MAY 22, 1855.

ARCHIBALD FINNIE,[1] *Appellant*, *v.* THE GLASGOW AND SOUTH WESTERN RAILWAY CO., *Respondents*.

Railway—Statute—Clause—Construction—Equal Rates Clause—Railway Clauses Act—*The A railway company was bound to charge equal rates for the carriage of all goods, "of a like description and quantity, passing over the same portion of, and over the same distance along the railway, and under the like circumstances." Under a statute empowering the B railway company to lease its line to the A company, and incorporating the general railway acts, and the special acts of the A company, the latter took a lease of the B line, the consideration to be paid being a toll on all minerals loaded on the B line from the lands adjacent thereto. The A company then published two tables, the one bearing to be the table of charges for the A, and the other that for the B railway, the charges in the latter being higher than in the former; and they proceeded to charge all goods loaded on the B line from the adjacent lands at the rates stated in the B table, for so far as they travelled over the B line, and at the rates charged in the A table for so far as they travelled over the A line, while those minerals loaded on the A line were only charged at the lower rates of the A table for the whole distance, though part of that distance might be on the B line.*

HELD (affirming judgment, the Lords being equally divided), 1. *That the two sets of minerals not being carried "in the like circumstances," in respect that for those loaded on the B line the company had to pay toll, the difference of charge was no infringement of the equal rates clause; and*, 2. *That although there was no table shewing the lower rates for conveyance along the B line charged on minerals not there loaded, yet there was no such ambiguity in the tables, and no such deficiency of publication of the rates of charge, as to render the higher charge levied on minerals loaded on the B line illegal, in respect of want of the statutory publication.*

QUESTION—*Whether money paid under such overcharge can be received back?*

The pursuer, on appeal, pleaded that the judgment of the Court of Session should be reversed. —1. Because the respondents are not entitled to charge the appellant for the conveyance of his coal along the Kilmarnock and Troon line of railway a higher rate than that charged by them against other parties whose coal is also conveyed along that line. 2. Because the respondents are not entitled to charge any portion of the rent which they pay, under their lease of the Kilmarnock and Troon Railway, against those parties exclusively whose coal is raised from coal-fields lying between Kilmarnock and Troon, and the whole of the rent so payable by them ought to be charged against all parties making use of that line.

The respondents maintained that the judgment was correct.—1. Because the appellant could not shew any sufficient ground for holding that a precise equality of rates for carriage on the Kilmarnock and Troon Railway should apply to the coals raised and laden by him on the line of that railway, and the coals of other traders brought upon the Kilmarnock and Troon Railway from the company's main line. 2. The great difference of circumstances between the case of the appellant and that of other traders entirely justifies a difference of charge.

Solicitor-General (Bethell), and *Anderson* Q.C., for the appellant.—The respondents have violated their act of parliament by charging the appellant, in the circumstances, a higher rate than other persons. They have shewn a partiality in benefiting the people on the main line at the expense of the appellant and those who are situated on the Troon line. The appellant is therefore entitled to recover back the sums he has overpaid.—*Parker* v. *Great Western Railway Company*, 7 Man. & Gr. 253; *Parker* v. *Bristol and Exeter Railway Company*, 6 Exch. 184 and 702; *Attorney-General* v. *Derby Railway Co.*, 2 Rail. Cas. 124; *Stockton R. Co.* v. *Barratt*, 11 Cl. & F. 590.

Lord Advocate (Moncreiff), and *Rolt* Q.C., for the respondents.—The respondents have acted within the powers of their acts, and were entitled to make a difference of charge against the appellant, for he is not in the same circumstances with other parties on the main line.—*R.* v. *Glamorganshire R. Co.*, 3 Rail. Cas. 16.

Sir R. Bethell replied.

Cur. adv. vult.

[1] See previous reports 15 D. 523; 25 Sc. Jur. 301. S. C. 2 Macq. Ap. 177: 27 Sc. Jur. 379.

LORD CHANCELLOR CRANWORTH.—My Lords, in this case an action was brought by the pursuer, the present appellant, who is the owner or lessee of certain coalmines adjoining a line of railway called the Kilmarnock and Troon Railway, and the object of the action was to seek to be reimbursed certain moneys (by an action of repetition, as it is called) which he had been overcharged by the defenders, the Glasgow and South Western Railway Company, and with a view to obtain that repayment there was a declaration raised as to his rights. He alleged that the company were bound to charge all persons equally who were passing along that line, and that he had not been equally charged. The case made by the appellant is this—that an act of parliament was passed, 1 Vict. c. 117, for incorporating the Glasgow, Paisley, Kilmarnock, and Ayr Railway, with branches. Then there were certain other acts for extending the railway and making branches to different places; and finally, in another act, 5 Vict. c. 29, which was an act amending some of the former acts, a clause was introduced, to which I shall presently call your Lordships' attention more fully. The railway was made with the branches or such of the branches as are material to the present question, under the provisions of the several acts of parliament. The case then states that there had been a railway, which was a mere tramway, for the conveyance of coals from Kilmarnock to Troon, and that by an act passed in 9 and 10 Vict. c. 211, the defenders, the Glasgow and South-Western Railway Co., were authorized to take a lease of this railway for 999 years, and to convert it into what is called an edge railway, that is, a railway on which passengers might travel. And by that act of parliament it was provided, that all the provisions which had been introduced into the Act 5 Vict. c. 29, with reference to the defenders' railway, the main line of railway, should be incorporated with, introduced into, and form part of the provisions of the act of parliament for leasing this line from Kilmarnock to Troon.

