when the agreement was entered into that Troon was excluded from the mileage rate, because your existing agreements with the other parties would not admit of your charging less than 2½d. per ton from there than is charged from Ardrossan, and as the rates from the various places were reduced on the 1st February last, I think that if you were to present the case to the directors as to the reason why Troon was excluded from the mileage rate, they could not reasonably refuse to allow us a corresponding reduction from that port from 1st of February. I shall expect to hear from you as to this."

"Letter, Mr Hunter to Mr Johnstone. *Dalmellington Iron Works, by Ayr*, 1*st Octr.* 1870.—My dear Sir,—I am a good deal astonished to learn from your letter of 29th ultimo that all the facts of the case regarding the high rate charged for the carriage of limestone were laid before the directors, and that notwithstanding they could not see their way to make the reduction asked. If there was any truth in the argument used at the entering into the agreement, about 2½ years ago, that there must be a difference of 2½d. per ton between the carriage to and from the harbours of Troon and Ardrossan as the reason why Troon could not be included in the mileage rate, surely the same argument holds good at the present time, and therefore I consider we are justly entitled to the reduction. I will feel obliged by your letting me know when the next meeting is to be held, and will myself appear before the directors and state my case."

On 30th May 1876 Mr Hunter wrote the following letter to Mr Barr:—"*Dalmellington Iron Works, by Ayr.*—My dear Sir,—Has the agreement between the G. & S.-W. Ry. Coy. and the Dalmellington Iron Co, to which you refer in your letter to me of the 6th December 1872, ever been executed? If it has not, no time should be lost in getting it completed," &c.

From a number of letters it appeared that the pursuers through Mr Hunter were continually pressing for a reduction in their rates, and on 29th August 1883 Mr Hunter wrote the following letter to the defenders:—"(*Private and confidential.*)—My dear Sir,—I beg to inform you that this long depression in the iron trade has about reached a climax at Dalmellington Iron Works, and unless we get some reduction in the carriage of our pig-iron and minerals to and from these

works they must be stopped. I may mention that the mineral proprietors met us with a reduction in the lordships during the last twelve months, which has given us some relief so far, but notwithstanding this and the low rate of workmen's wages, we are still carrying on at a serious loss, and this having continued for so many years, we are compelled to face the question of stopping altogether. I will be glad to hear from you as soon as possible whether or not your company is disposed to grant us any reduction."

On 14th March 1888 the Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Repels the first, second, third, and fifth pleas-in-law for the defenders: Finds that under the agreement of 1868, and supplementary agreement of 1872, between the parties, that the pursuers were and are entitled to have the traffic sent by them to the defenders conveyed along the defenders' railway system at the same rates per ton per mile as are charged by the defenders to other traders for the same kind of traffic; and are now entitled to repetition of any rates or charges paid by them to the defenders in excess of rates charged by the defenders for the same kind of traffic to other traders: *Quoad ultra* continues the cause, &c.

"*Opinion.*—In 1868 the pursuers and defenders entered into an agreement under which the pursuers bound themselves that the whole mineral and other traffic of the description specified in the third article thereof, which they had occasion to send by public railway to and from their works or mineral fields, should be sent by them to be conveyed by the defenders over their railway system, and that the pursuers should pay, in respect of the conveyance of such traffic, the rates and charges therein stipulated. This agreement came into operation on 1st January 1868, and was to continue for ten years.

"By the third article of said agreement it was set forth that the mineral and other traffic above referred to should be held to embrace all traffic falling under the description there given, 'excepting therefrom all traffic to or from the port and harbour of Troon.' The traffic was divided into two classes—Class A and Class B—and certain rates were agreed on to be paid for its conveyance. It is not necessary to specify what articles were included in either class, but the rate or charge on each article in each class was the same—that is to say, that one rate was charged on the different articles contained in Class A, while a different rate was charged on all the articles contained in Class B. With regard to the traffic to and from the port and harbour of Troon the defenders were authorised to charge such rates or charges 'within the powers of their Act' as they might think proper.

"This agreement was acted upon for some years, but it was modified and altered by a supplementary agreement dated 24th December 1872 and 14th and 15th February 1873, which extended the time during which the original agreement should continue in force till 1st February 1890. That supplementary agreement (which was declared to come into force from and after 31st August 1872) contained the following clause—'*Fifth*, The first party (the defenders) undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party (the pursuers), and to place the latter on the same footing as that enjoyed by the most favoured traders on the line, Troon traffic . . . alone excepted from this condition.'

"The pursuers now aver that in violation of the clause just quoted the defenders carried traffic for other persons and firms at rates lower than those charged to the pursuers, and they seek repetition of the amount paid by them in excess of what was charged to and paid by others.

"The parties have argued before me three questions involved in the defences, and on these questions I have been asked to give judgment in the meantime, because if decided in favour of the defenders the pursuers' claim would be excluded in whole or in part, while if decided in favour of the pursuers they would be entitled to decree for such sum as an accounting would show to be due to them. These three questions are—(1) Did the pursuers pay the charges now complained of as overcharges in the knowledge that others were being charged less than they were for their traffic? (2) Does that knowledge, if it existed, or such as it was, bar the pursuers from insisting in their present claim? and (3) On a construction of the agreements before referred to, what parts of the pursuers' claim, if any, can be maintained, and what parts are excluded?