Then the case states—that in pursuance of those provisions in the act of parliament, tables of charges were made as to the rate at which coal should be conveyed upon the one line and upon the other line. And it is sufficient for the present purpose to say, that the rate of toll fixed on the Kilmarnock and Troon line, the line of which the defenders are merely lessees for 999 years, was a higher rate than the rate which was fixed upon the main line. It is not always so. Under a certain distance it is the same, but if the traffic goes beyond a certain distance, the rate of toll is higher upon the cross line than it is upon the main line. For a certain distance, I believe, it is the same rate upon both lines; but it may be taken for practical purposes, that it is a higher rate of charge upon the cross line than upon the main line. The pursuer is, as I have stated, the proprietor or lessee of coalpits which adjoin the cross line a mile or two to the west of Kilmarnock. The principal object, no doubt, of those railways is to carry that coal to the sea, by conveying it to Troon, Ayr, and other places on that line. And the complaint of the appellant is this, that he is charged according to the higher rate, namely, the rate upon the cross line, upon which alone his coals run, when they are taken to the sea; whereas parties sending coals from the coalpits beyond Kilmarnock, and which travel a part of the distance upon the main line, are charged upon the main line at the main line lower rates, and at that same lower rate all the time that they are traversing the cross line, so that those persons have undue advantages over him. By the Act 5 Vict. c. 29, which regulates the main line, and the provisions of which are by reference incorporated in the act which relates to the Troon line, it is provided, that the company may, if they choose, have locomotive engines and act themselves as carriers, provided always that they make certain charges not exceeding certain amounts—"Provided always, that in whatever way the said charges are made, they shall be made equally to all persons in respect of all animals, and of all goods, wares, merchandize, articles, matters, or things of a like description and quantity, and conveyed or propelled by a like carriage or engine, passing over the same portion of, and over the same distance along, the railway, and under the like circumstances, and in respect of all accommodations of a like nature afforded in respect thereto." Now, the complaint of the pursuer is—that in violation of that provision, for the coals coming from his collieries, which border upon the cross line (principally the two collieries which are mentioned, namely, the Annandale and Gatehead collieries) which go wholly along that railway to Troon, or partly along that railway and then turn off from the cross line to the main line, and go to Ayr, he is charged for so much as passes along the cross railway at a higher rate; whereas other persons bringing coals from places beyond Kilmarnock, are charged for traversing along the whole line of the cross railway at the main railway rates, which are materially lower. Therefore, he says, that the money which he has paid at the higher rate beyond what others have paid at the lower rate is an excess; that it ought to be declared that it is so; and that he should be allowed to recover back the excess, which he has so paid, which he calculates amounts to many hundred pounds.

The precise allegations that he makes are these:—That the charge exacted from the pursuer for the carriage of his coals from Annandale (the Kilmarnock Colliery) to Ayr, a distance of $5\frac{3}{4}$ miles of the Kilmarnock and Troon Railway, (that is, the cross railway,) and 7 miles on the defenders' line, being together $12\frac{3}{4}$, has all along been, and still is, 2*s.* $0\frac{3}{4}$*d.* per ton; while the charge from Hurlford to Ayr, $6\frac{3}{4}$ miles on the Kilmarnock and Troon Railway, and 10 miles on the defenders' line, together $16\frac{3}{4}$ miles, has all along been, and still is, only 2*s.* per ton, being entirely charged according to the lower rate on their own line. Then he states not exactly the same amounts, but

similar differences of charge upon the pursuer carrying coals from Gatehead Colliery to Irvine, as compared with what others would pay when they brought coals to Irvine, and, in the same way, from Annandale Colliery to Troon. Then he compares the charges where a party brings coals along the cross line with that which others are charged when they bring coals along the main line from another distance to Ayr. He says that they are charged again at a different rate. So that the result is, that he is charged at the higher rate all along, viz., at the rate of the cross line; whereas the others are charged all along at the rate of the main line, as well when they are traversing the main line as when they are traversing the cross line.