"1. On the first question proof has been submitted by both parties, partly parole and partly documentary, the result of which will now be considered. It is not proved that any of the partners of the pursuers' company (as then constituted) knew of the lower rates which were being charged to other traders, except perhaps Mr Hunter. Indeed, on this part of the case it is not maintained by the defenders—it certainly is not established—that there was knowledge on the part of anyone connected with the pursuers regarding the lower rates conceded to other traders, except on the part of Mr Hunter and Mr Barr, the law-agent of the Dalmellington Company. The defenders, however, maintain that any knowledge which Mr Hunter had must be regarded as knowledge on the part of the pursuers, because of Mr Hunter's position in the pursuers' firm. This makes it necessary to consider what that position was. Mr Hunter was from 1846 the manager of the pursuers' company, his duties being 'to take the practical management of the iron works in all its details.' 'He was not then authorised in any way to enter into agreements of a large or important character for the company. If there was any question of entering into a lease or traffic agreement, he was instructed to go to the partners of the company.' Mr Hunter in 1874 became a partner of the pursuers' company to a small extent—'a thirty-first share'—but he continued still to take the practical management of the works. That being Mr Hunter's position, the next question is the state of Mr Hunter's knowledge, and that so far as the case has been presented to me concerns the rates at which the defenders were carrying traffic under (1) Lord Eglinton's agreement, and (2) under agreement or arrangement with the Lanemark Company. I shall take these in their order.

"Under an agreement entered into between the defenders and the Earl of Eglinton dated in 1866 the defenders agreed that their rates on coal and pig-iron from the Hurlford district to Ardrossan should not exceed the rates for the time being charged for the conveyance of coal

and pig-iron from the same district to Troon by more than twopence per ton, while for coal and pig-iron conveyed from works and pits (which are specified) not within the Hurlford district to Troon, the defenders might charge rates of any amount not less than twopence per ton higher than the rates for the time being charged for the conveyance of such traffic to port of Ardrossan. It is said by the pursuers, and I understand it is not disputed, that under this agreement traffic was conveyed by the defenders to Ardrossan at rates less than those which were charged to the pursuers on similar traffic to the same terminus. It is said, however, by the defenders in reply that this agreement, and the fact that traffic was carried under it for reduced rates, was known to Mr Hunter, and this, they further say, is now established by the proof adduced. The first item of proof referred to by the defenders in support of this position is a letter written by Mr Barr (the pursuers' law-agent) to Mr Hunter, dated 16th August 1867, at the time when the original agreement between the pursuers and defenders was in course of adjustment. In that letter Mr Barr says 'Mr Kerr' (who was then the defenders' law secretary) 'explained to me that in consequence of agreements with the Duke of Portland and Lord Eglinton they could not include Troon Harbour in the agreement.' The defenders maintain as a fair inference from this letter that Mr Kerr explained to Mr Barr on the occasion referred to what the terms were of the agreements with the Duke of Portland and Lord Eglinton, and put Mr Barr, at least, in possession of such knowledge of the terms of these agreements as the pursuers admit they have since acquired. Unfortunately it is not possible now to get any information from Mr Kerr or Mr Barr as to what actually passed between them. Mr Kerr is dead, and Mr Barr's memory 'does not enable him to recal anything connected with the negotiations and communications referred to in the correspondence.' This matter must therefore be determined on the letter as it stands. I am of opinion that the terms of that letter do not, either necessarily or by any fair implication, support the defenders' view. At the time when that letter was written the pursuers were binding themselves to send all their traffic by the defenders' railway system, and at certain rates. The defenders proposed to accept from the generality of the agreement all traffic to Troon, and as the reason for this exception advanced the statement that they were under certain agreements with other parties which prevented them from including Troon traffic in their agreement with the pursuers. It was not necessary for the defenders to say more than this, and it does not appear to me that the pursuers could ask them to say more. What the agreement with these third parties was as to rates or otherwise was not then a matter which the defenders were called on to explain. It was enough to say that these agreements precluded the defenders from including Troon traffic in their agreement with the pursuers. I think the letter fairly read means no more than this, and this only had been said. If the terms of the agreement had been minutely explained by Mr Kerr to Mr Barr I think this would probably have been mentioned, and if the agreement had been exhibited to Mr Barr (the best way, and the business-like way, of making him acquainted with their terms), I think he would certainly have said that he had seen them. I am of opinion therefore that this letter does not prove knowledge on the part of Mr Barr, or through him knowledge on the part of Mr Hunter of the terms of Lord Eglinton's agreement.