The first question is—whether this is in violation of the provisions of the acts of parliament. The Court of Session were of opinion that it was not a violation of those provisions; and after carefully looking at them as fully as I am able to do, I have come to the same conclusion at which the Court of Session arrived.

The question lies in the very narrowest compass. It appears to me to turn entirely upon what the provisions are in 5 Vict. c. 29, which by reference was incorporated in the Act 9 and 10 Vict. c. 211. The provision is:—That "in whatever way the said charges are made, they shall be made equally to all persons, in respect of all goods, &c., of a like description and quantity, conveyed or propelled by a like carriage or engine, passing over the same portion of and over the same distance along the railway, and under the like circumstances." Now the question on this part of the case is—whether, in the case stated by the pursuer, charges have been made unequally. The provision is, that they shall be made equally to all persons in respect of matters or things of a like description and quantity. There is no doubt that they are "things of a like description and quantity, and conveyed or propelled by a like carriage or engine."

The question is—whether the articles are conveyed "over the same portion of, and over the same distance along, the railway." My opinion is, that they were not conveyed over the same portion of, and over the same distance along, the railway. The language is exceedingly complicated, and difficult to understand; but whatever the difficulties are, we must endeavour to find our way out of them as well as we can, and endeavour to interpret the clause by strictly looking to what is the meaning of the language. It appears to me that this obligation to charge equally only applies where the same goods are conveyed over the same portion of, and over the same distance along, the railway.

These words, I think, in any interpretation, must be tautologous to a certain extent, because if goods are conveyed over the same portion of the railway literally, the "same portion" must mean the same distance. But the only way in which I can interpret the language used is this, that not only are they to go over the same portion of the railway, but they are to go over that, and not to go over any other distance, in order to make this clause of the act of parliament applicable. And I think that is extremely reasonable, for, if there is a railway 10 miles long, and one person sends his goods along the whole of it, and another sends his goods along half of it, it may be very reasonable not to impose upon the company making the charges the necessity of putting a charge at the same rate on the person who is going the small distance as on the person who is going the longer distance, for in truth a greater duty is or may be imposed in the first case in compelling the company to stop the train, or compelling them to have a station at which to take the goods or passengers up. There may be inconveniences of that sort; but without speculating as to what might have induced the legislature to come to such a conclusion, it appears to me that, in fact, they have said that this obligation exists only where the parties traverse the same distance.

My Lords, I hesitated a good while in coming to this conclusion, because it was the exact expression used in the former act of parliament, repeated in regard to the clause in which the provision occurred, and for which the clause was substituted. It looked, therefore, as if the legislature meant, in using this expression, "passing over the same portion of, and over the same distance along, the railway," something different from what they had said before, when they said "over the same portion only;" but, on consideration, I can come to no other conclusion than that the two provisions mean exactly the same thing. If that be so, it puts an end to the case, because I have looked at every one of the complaints made by the pursuer, and it appears that in no one instance does he go over the same portion and over the same distance as the other persons who are charged at the lower rate; because, except in one instance, the other persons have traversed the whole line of railway, whereas he has never traversed more than a certain portion. I say, in all instances but one. There is one class of cases in which he says, coals are brought to Irvine or somewhere thereabouts on the cross line, which come from a more distant place. There again, however, the parties have not gone "over the same portion of, and over the same distance along, the railway." It appears to me, therefore, that this pursuer has not brought himself within the provision of that act of parliament which entitles him to say that the charges must be equal, and consequently that the Court of Session came to a right determination in assoilzieing the defenders.

If that had not been the case, a question of very great difficulty and nicety might have arisen; but it is one upon which I shall not now feel myself called upon to express any decided opinion.

But even supposing that the pursuer had made out that the defenders had done something in violation of that prohibition, I must not be taken as assenting to the doctrine that, they having done so, the result would have been that the pursuer would have been entitled to recover back the difference. I do not so interpret the cases which were referred to, decided in the Court of Common Pleas; and I have had the advantage of speaking to several of the Judges of that Court, and I do not think that they so understand it. I do not wish to commit anybody upon mere loose conversation, but on explaining to them this case, and talking it over with them, they did not seem to consider that their decision at all touched this case. If it does, I only wish to guard myself against being supposed to unequivocally assent to the doctrine, that, where a company is bound to make equal charges, but does make unequal charges, the remedy for the person who has paid the higher charge is to recover back the difference, because I confess I see extreme difficulty in such a doctrine. Suppose a charge began to operate on the 1st January, and there was a clear violation of the act of parliament by some regulation that the company had made (I put an extreme case); that the directors of the company were charged 2*d.* a ton, whereas other persons were charged 3*d.* a ton—I suppose something to be done which would be in direct violation of the act,—supposing that rate to have come into operation on the 1st January, and that up to 1st June parties ran their coals at that higher rate of 3*d.* a ton, can it be said that, because on the 1st June the directors began to run and to be charged at a lower rate, the other parties might recover back the moneys that they had paid in the mean time? I do not quite see my way to any such conclusion. It may be that when the case is argued I shall be convinced that that is right. I only wish to guard myself against being supposed unequivocally to assent to what is supposed to be the doctrine laid down in that case which was decided in the Court of Common Pleas. I confess I do not so understand it if that is to be the interpretation, as it is said to be at the bar. I think it is a case which requires much reconsideration.