"The next part of the proof relied on by the defenders as showing knowledge on the part of Mr Hunter of the terms of Lord Eglinton's agreement consists of three letters written by Mr Hunter to the defenders dated 15th September, 27th September, and 1st October 1870. To understand these letters aright it is necessary to have in view that under the agreement entered into in 1868 between the pursuers and defenders, it was stipulated that notwithstanding what was there agreed to as to the rates charged on traffic, Class B, the defenders were to be entitled to charge 'to the 1st day of February 1870, but no longer,' one penny halfpenny per ton more than the rates specified for Class B. When the first of the letters now under consideration (that of 15th September 1870) was written, the right to charge that additional three halfpence per ton on Class B had ceased, and the purpose which Mr Hunter had in writing the letter was to ask a corresponding deduction of three halfpence per ton on the Troon traffic. He says—'You are aware that when the last agreement was entered into that Troon was exempted from the mileage rate in consequence of your existing arrangements with other people, compelling you to have a difference of not less than 2½d. per ton between that port and Ardrossan, but as a reduction of 1½d. per ton, came into operation on the 1st February last, I think we are justly entitled to a corresponding reduction from Troon from the same date.' Now, to my mind this letter does not prove (any more than Mr Barr's letter, already considered) any knowledge of the rates charged under Lord Eglinton's agreement. It no doubt shows that Mr Hunter had been informed that there must be a difference of not less than 2d. per ton (the 2½d. of the letter is an error) between Ardrossan and Troon rates, but it does not show that he knew the rates charged for traffic either to the one harbour or the other, and unless it can be shown that Mr Hunter knew this, and was consequently in a position to contrast the rates to Ardrossan charged under Lord Eglinton's agreement with the rates charged to Ardrossan under the pursuers' agreement, this letter is not evidence bearing in any way on the question which I have to determine. The same observations apply to the second letter (27th September 1870), which is for the most part a repetition of the first. It contains, however, a sentence on which the defenders lay great stress—'I think that if you were to present the case to the directors as to the reason why Troon was excluded from the mileage rate they could not reasonably refuse,' &c. Something might perhaps have been made of this had Mr Hunter been available for examination, but as he is not, I can only proceed now upon what is written, or upon any reasonable inference deducible from what is written. The only reason which hitherto I have met with in the case assigned by the defenders for the exclusion of the Troon traffic from the pursuers' agreement is simply this—that on account of other existing agreements Troon rates must be in excess of Ardrossan rates by twopence

per ton, and therefore Troon could not be included in the pursuers' agreement, which was an agreement as to rates to Ardrossan and elsewhere. Why that reason should be put forward by Mr Hunter as a ground for asking a reduction of rates to Troon I do not know. But I cannot deduce from Mr Hunter's letter that he knew the defenders were charging other traders (under Lord Eglinton's agreement or otherwise) less rates on their traffic to Ardrossan than were being charged to and paid by the pursuers on their traffic. If he had known that he might very reasonably have assigned that fact as a reason for asking a deduction on his Ardrossan rates, but not on Troon rates, which were excluded from his agreement.

"The third letter (1st October 1870) presents no features differing from the other two calling for further observation. It no doubt speaks of the 'argument used' for the exclusion of Troon traffic from the pursuers' agreement, but this appears plainly enough from the letter itself to be a phrase synonymous with the 'reason why' elsewhere used. Up to this time, therefore, I think the defenders have failed to show that Mr Hunter, or any other person representing the pursuers' firm, knew of the rates to Ardrossan charged under Lord Eglinton's agreement.

"In 1872 the parties were negotiating for a modification or alteration of the agreement of 1868. The defenders were obtaining an extension of the period of its endurance, and the pursuers were desirous that the exception of the Troon traffic should be abolished. A meeting took place on 6th February 1872 between Mr Hunter and Mr Barr, as representing the pursuers, and the chairman and directors of the defenders' company. What took place at that meeting is to be found stated in a memorandum written on the day of the meeting by Mr Barr, and communicated by him same day to the defenders. The third article of that memorandum is in these terms—'The peculiarities of the Troon exception were explained and discussed, and railway company saw no means of removing same, looking to the effect same would have on Messrs B.'s agreement, but railway company to endeavour to make some arrangement by which exception may be removed.' Now that memorandum in itself, and apart from extraneous explanation, amounts only to this, that some explanation and discussion had taken place regarding the peculiar position in which the defenders stood towards the Troon traffic under their existing agreements with others, and that standing these agreements the defenders were still prevented from including Troon traffic in the pursuers' agreement. The memorandum makes no reference whatever to the Ardrossan rates under Lord Eglinton's agreement. It does refer to the effect which the change desired would have on 'Messrs B.'s agreement,' and that I am told is an agreement between the defenders and Messrs Baird, otherwise referred to as the Eglinton Iron Company's agreement. That was an agreement with which Mr Hunter and Mr Barr were well acquainted. I take it to be the agreement of which a copy had been furnished to them, and which is referred to in Mr Barr's letter of 16th August 1867. The effect of the Troon exception being abolished upon that agreement might very well be discussed, because the parties to the discussion knew all about it. But how the abolition of the Troon exception and its effect upon Lord Eglinton's agreement could be discussed I do not very well see, because so far it is not proved that Mr Barr or Mr Hunter knew anything about it, beyond the fact that in some way or other it prevented the defenders including the Troon traffic in the pursuers' agreement. But an explanation of this memorandum is given by Mr Brunton, the defenders' solicitor, who was present at the meeting to which the memorandum refers. I refer for this explanation to the proof where it is given without here repeating it. But I observe upon it that the discussion which took place between the representatives of the pursuers and defenders regarding the Troon exception and its peculiarities proceeded 'on the assumption' that Mr Hunter and Mr Barr 'knew all about' the agreement with Lord Eglinton, an assumption which I have not found to be warranted by anything I have yet seen. But if Mr Hunter and Mr Barr were 'understood' and 'assumed' to know all about the Lord Eglinton agreement it is surely more than probable that its details were neither stated nor explained at the meeting, a probability likewise which may be inferred from the fact that the memorandum, while referring to the effect of abolishing the Troon exception on Baird's agreement, makes no reference (in terms at least) to its effect on Lord Eglinton's agreement, or the effect of Lord Eglinton's agreement upon it. Mr Brunton's explanation complicates the matter (so far as I am concerned) by the introduction of a new element about the rate to be charged for traffic to be carried between Ardrossan and Troon. This is something outside of the several agreements to which I have referred, so far at all events as my attention has been called to them. These agreements relate to traffic between certain districts and Ardrossan or Troon, but not to any traffic carried between these two ports themselves. I am bound to say that I have not been much enlightened by Mr Brunton's explanation. But in my opinion it is certainly not proved either by the memorandum or Mr Brunton's explanation that at the meeting in question the defenders stated, or the pursuers understood, that the defenders were carrying traffic from Hurlford district to Ardrossan for a less charge per ton per mile than they were charging the pursuers for their traffic to Ardrossan. If this had been stated or understood it is inconceivable that the pursuers would have gone to the defenders for a reduction of rates as they did in December 1883, and less conceivable still that they would have been contented with the answer that they then got.