The short ground, however, on which I go in this case is, that the parties have not traversed over the same portion of the railway, and over the same distance, and that, consequently, the pursuer is not a person who has a right to complain of the unequal charges which he says the company have imposed. Therefore I am of opinion that the decision of the Court of Session is right.

LORD ST. LEONARDS.—My Lords, I very much regret that I cannot concur in the view which my noble and learned friend has taken of this case. It will not alter the determination of the House, but it may be useful that I should state the grounds on which I differ from my noble and learned friend, with a view to shew to the company what I believe to be the true principle by which they ought to be guided, and the principle which would probably guide the legislature in this respect, if the company ever should have occasion to apply for any addition to their powers.

The second question, which is now an unimportant one in the view which your Lordships take of this case, is—Whether or not the money could have been recovered which had been overpaid, supposing there had been an overcharge? It appears to me that the cases in the Court of Common Pleas and Court of Exchequer which have arisen against the great companies—the Great Western and the Bristol and Exeter Railway Companies—really decided that point, because the Judges treat it, not as a question of damages sustained by the man who is overcharged, so as to make it necessary to ascertain, for example, whether somebody else has carried any and what given quantity of coals, and how much the man who has been overcharged has lost in the market by not being able to bring his coals cheaper to market than the other man; but it is put upon this principle, that the company ought to maintain an equal charge, and that if they levy an unequal toll, the person upon whom they levy that unequal toll is entitled to recover that excess of charge. Nothing can be more simple; and although cases may be put in which great difficulty will arise in the application of the principle, no such difficulty arises here, because this is a case of palpable overcharge upon a mistaken ground, which may be within the act of parliament, but which is certainly not, as it appears to me, within the principle and justice of the case.

It is impossible to understand the true bearing of the point to be decided without looking a little to the different acts of parliament, for they vary very much, and require a little consideration. The first, that of 48 Geo. III. c. 46, passed in 1808, established a railway between Kilmarnock and Troon. That was, in point of fact, a tramroad, and was not for the purpose of carrying passengers, and, as I understand it, was worked by stationary engines; and that was what was called haulage. There was therefore nothing in that act about equal charges. There was a limit of charge beyond which they could not go, but they were left within that limit to distribute the charge as they thought proper. And I should wish in the outset to be distinctly understood as not stating to your Lordships a single word, or meaning to do so, which should bear against the known right—the right proper to railway companies—of varying, according to circumstances, their charges upon different portions of the same road. It is impossible that a railway company can exist without that power. They have that power, and I mean in nothing that falls from me to throw any doubt upon the right to exercise that power.

This tramroad being in existence by 1 Vict. c. 117, passed in 1837, the Glasgow and Ayr R. Co., (as I may call them shortly,) the present company, were established as a company, and were directed to make equal charges. Your Lordships will see the terms in which that is expressed in § 171, and it is very important to draw your Lordships' attention to the words of that provision:—"That, save as hereinafter excepted, the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged equally, and after the same rate per mile, in respect of all passengers, cattle, goods, matters, or things, and after the same rate per ton per mile, throughout the whole of the said railway, in respect of the same description of articles, matters, or things, and that no reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially, or in favour of or against any particular person or company, or be confined to any particular part of the said railway; but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, shall extend to all persons whomsoever using the same," and so on. That appears to me, I admit, to militate too much against the action of the railway company, but it had started with that strong ground that there must be equality, and not only equality, as is here pointed out, in like circumstances, but there is an express provision that no reduction or advance shall be made, directly or indirectly, in favour of any one person or company, at the expense of another.

There is a provision in the same act for making a branch from a part of the Troon Railway, if the Kilmarnock and Troon Railway Co. did not themselves make it. There was a provision that this company should furnish a railway from Barrassie Hill to Troon Harbour. Then in § 172 of the same act, 1 Vict. c. 117, it is enacted—that if the company, that is, the large company, shall make this branch from Barrassie Hill to Troon, "it shall be lawful for the company to charge such tolls or duties per mile on coals or other articles carried upon the said branch railway to or from the Kilmarnock and Troon Railway, as the company shall determine, not being higher than shall be charged in respect of any other part of the railway hereby established, nor higher than the rates and duties charged by the said Kilmarnock and Troon Co. upon other portions of their line." So that if the Glasgow and Ayr Co. had made that branch, and finished off the Kilmarnock and Troon line, they would have been bound to charge equal rates in the way there pointed out, and which would have prevented the present litigation.