"I come therefore to the conclusion that the defenders have failed to prove knowledge on the part of the pursuers of the rates charged and chargeable under Lord Eglinton's agreement for traffic to Ardrossan.

"I come now to consider the proof bearing upon the question, whether the pursuers knew of rates being charged to the Lanemark Company which were less than those charged to the pursuers? The pursuers, I think, did not know of these rates, unless it be held that knowledge on the part of Mr Hunter or Mr Gavin (the pursuers' clerk) is knowledge by the pursuers. In 1859 Mr Hunter (then manager, as I have already said, for the pursuers) became a partner of the Lanemark

Company, in which he held a very substantial interest until his death. He was therefore quite aware in 1868 and 1872 of the rates paid by the Lanemark Company to the defenders for the traffic carried by them for that company.

"When the agreement of 1868 was entered into Mr Hunter was not a party to it; he was then the pursuers' manager at the works—nothing more. He had no authority to make traffic agreements or enter into any important contract as representing the pursuers. In these circumstances I am of opinion that the knowledge which Mr Hunter had in 1868, and which came to him as a partner of the Lanemark Company, cannot be imputed to the pursuers, because Mr Hunter was at that time also the pursuers' servant. Matters, however, stood in a different position in 1872. Mr Hunter was then a partner of the pursuers' company, and was apparently put forward by the pursuers as their representative in negotiating on their behalf along with Mr Barr, their law-agent, the agreement of 1872. This appears from the correspondence and from the memorandum of the meeting held on 6th February 1872 with the chairman and directors of the defenders' company, in which Mr Hunter is described (by Mr Barr) as appearing for the 'Dalmellington.' No other partner of the pursuers' company appears at that time to have taken part in the negotiations. Accordingly I am of opinion that in 1872, when the supplementary agreement was negotiated and concluded, the pursuers, through their partner Mr Hunter, must be regarded as being in the knowledge that the charges made by the defenders for the Lanemark Company's traffic were less than those charged for similar traffic to the pursuers. I need say nothing about Mr Gavin's knowledge. What he learned on the subject now under consideration was only learned in 1882, and went no further than to Mr Hunter, and if Mr Hunter's knowledge of the Lanemark rates was the pursuers' knowledge in 1872, what Mr Gavin learned in 1882 neither made that knowledge more nor less.

"2. This leads me to the second question submitted at present for decision, viz., What is the effect of the pursuers' knowledge; does it bar the present claim? At the most the pursuers' knowledge of the Lanemark rates could only bar the present claim in so far as it consists of charges made by the defenders in excess of the Lanemark rates. But in my opinion it has not even this effect. Whatever knowledge the pursuers had about the Lanemark Company, or any other trader's rates, the defenders had at least as much knowledge. In this state of matters the parties entered into an agreement, which is free from all ambiguity. They agreed that from and after 31st August 1872 the defenders should not carry traffic for any other party at lower proportionate rates than those charged to the pursuers (*i.e.*, the rates charged to the pursuers under the original agreement), and the defenders undertook to place the pursuers on the same footing as that enjoyed by the most favoured traders on the line—Troon traffic 'alone excepted from this condition.' Nothing could be more explicit. Nobody using the defenders' line was to have any advantage over the pursuers in the matter of rates; the pursuers were to be put on an equal footing with the most favoured traders. Assuming now that both parties to this agreement knew that the Lanemark Company, or any other trader, was at the date of the agreement in a better or more favoured position as regards rates than the pursuers, what was the purpose and effect of that agreement? Simply to abolish the inequality by putting the pursuers on a footing with the most favoured. I do not know whether the parties had any particular rates or agreement in view at the time this agreement was made, but if they had, then it was their knowledge of the existing inequality which probably led to the agreement being expressed as it was; if they had not, then it was to prevent any inequality for the future that they stipulated. Whatever knowledge either or both of the parties had before the agreement was concluded cannot affect or overrule the agreement actually made. Nor can the defenders be heard to say that the Lanemark Company's rates, or the Lord Eglinton agreement rates, were in view of the parties, and were intended to be treated as exceptions. Troon traffic alone was excepted from the agreement.

"3. One or two questions have been raised on the construction of the fifth article of the agreement of 1872.

"(*a*) The defenders say that 'traffic' means only outward traffic. I see no ground for this limitation. I think traffic means all traffic—outward or inward.

"(*b*) The defenders further say that if the pursuers are not charged more than other traders for the same kind of traffic to the same port or terminus they are then placed on the footing of the most favoured trader, and can ask nothing more. I do not adopt this view. Suppose that one trader sends goods to Ardrossan alone, that being his market, and that the pursuers never send anything to Ardrossan, having there no market, is the Ardrossan trader to have his goods sent to Ardrossan at 1s. 6d. per mile for twenty miles, and the pursuers to be charged 2s. per mile for twenty miles in another direction? That would neither be placing the pursuers on the footing of the most favoured trader nor observing the other branch of the defenders' obligation 'not to carry traffic for any other party at lower proportionate rates than those charged to' the pursuers, for lower proportionate rates mean lower rates per ton per mile irrespective of the direction in which the traffic is carried.

"(*c*) The pursuers maintain that if the defenders have carried for another trader any traffic at lower rates than those charged to the pursuers, they are entitled to have carried at the lower rate, not only the same kind of traffic, but the whole articles comprised in the class to which the particular traffic belongs. Thus, by the pursuers' agreement with the defenders the defenders are bound to carry under Class A 'pig-iron, coke, hewing stone, bricks, and tiles,' at 1½d. per ton per mile for any distance over six and not beyond sixteen miles. Suppose that the defenders have carried for another trader bricks for fifteen miles at 1d. per ton per mile, in that case the pursuers maintain that they are entitled to have pig-iron carried for the same distance at the same rate, not because the defenders have carried pig-iron on these terms for anyone, but because the defenders having carried bricks at that rate, and bricks being one of the articles in Class A of the pursuers' agreement, the whole of Class A must be put on the same footing and carried at

the same rate. In short, the pursuers maintain that Class A is a *unum quid*, and that if they are entitled on any ground to have one of the articles enumerated in that class carried at lower than agreement rates, the whole class must be carried at the rate thus reduced. I do not so read the agreement. The classification of different kinds of traffic saved repetition, but does not seem to me to have had any other intention or purpose. It was easier to say that pig-iron, coke, bricks, &c., shall be carried at 1½d. per ton than to say pig-iron 1½d. per ton, coke 1½d. per ton, and so on. In my opinion the pursuers get all the benefit which the clause was intended to give, or does give, if they are charged the same rates per ton per mile as is charged on the same kind of traffic to the most favoured trader."

The defenders reclaimed, and argued—The first point (apart from the question of knowledge on the pursuers' part) at which it was material to arrive, was a just construction of the equality clause of the agreement. The rate there mentioned was a special rate. The Lord Ordinary was of opinion that the pursuers obtained all the benefit which the clause was intended to give them if they were charged the same rate per ton per mile as that which was charged to the most favoured traders on the same kind of traffic. If this reasoning was correct it led to the construction that they were only entitled to reduction where they could show that the defenders had been giving preference for traffic to the same or analogous destinations, and in the same direction. The pursuers sent only to Ardrossan, and had no concern with alleged preferences given to the other traders who sent their traffic to Carlisle and Glasgow. There could be no question of reduction in the case of traffic involving no competition whatever. The importance to the defenders of this construction of the agreement being given effect to was brought out by the following figures:—The result of the Lord Ordinary's construction of the 3d question raised upon the construction of the agreement, viz., as regards material, was (apart from the question of knowledge) to reduce the pursuers' claim from £36,745, 19s. to the sum of £20,266, 6s. 9d. If the defenders' present argument was given effect to, viz., that the traffic must be restricted to similar materials going to the same places in the same direction, then the pursuers' claim would fall to be still further restricted to £1823, 7s. 9d. The next question was whether the alleged overcharges were paid by the pursuers in the knowledge that other traders were being charged less for their traffic. That question fell to be considered with reference (1) to the Lanemark agreement, and (2) to Lord Eglinton's agreement. The first three conclusions of the summons would be disposed of if knowledge of the former agreement were established, just as knowledge of the latter agreement would affect the further conclusion. First, then, with reference to the Lanemark agreement. It was quite clear that Mr Hunter, the manager of the pursuers' company, knew of it throughout the whole time. In 1859 he became a partner in the Lanemark Company, in which he held a substantial interest till his death in 1886. He was therefore quite aware in 1868 and 1872 of the rates paid by the Lanemark Company. In 1874 he became a partner in the pursuers' firm, and was put forward as the *alter ego* of the company in the negotiations along with Mr Barr, the pursuers' law-agent. The correspondence and memorandum of meeting with the defenders of 6th February 1872 showed this. Hunter was described as appearing "for Dalmellington." He was clearly the acting and responsible manager. He signed the railway accounts, and was thus cognisant of all the rates paid. Throughout his correspondence with the railway company he dealt with them as having power to adjust and get new rates. The Lord Ordinary was of opinion that knowledge on his part was proved in 1872. It was also beyond question that Mr Gavin knew also in 1882. It must be taken, then, as clearly proved that both Hunter and Gavin knew of the Lanemark rate. That being so, the pursuers had, in respect of this knowlege, intentionally abandoned their advantage under the equality clause of the 1872 agreement. Second, with reference to Lord Eglinton's agreement, the evidence, though not so absolutely clear, was equally convincing. The first point to observe was that this agreement was well known to Hunter when the original agreement in 1888 was in course of adjustment. Indeed, Barr sent the Eglinton Iron Company's agreement (which contained the same clauses as to schedule rates as Lord Eglinton's agreement) to Hunter on 16th August 1887. He wrote Hunter saying that in consequence of Lord Eglinton's agreement the defenders could not include Troon Harbour in the agreement. The reason for the impossibility of removing this exclusion was that stated by Mr Brunton. If the defenders had given the Troon rate they would have been giving the pursuers to Ardrossan less than schedule rates, and the Eglinton Iron Company under their equality clause would have at once asked for a 31-mile rate. With the Eglinton Iron Company's agreement in his hands, Hunter saw that the Eglinton Iron Company were paying schedule rates to Troon, and he knew he was paying a great deal more owing to Troon being excepted. The correspondence showed that full explanations were given to him as to the reason of the exclusion. The expressions in the subsequent letters, "the argument used," and "the reason why" were conclusive of this. Then the subsequent memorandum of meeting showed that the "peculiarities of the Troon traffic" were fully explained to him. Brunton deponed quite distinctly that the discussion proceeded "on the assumption" that Hunter and Barr understood all about the Eglinton agreement. The proof then established that the pursuers made payment of the alleged overcharges in the knowledge that traders under Lord Eglinton's agreement were being charged less. In this state of the facts, what was the law applicable? It appeared to be settled, according to the law of Scotland and the law of England, on a review of the cases cited by the pursuers *infra*, that (1) if a payment were made in full knowledge of the facts the Court would not give the remedy of repetition to the person who had made such payment; (2) that while the mere existence of the means of knowledge would not absolutely disentitle the person who has made payment from recovering, yet if it appeared that he had so acted as to waive all inquiry his right of repetition would be barred; (3) the Court would also consider the element whether it was unconscionable for the person paid to retain the money, and unconscionable