Then came the act 3 Vict. c. 53, and there also the charges are regulated by the clauses which have been read. The object of this act was to alter and amend the Glasgow and Ayr Act; and by the 18th section of that act it is again enacted, but in different words, that, "save as by the said act or this act excepted, the charges by the said recited act authorized to be made for the carriage of any passengers," and so on, "shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line only, and under the same circumstances." Then comes this clause—"that no reduction or advance in any charge for conveyance by the said company, or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the said railway, as aforesaid." That gives the most positive direction that there shall be an equality as between persons or companies using the railway, but there is a particular provision that they are to be equal, and to use the same portion of the line. That, as it strikes me, was meant to meet this case. For example, suppose that, starting here from the nearest railway, two persons went from London to Kingston; that one stopped here and the other went beyond; the one who had gone beyond would have gone over the same portion of the line as the other. There is no doubt about that. The one would not have gone over the whole distance traversed by the other, but they would both have gone over the same portion; they would both have gone over the entire space from the London terminus to the Kingston station. But here, as in the other act, there is this express provision, after stating the case in which there shall be equality, the legislature then states that there shall be no advance and no diminution, and no favour shewn to the one person or company at the expense of the other.

Then came the act 5 Vict. c. 29, passed in 1842, and that was also to amend and alter former acts. Sect. 28 of that act is the clause upon which so much difficulty has arisen. Your Lordships will see that as these different bills were brought into parliament, the company have very adroitly contrived, upon every occasion, to lessen their liabilities, and to extend their power of charging, by introducing different words, so as to enable them to have, as they will now be decided to have, the power of establishing as gross an inequality of charge as one can well conceive.

Now this act, after reciting the former provision, and stating that it is desirable and expedient that the provisions should be modified, enacts—"that it shall be lawful for the said company, wherever they shall provide locomotive or steam power, or carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, or shall act as carriers," to charge as they shall think expedient. It gives them the largest powers to charge whatever they think proper for both passengers and goods. But then there is this limitation, that the charges shall be equal upon everybody, and that prevents an

abuse of the power, independently of any question as to whether they are limited to any particular amount. The clause states—(reads rest of clause.) Those words, "of a like description," &c., were introduced to meet, what I have already stated, the case of persons or goods travelling over the same portion of the railway, but not the same distance along the railway, and therefore, for the first time, were added those words, "and over the same distance along the railway, and under the like circumstances," &c.

Now they want a measure or rule by which they are to be governed in their equal charges, and parliament gives them a measure. It gives them a standard, where the circumstances are precisely equal in the one case to the other, and where the two cases are equal to each other they shall be subject to exactly the same rule, and be liable to exactly the same charge; but these words are not to be rejected. In whatever way the charges are made, there is to be no reduction or advance in any of such charges "partially, either directly or indirectly, in favour or against any particular company or person." And, therefore, when you have ascertained that the cases seem to be the same, and that therefore there should be equal charges, of course they must be charged alike. But supposing that you say that one case is not quite equal to the other, and that therefore it does not fall within the description, well, admitted that it does not, what then? The section provides, that in whatever way you make the charges against one person or against one company, you must not, directly or indirectly, advance or lower those charges to the damage or prejudice of any person. You must act fairly and equally. No man can sit down, whatever his ability may be, and give instances of different cases that must practically occur. Nobody can draw out an abstract rule that would embrace every case with reference to equality; but first of all, putting the cases of two persons or two companies, where there is perfect equality in the circumstances, it is provided that there shall be equality in the charges. Nothing can be so clear as that; but where that does not occur, the section goes on to state, in whatever way you make the charges, you shall make no advance or no lowering of your tolls, directly or indirectly, to the injury of one as against the other; and, therefore, in every case where there is inequality, you have to ask whether that is, directly or indirectly, an advance or a lowering, for the purpose of benefiting one party preferentially and favourably at the expense of another. It has nothing to do with charging persons equally, whether they travel over the entire of the ground that the others travel over; but it has everything to do with the simple question, when the question is put—is that, or is it not, a charge which is an advance or a lowering to the benefit of one at the expense of the other? So far the case seems very clear.

Then there is the Railway Clauses Consolidation (Scotland) Act, 8 and 9 Vict. c. 33, which provides for equality also. That act is embodied in and applied to this very act. And § 83 enacts, that there shall be equal charges "in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway," (there is not a word about distance,) "and under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of, or against, any particular company or person travelling upon or using the railway." So that the public act is quite as precise as the particular private acts, in order to prevent inequality.