for the person who had paid to demand it back again. The recent case of *Evershed* was *a fortiori* of the present. The proof then having disclosed a case of waiver by the pursuers of their right to recover the alleged overcharges, as well as of payment by them in the full knowledge that they were paying less than was paid by Lord Eglinton and the Lanemark Coal Company, their right to recover could not be maintained—*Evershed* v. *London and North-Western Railway Company*, Feb. 1877, L.R., 2 Q.B. Div. 254, and July 5, 1878, L.R., 3 App. Cas. 1029.

Argued for the pursuers — The Lord Ordinary's views upon the construction of the agreement were sound, subject to the modification that the pursuers were entitled to have Class A dealt with as a whole, so that for ironstone and limestone carried for others they were entitled to have a coal-rate because they were in the same class. (2) On the question of knowledge (*a*) with reference to the Lanemark rate.—It was important to observe that until 1878 the pursuers dealt solely with iron, while the Lanemark rate was a coal-rate. It was also important that they had no knowledge which the defenders did not possess, and the latter had a duty to see that their accounts were properly charged under the equality clause. Hunter paid no detailed attention to Lanemark; indeed he could not do so as his whole time was required for the pursuers' business. He had no authority to enter into agreements. It was evident too that he was constantly pressing to get reduced rates for the pursuers' traffic. From the evidence given by Mr D. Houldsworth it was clear that at the meeting referred to by him in 1883 with the railway company he pressed for a reduction, not as matter of right, but owing to the exigencies of trade. That was an attitude quite inconsistent with the attitude of a man who thought he was entitled to a reduction of rates. Indeed from 1871 he was constantly fighting for a reduction of coal-rates. That was a period prior to the date when he became a partner, and prior to the agreement which alone gave him the equality clause, and further prior to the date when he had any interest in coal at all. He had no suspicions that the pursuers were being dealt with unfairly, and never waived inquiry. It was inconceivable that if the pursuers had known of the agreement that they should not have insisted on a reduction when the equality clause was inserted into the 1872 agreement. No explanation of this important feature in the case had been offered. This was a piece of real evidence against an inference sought to be drawn from communings prior to 1872. It was proved too that Hunter never knew in 1876 that in 1872 the deed had been signed, and there was nothing in the case to warrant the inference in fact that Hunter in neglecting the latter agreement had in his mind what was done in 1871. It was true that Gavin had a certain amount of information in 1882 about it; but he obtained this information in order to satisfy himself about a special transaction which was never carried out. He had, moreover, nothing to do with the rates. When the transaction came to an end the information would very naturally go out of his mind. (*b*) As to Lord Eglinton's agreement—The Lord Ordinary had gone very fully into the letters and oral evidence which were said to show knowledge of this agreement on the part of the pursuers, and his view of the evidence was sound. Here again Hunter's position as practical manager of the pursuers' firm did not admit *prima facie* of his paying strict attention to other rates charged to other traders. The letter of 16th August 1867 meant no more than that the defenders were precluded by their agreements with other parties from including Troon traffic in the agreement of 1872. If the terms of Lord Eglinton's agreement had been fully explained to Mr Kerr he would most certainly in this letter have told Hunter. The same remark applied to the letter of 15th September 1870. It did not show that Hunter knew the rates charged for the traffic either to Ardrossan or to Troon. No doubt the letters of 27th September 1870 and of 1st October 1870 contained expressions which were capable of the construction put upon them by the defenders, but they did not show that Hunter knew that the defenders were charging other traders less rates on their traffic to Ardrossan than were being charged to and paid by the pursuers on their traffic. The memorandum also of 6th February 1872 made no reference to Ardrossan rates under Lord Eglinton's agreement. Brunton's evidence as to what passed only amounted to an argument on his part that Hunter knew of the agreement. If Hunter had known, it was absolutely inconceivable that the pursuers would have gone to the defenders for a reduction of rates as they did in December 1883. The proof then on this part of the case also failed. In this state of facts how stood the law? The old doctrine of *condictio indebiti* was that an unavoidable error in fact or in law was sufficient to ground an action to recover payment made in such error—3 Ersk. 354; Stair 179; Bell's Prins. 534. There was no distinction recognised between the two classes of error—*Carrick* v. *Carse*, August 5, 1778, M. 2931. It was quite true that Lord Brougham had as regards error in law laid it down in two cases—*Wilson* v. *Sinclair*, December 7, 1830, 4 W. & S. 398–409, and 3 Scot. Jur. 123; *Dixons* v. *Monkland Coal Company*, September 17, 1831, 5 W. & S. 445–452—that by the law of Scotland payment made under such an error could not be recovered. There was, however, good reason to doubt whether the rule so laid down could be accepted as sound—Kerr on Fraud, 474. The Court had expressed hesitation in accepting these cases as absolutely settling the law, although it was admitted that in very few cases would *ignorantia juris* found a *condictio*. In *Dickson* v. *Halbert*, where these general doubts were expressed, the Court held that error in point of law afforded a ground for reducing a discharge granted *sine causa* in ignorance of the granter's legal rights—*Dickson* v. *Halbert*, February 17, 1854, 16 D. 586, 26 Scot. Jur. 266. In England Lord Brougham's *dictum* had been rejected—*Kelly* v. *Solare*, 1841, 9 Mees. & Wel. 54; *Townsend* v. *Crosby*, 1860, 8 C.B. (N.S.) 477; *Dixon* v. *Brown*, April 13, 1886, L.R., 32 Ch. Div. 597. At the present time the law seemed practically settled that *condictio indebiti* will always lie where the party paying has not paid knowingly and voluntarily intending to waive all inquiry—*Baird's Trustees* v. *Baird & Company*, July 10, 1877, 4 R. 1005; *Durrant* v. *Ecclesiastical Commissioners for England and Wales*, November 16, 1880, L.R., 6 Q.B.D. 234; *Balfour* v. *Smith &*

Logan, February 9, 1877, 4 R. 454, *per* Lord Shand, 462; *Lancashire and Yorkshire Railway Company* v. *Godlow*, 1875, L.R. (H. of L.), 517, Lord Chelmsford, 527. Further, the pursuers were not barred from their right to recover by lapse of time since they made the payment—*Earl of Beauchamp* v. *Winie*, 1873, L.R., 6 E. and Ir. App. 223; *Cooper* v. *Phibbs*, 1867, L.R., 6 E. and Ir. App. 149; *Durrant* v. *Ecclesiastical Commissioners for England and Wales*, *supra*. The case of *Eversheд* did not apply, because there was there the amplest and fullest knowledge on the part of the agent who had charge of the traffic. On the whole matter, then, the proof disclosed facts sufficient in law to ground a *condictio*, and the overcharges fell to be repaid to the pursuers.

At advising—

LORD RUTHERFURD CLARK delivered the opinion of the Court:—

This is an action for the recovery of overcharges. It is founded on an agreement entered into between the pursuers and defenders in 1868, and a supplementary agreement dated in December 1872 and February 1873. The latter agreement by the 5th article thereof provides as follows—"The first party undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line, Troon traffic, unless arranged for as above, alone excepted from this condition." On the construction and effect of that agreement I adopt the judgment of the Lord Ordinary. I have nothing to add to the views which his Lordship has expressed in his note.

The rates with which the pursuers compare the rates charged to them are—1st, Hurlford to Ardrossan for ironstone; and 2nd, Lanemark to Ayr for coal. These were charged to the Eglinton Iron Company and the Lanemark Company respectively, and were lower than the rates charged to the pursuers.

The defenders aver that the pursuers knew the rates which were charged to these companies, and that they paid the rates charged to them in the full knowledge of the overcharge. They plead that the pursuers are thereby barred from recovering the overcharge.

The persons to whom this knowledge of the overcharge is attributed are Mr Hunter and Mr Gavin. Mr Hunter was during the period libelled the manager of the pursuers' company, and became in 1874 a small shareholder. Mr Gavin was at one time a clerk, and afterwards the secretary of the pursuers. It is not alleged that any of the other partners or officials were aware of the overcharge.

In considering this question it is to be observed that the parties are not in the same position. The defenders knew, or must be held to have known, that they were overcharging the pursuers. They knew the agreement, and of course they knew the rates which they were charging to other traders, and consequently knew, or must be held to have known, that they were violating the agreement. They say that they put upon it a construction other than that which has been adopted by the Court, and that the rate which was allowed to the Lanemark Company was a special rate, which under the agreement they were not bound to allow to the pursuers. But I must hold that they were wrong. Nor do I see any plausible ground on which they can maintain the construction which they put on the agreement. To my mind there was no justification for their charging higher rates to the pursuers for ironstone than they charged to the Eglinton Iron Company. Nor can I see how any special rate could be excepted from the operation of the agreement. For the agreement is expressed in very absolute terms, and applies to all traffic carried for any trader, with the single exception of Troon traffic, and though the pursuers choose to call the Lanemark rate a special rate, it was nothing more than a charge for carrying coals from Lanemark to Ayr.

Again, there is nothing in the case to suggest that the pursuers intended to submit to what they knew to be an overcharge. It is inconceivable that they should. Further, their correspondence, which was conducted almost exclusively by Mr Hunter, shows that there was a continuous effort on their part to get the rates reduced. But they made no claim for a reduction under the equality clause. It does not seem to have occurred to their mind that the circumstances admitted of an appeal to it. Their application was based on the necessities of their trade, and writing on 29th August 1883 Mr Hunter goes so far as to say that "unless we get some reduction in the carriage of our pig iron and minerals to and from these works they must be stopped." Such a course of action and such expressions seem entirely inconsistent with the notion that the pursuers knew of the overcharge and voluntarily submitted to it.

The defenders, however, undertake to prove that Mr Hunter knew of the rates allowed to the Eglinton Iron Company and Lanemark Company, and it is necessary that I should shortly notice the evidence in regard to each of them, though I am relieved from the necessity of going into this matter at any length from the detailed examination which the Lord Ordinary has made of it.