The view, therefore, which I take (without for the moment considering the circumstances of this case) upon these mere acts of parliament is this—that if in this case the Court should be satisfied that there has been a difference of toll for the purpose of giving an advantage to one set of owners of coal over another set, that is a toll which cannot be maintained, because, construe acts of parliament as you will, however the company may make their charges, whatever shape their charges may assume, however they may attempt to disguise what they are doing, if it is an infringement of the rights of one to the benefit of others, the acts of parliament, one and all, strike at the very root of that, and prevent the inequality of the toll.

Then the Act 9 and 10 Vict. c. 211, was the act which gave powers to the Kilmarnock and Troon Company to lease their railway to the Glasgow and Ayr Company, and under § 25 they were restricted as to their power of taking toll. There was nothing peculiar in that act; but the 8 and 9 Vict. c. 33, it is very material to observe, was extended to this act, and therefore, in point of fact, the general clauses of the Consolidation Act do bear upon, direct, and influence the proceedings, and ought to do so, of the company under this particular act.

Now we come to a very important matter, and that is the lease which was granted in pursuance of this act. The Kilmarnock and Troon Company did lease that railway, then being, as I have stated, a mere tramway, worked, as I understand, by a stationary engine, and therefore haulage only being practised. A lease for 999 years was made to this company. Now, in point of fact, they hold that railway under that lease; and whether the decision below be right or wrong, it proceeded upon a wrong ground, which I believe everybody has given up, because it proceeded upon this ground, that the Glasgow and Ayr Company held that property under that lease, by which they were bound to pay not only a fixed rent, but also a tollage rent, which was to be estimated by the quantity of coal raised upon this very railway, from a point in which the pursuer is himself interested, up towards Kilmarnock. Whatever coals were raised there was a tollage

paid, and that was the measure of the rent to be paid by the company. Now the Courts below held that that was a circumstance, which entitled the company to charge those persons who lived upon the line of the Kilmarnock and Troon Railway a sum beyond that which was charged upon the main line, so as to cover that tollage. Everybody has given that up. It has not been attempted to be argued. The point has not been taken. They would have been equally entitled to charge as paying a fixed rent. It might or might not be a circumstance that would entitle them to charge, but nothing has been shewn to the House to prove that they were entitled to charge, because, look at the fallacy of it—the main line had been made, the company had to buy the land, they had to give a large price in ready money for the land; of course a large capital had been sunk, and they estimated their tolls by the amount of their expenditure, and a fair rate of interest, or the rate that they desire to have, according to the power given to them. And so in the same manner with regard to this rent, though it was measured by the tollage on this particular part of the line, with reference to the quantity of coal, it is only a representation of the price paid; and unless it could be made out that the price was greatly expended on the Kilmarnock and Troon line, and that therefore was a circumstance which differed or distinguished the case, it could make no possible difference that the one was a purchase and that the other was a mere lease, subject to a fixed rent. That, therefore, was a ground that could not be maintained, it is perfectly clear.

Now it is material to consider what the provisions of this lease were, because, although I admit that the rights of the landlord under that lease could not be brought into question here, yet it is very important in adjudicating upon this case, to ascertain what were the terms upon which the Glasgow and Ayr Co. obtained this Kilmarnock and Troon line. Let us see what those sums were. They were to pay a fixed sum, ascertained by the tollage, in the way I have mentioned; and then comes this most important clause:—In regard to the haulage charges they say—"that it is further agreed to, that the gross charge to be made by the Glasgow and Ayr Co. against the traders for haulage of minerals, for any given distance on the said railway—(that is, the Troon line)—shall never exceed the gross charge for haulage of minerals (in course of being conveyed to Troon) for the like or any greater distance on the main line of the Glasgow and Ayr Co." Then, lower down, there is another provision as to the charge, and you will find there must be an equal charge. The gross charge must not exceed the gross charge in going to Troon for the like or any greater distance on the main line; so that the tollage charged upon coals coming along the main line is to be the measure of the charge upon the Kilmarnock and Troon line for conveying coals. The one is to pay 6*d*., we will say, for going seven miles along the main line, carrying coals to Troon, and you are not to charge persons who are upon the Troon line more than 6*d*. for the same distance. But beyond that you are not to charge, as a gross charge, on the Troon line more than you would charge for the greater distance on the main line. Not only your charge on the Troon line is not to exceed the charge for an equal distance on the main line, but you must never have a lower charge on the main line than you have on the Troon line. You must not charge more upon the Troon line, whatever the distance may be, than you charge for any greater distance upon the main line.

Now what was the meaning of that? It was evidently, as I understand it, that the coals upon the Troon line should find their way to the sea by way of Troon harbour, at exactly the same cost of carriage as the cost was to persons on the main line for carrying coals to that place. If it does not mean that, I cannot understand what it means. It means to give the persons living along the Troon line the same facilities, in point of price, of getting to Troon harbour, as persons would have upon the main line, however distant they might be. Of course that which the company have done under their lease is in direct violation of that stipulation. If it is to be considered to apply, as I should consider it ought, to the locomotive—the one being a substitute of the other—the principle applies beyond all question; and if it be so, then they are directly infringing and breaking in upon the very terms of the lease under which they hold the Troon Railway.