The rate allowed to the Eglinton Iron Company, called the Hurlford rate, was fixed by an agreement between that company and the defenders in 1865. One important consideration is, that that rate was fixed some years before the agreement between the pursuers and defenders. If the pursuers or Mr Hunter, who took a leading part in negotiating the agreement, had known of the Hurlford rate in 1868, it may be doubtful if they would have accepted the rates fixed by the agreement in that year. But when in 1872 they got the benefit of an equality clause, they would either have insisted on a reduction of the existing rates, or made a claim under that clause. It cannot be imputed to them that they desired to pay more than they could help. If they knew of the Hurlford rate at the time when they settled the equality clause, they must have known that they had an immediate right to a reduction.

It is the case of the defenders that Mr Hunter came to know of the Hurlford rate when the agreement of 1868 was settled. They say that the Eglinton Iron Company's agreement or the terms of it was communicated to Mr Hunter. There is evidence to the effect that at later discussions the arrangements of the defenders

with Lord Eglinton and the Eglinton Iron Company were fully explained to Mr Hunter and Mr Barr who represented the pursuers. But I am unable to hold that there is any sufficient proof of Mr Hunter's knowledge, because it seems to me to be certain that if the knowledge which is imputed to him had really existed, he could not have acted as he did, but would at once have insisted on the right of his company to a reduction, which it is conceded on both sides he never did. On this question of fact I agree with the Lord Ordinary, and I need not go into more detail.

With regard to the Lanemark rate, I think that it is proved that it was at one time known to Mr Hunter. Mr Hunter was a partner of the Lanemark Company, though he took very little if any charge of its affairs in consequence of the pursuers insisting that he should give his whole time to the management of their company. It further appears that the Lanemark rate became known to Mr Gavin the pursuers' secretary, though in connection with a particular transaction which was not carried out. And when I am on the subject of Mr Hunter's knowledge, I may notice that it is not clear that he ever knew whether the agreement of 1872 was signed or not if we are to judge by the terms of his letter to Barr dated 30th May 1876.

One matter more requires to be stated, viz., that until 1878 the pursuers dealt almost entirely in iron. Till that date the amount of coal carried for them was inconsiderable, and the coal rate was not of much importance to them.

It is in these circumstances that the defenders contend that the pursuers are barred from recovering the overcharges for which they sue. As I think that the pursuers did not know of the Hurlford rate, the case of the defenders so far fails. But as Mr Hunter and Mr Gavin had some knowledge of the Lanemark rate, I have to consider how that knowledge may affect the pursuers.

There is high authority for the proposition that a payment made in the knowledge that it is not due cannot be recovered. It seems to depend on the principle that such a payment imports a waiver of all objections and an admission that the debt is justly due. When there is a question whether money is due, and when it is paid in the knowledge of the facts on which that question depends, it may be reasonably inferred that all objections are waived, and that the debt is admitted. To hold that a payment so made cannot be recovered is nothing more than to hold that the voluntary waiver and admission cannot be afterwards called into question, or, in other words, that a person who has paid a debt which he has admitted to be due will not be allowed to go back on his admission. I can see no other principle on which the rule of law can depend.

I do not think that we can apply this rule of law unless we are satisfied that the presumption on which it is founded is, or at least may be, in accordance with the fact, nor, in my judgment, can this condition exist unless it be the case that at the time when the payment was made the knowledge of the overcharge was present to the mind of the person who made the payment. If it was not he could not intend to waive any right or make any admission. It may be sufficient if the knowledge should have been present to his mind, on the ground that he cannot be allowed to say that he did not know what he ought to have known. But unless it was present or should have been present it would, I think, be unjust to apply the rule, and particularly in this case, when I think it to be certain that neither the pursuers nor any of their officials ever intended to waive any right or submit to any overcharge.

Assuming that the pursuers are to be identified with Mr Hunter and Mr Gavin, it is in my opinion plain that when the rates charged by the defenders were paid they never thought that there was any overcharge. Such a thing never entered into their minds.

As I have already said, Mr Hunter was constantly urging the defenders to concede a reduction of rates. He may have known of the Lanemark rate, in the sense that it had at sometime or other been brought under his notice, but it seems to have escaped his recollection. That he should have knowingly submitted to the overcharge which the defenders made is out of the question unless he was defrauding the pursuers for the benefit of the Lanemark Company, a charge which has not been made against him. Nor is it remarkable that the Lanemark rate might have dropped from his memory, because his whole attention was given to the pursuers' affairs, and because at the time when the rate was fixed, and for a long time afterwards, coal traffic was of little importance to the pursuers. The position of Mr Gavin need hardly be considered. His knowledge was confined to a particular transaction which was not carried out, and besides, it does not appear that the payment of the rates fell within his department.

Nor can it, I think, be said that the pursuers—including Mr Hunter—ought to have been aware of the overcharge when the rates were paid. Assuming such knowledge as may be fairly imputed to Mr Hunter, I think that his oversight was excusable, and that the defenders cannot retain the moneys which they have received in excess of what was justly due to them on the plea that the pursuers were in default. The defenders were the real defaulters. There was no excuse for them making the overcharge, and in my opinion they must repay the amount of it.

The Court pronounced this interlocutor :—

"Refuse the reclaiming-note, and adhere to the interlocutor reclaimed against, . . . Remit the cause to the Lord Ordinary to proceed therein as accords," &c.

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