The way in which they have managed it is this:—They issue, as they were bound to do, tables of rates under their act of parliament. I need not stop to observe, that for short distances the rates are the same, but after short distances they have a higher rate on the Troon line than they have upon the main line. They issue two separate tables—one for the Troon line, and the other for the main line. That is right enough, according to the act of parliament. Nobody, as I understand, finds fault with those two tables standing, as they do, separately. They are justified by their powers in doing that, although they are not justified by the circumstances under which they have increased the toll. But we will consider them as both properly issued. They do not adhere to that which they are bound to furnish under the act. Without notice to the public, they break in upon the very tables by which they are bound to be guided, and which are to be the guiding rule of the company, for, instead of stating, as they ought to do, that these Troon rates are only to apply where the Troon people run over the line, and that, when persons come to the main line, then, at once, the rates are to drop, the tables do not tell you a word about that. Those tables are a violation of the act of parliament. They mislead the public. If they had stated the

thing as they ought to have stated it, upon the face of the tables, the inequality would have been manifest. They were bound to state it. They have evaded the act, and committed a breach of their duty in their way of levying these tolls, without reference to the question of law, which I am not now adverting to. They have created that inequality, and they have attempted so to arrange it, that the inequality should not appear on the face of the tables. I defy anybody to draw those tables as they ought to be drawn, without shewing the inequality upon the face of them.

Then, is or is not that an infringement of these acts of parliament? If I understand the principle of them, it clearly is not simply that you are to look at the words which state, that things which are equal to each other are to be charged alike, but you are not at liberty to strike out from all those acts the clauses which emphatically declare that there shall be no advance, no diminution, so as to favour, directly or indirectly, one to the prejudice of the other. Now, has that been done here? That is a simple question of law. The question of fact admits of no doubt. because there is no equality, and no pretence of equality. They do not pretend that there is any equality. The Troon people, who are upon the cross line, can neither go to Irvine harbour nor Ayr or Troon without paying an extra large charge which is imposed upon that line, and imposed, according to the table, upon the whole world passing that way, but, according to the practice of the company, imposed only upon that particular line. Then they are bound to pay it. But is not that an advancing, directly or indirectly, of the tolls upon those particular persons for the benefit of others? What is the position of parties upon the other line? If they come from any distance, either short or long—if they come merely from Kilmarnock, travelling upon that portion of the principal line running from Kilmarnock to join the Troon line—a very short portion—the moment they reach the Troon line they are actually exonerated from charge upon the Troon line, and they are allowed to run over the whole of that line at the lower rates. It is impossible to tell me that that is not an infraction of the act of parliament. It is contrary to the very words and the principle of those acts. I look at the principle. I never break in upon what I believe to be the true construction of words. But it is the duty of a Court of Justice to make words which have an uncertain import bend to the justice of the case; and it is very seldom, indeed, that any man who is master of the law cannot, without breaking in upon the law, make the rule bend so as to meet the justice of the case.

Hard cases make bad laws, and so they do. If words have an unnatural import given to them, if the rule of law is twisted and damaged in order to reach a particular hardship, nothing can be worse. But a Court of Justice, when they are making a fair application of the rule of law to words difficult to construe, bend them so as to meet the real justice of the case. Here there can be no doubt of the justice of the case. The effect of what is done is to benefit the coal owners of the main line at the expense of those who are on the cross line, and they are able, therefore, to carry their coals from a greater distance upon the main line to Troon harbour, and in that way to the sea, than the parties upon the Troon line can carry their coals, who are damaged accordingly. That, of course, takes away the benefit of that railway from the persons of that locality.

It appears to me, with very great deference to my noble and learned friend, that, upon the true construction of all these acts, without breaking in at all upon the rights of the company to levy different rates upon different portions of their line, according to the fair circumstances of the case, this is a breach of that positive enactment which is contained in every act, that, charge in whatever way you will, you shall not, directly or indirectly, favour one at the expense of the other.

There are no cases upon the subject. There was a case very much relied upon, which was before Lord Cottenham, and which was supposed to have a bearing upon this case. But I confess after a very attentive consideration of that case, with great respect to that very learned Judge, I do not think the judgment in that case is very clear, or altogether satisfactory. But I think the facts entirely distinguish it from the present case. That was the *Attorney-General* v. *The Birmingham and Derby Junction Railway Co.*, 2 Rail. Cas. 134. There was a railway from the London and Birmingham Railway at Hampton in Arden to Derby. It was a connection by a branch with the London and Birmingham Railway. It was 38 miles long. The railway company charged 8*s.* for a passenger going to or from Hampton in Arden to Derby. They charged the same both ways; but they charged 2*s.* if passengers were proceeding from or along the London, and Birmingham Railway from London to Derby or from Derby to London, but 8*s.* as before, when the passengers went from or to any place short of London. The object of that was to obtain passengers from the Midland Railway, which saved 11 miles. It was insisted that the decision of Lord Cottenham in this case shewed that these charges were proper charges. In the first place, you will observe that there was an equality of charges upon the Hampton in Arden line both ways. It was only when London was the terminus that the fare was lowered, and it was lowered to everywhere. It was not that a passenger starting from Hampton in Arden paid 8*s.*, and another starting from another part paid 2*s.* There was a difference but no inequality. I think, therefore, that in no respect does that case touch this. But that was a case in which difference of charges might be fairly made. It was not at the expense of one person or company

to the benefit of another person or company, but it was an arrangement with reference only to the railway itself, and there was no infringement, in point of fact, of the benefit of Hampton in Arden in the way which has occurred in this case. But in this case the result is, that the coal owners are damaged, no doubt very seriously, by the course which has been taken by this company, and the decision of your Lordships will give them authority to do this.

I thought it right to state my view, and I have done so for the purpose I have mentioned. The company will do well to consider whether they should make those tolls more equally between the parties; and I must say, stepping out of my judicial course, that if they should have occasion to come before parliament, I cannot doubt that, under the circumstances, your Lordships will do that justice which, it appears to me, is not now done.

The *Solicitor-General* asked that the House would take the course it took in *Johnston* v. *Beattie*, 10 Cl. & Fin. 52, where the learned Lords were equally divided, and instead of moving that the appeal should be dismissed, the consideration of the case was adjourned.

LORD ST. LEONARDS.—It is impossible to do that.

Solicitor-General.—It amounts otherwise to a complete denial of justice. That was the course there taken, and there was a re-argument.

Interlocutors affirmed.

Appellant's Agents, Walker and Melville, W.S.—*Respondent's Agents*, Gibson-Craig, Dalziel, and Brodie, W.S.

MAY 10, 1855.

JOHN PURSELL, *Appellant*, v. Mrs. NEWBIGGING and Others, *Respondents.*

Vesting—Trust—Construction—Death of Annuitant—*By a trust deed and settlement it was provided, that certain annuities should be paid to the truster's two sisters and his niece, the share of a deceaser being declared divisible among the survivors equally. After payment of the annuities, it was provided that the annual free produce of the trust funds should belong to the truster's nephew; that on the niece's annuity amounting to £40, the nephew should grant a bond binding himself in payment to her of that sum yearly, and, on her decease, of £800 to her children, and failing issue of her body, to himself; and that, "after executing the purposes of the trust," the residue of the trust estate should belong to the truster's nephew and the heirs of his body; whom failing, to the truster's niece. The nephew having predeceased the niece and another of the annuitants, without having executed any bond:*

HELD (affirming judgment), *That the fee of the residue of the trust estate became vested in him before his death.*[1]

The late George Warroch, by disposition and settlement dated 21st June 1799, disponed to James Warroch his brother, and failing him by decease, to Dr. John Warroch Pursell his nephew, or such of them that should happen to survive him, and accept of the trust, and the heir of the survivor, his whole property, heritable and moveable, for these purposes:—1. Payment of debts, &c. 2. Payment of annuities of £25 each to his sisters Ann and Euphemia Warroch, of an annuity of £20 to Dr. John Warroch Pursell, during the life of James Warroch, and of £20 to Catherine Paxton Pursell, subsequently Mrs. Gowan, sister of Dr. Pursell, during her life; declaring, that in case of the decease of any of the annuitants, the annuities provided to those deceasing should belong to the survivors equally,—it being provided, however, that Mrs. Gowan's annuity should in no event exceed £40 sterling by the falling in of the annuities; and that, after payment of the annuities, the annual free produce of the trust funds should belong to James Warroch himself during his life. 3. It was provided, that on the decease of James Warroch, Dr. Pursell should, besides the above annuities to each of the truster's sisters, pay to them equally £20 sterling yearly, and failing any of them by decease, it was provided, that the share of those deceasing should belong to the survivors equally, and that, after payment of the annuities, the free annual produce of the trust funds should belong to Dr. Pursell. 4. That so soon as Mrs. Gowan's annuity should amount to £40, and which sum it was never to exceed, Dr. Pursell should execute a bond binding himself to make payment to her of the annuity of £40, in full of her share of the trust funds, and to make payment after her death of £800 to any child or children lawfully procreated of her body; and failing such issue, it was provided, that the bond should be taken to Dr. Pursell, and his heirs whatsoever, whom failing, to the truster's own

[1] See previous report 15 D. 489; 25 Sc. Jur. 317. S. C. 2 Macq. Ap. 273: 27 Sc. Jur. 386.