FINNIE, ... APPELLANT,
GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, ... RESPONDENTS.

1857.
August 3rd, 4th, and 13th.

Railway Tolls—Agreement.—Circumstances under which it was held, (affirming the decision of the Second Division of the Court of Session,) that the above Company were not bound to restrict themselves to a certain rate of charge for the conveyance of coals.

Jus quesitum tertio.—Per the Lord Chancellor: This *jus* must be not merely a *jus* in which the *tertius* is interested, but it must be a *jus* that was intended to be beneficial in some way to a third person.

Per Lord Wensleydale.—I think it is not necessary that the stipulation should be in favour of a *named* party (though the instances given in the decisions are such), for I conceive that if the party be sufficiently described, and the description is already meant to be in his favour, it will entitle him to sue.

Per Lord Wensleydale.—By a stipulation in favour of a third party I understand an agreement that something is to be done or permitted for the benefit of a third person, clearly ascertained, who, though not a party to the contract, may afterwards come in and insist upon its performance, and in the meantime the actual parties cannot revoke it.

THE case commenced in April 1852, by a note presented to the Court of Session on the part of Mr. Finnie, praying an interdict against the Railway Company (Respondents) whereby they should be prohibited and discharged "from taking from Mr. Finnie "any higher rate of toll in respect of the conveyance "of coals than the rate of one penny and one-eighth "of a penny per ton per mile, *fixed in concert* by the "Glasgow, Paisley, Kilmarnock, and Ayr Railway "Company, and the Kilmarnock and Troon Railway

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" Company, in terms of the Respondents' lease, and " which was contained in a list published by them, in " compliance with their Acts, on the 4th October 1848, " with the approval of the Kilmarnock and Troon " Railway Company."

The interdict was granted by Lord *Anderson* on caution, his Lordship observing that the lease provided that the tolls to be taken in respect of minerals should, as occasion might require, be fixed by the two companies *in concert*, whereas the tables complained of had been fixed by the Respondents alone, not only without concert, but against the consent of the Kilmarnock and Troon Company.

Afterwards a record was prepared, and on the 18th March 1854 Lord *Handyside*, having heard Counsel, gave judgment finally interdicting, prohibiting, and discharging the Respondents in conformity with the prayer of the Appellant.

This decision was carried by reclaiming note to the Second Division of the Court of Session, and on the 14th July 1855 the following opinions were delivered:

The *Lord Justice Clerk:* In whatsoever way the table of tolls of 4th October 1848 originated, I think the Suspender has failed to prove that it was ever deliberated upon and concerted between the two Companies. As the prayer of his petition expressly founds upon it as concerted between the two Companies, and published by authority, he must make out that proposition, or he has no case. Now, I think it clear that that table was never known to or approved of by the Kilmarnock and Troon Company. *Agreed* to or *approved* of by that Company it was not; for the agreement was, that 2*d.* per ton per mile might be charged, that sum being divided with the Duke of Portland, the representative of the Troon Company, in the proportion of $1\frac{1}{8}d.$ to his Grace, and seven-eighths of a penny to the Ayrshire Company. So the table of 1848 cannot be evolved out of this agreement. It was certainly not *published* by the authority of the Kilmarnock and Troon Company. I am therefore clearly of opinion that Finnie has failed to prove his case. I say nothing as to his right to found on the lease between the two Companies, as conferring a boon upon traders, and restricting the statutory powers of the railway. That question I reserve open. On the argument addressed to us on that point, I think it proper to say I incline to think he has no

such right, in order that we may not be supposed to countenance such claim by saying that it is left open. It is enough for the decision of the question now before us that the Suspender has failed to prove his case.

Lord *Murray:* I apprehend we have only to deal with a note of suspension presented by a trader who has a great pecuniary interest at issue, and has certainly a right to complain, if more be exacted from him by the Railway Company than the Acts of Parliament sanction. But it appears to me that he has not shown that he has been charged more than these Acts warrant. As to the respective rights of the Companies *inter se*, they are not before us; and I do not think we are bound to go into the consideration of them, or of all the correspondence referred to in support of the views of either party. The whole question we have to deal with depends on the Act of Parliament. The two Companies may have made an agreement with each other, and the actings of one of them may have been inconsistent with what was so settled. If so, it is for the other Company to bring some definite action, in order to enforce the observance of said condition. But if a trader has not been paying more than the Company is authorized by its Act to charge, he has no right to prevail in an application like the present.

Lord *Wood:* I agree with your Lordship. I do not say that there might not be cases in which Finnie might be entitled to found upon the case between the two Companies, but I am inclined to think that he cannot succeed here. He has entirely failed to make out any case upon the prayer of his own petition. His argument is, that he cannot be charged more than $1\frac{1}{8}d.$, because that is the sum contained in a list of tolls of October 1848. Is that the case? There is no doubt that, according to the lease, a table is to be concerted between these two Companies from time to time. But there is not the slightest ground for saying that the one founded on by Finnie was fixed in concert for traders using the line and furnishing their own engines and carriages. In order to make that out, it is necessary that the table should be evolved out of the arrangements between the two Companies in 1847. At that time the state of matters was different, and the negotiation with the Duke of Portland was not entered into with a view to traders at all. The question the Ayrshire Company had then to solve was, how to make the Troon line pay. Having fixed upon a reduction of the dues from $2\frac{3}{4}d.$ to $2d.$ per ton per mile, they enter into a negotiation to carry out that reduction, by obtaining a diminution of the rent paid to the Duke. And, after all, what was the table? It fixes nothing at all as to the case of traders using their own engines and carriages; and, in fact, beyond the lowering of what was paid to the Troon Company or the Duke of Portland, nothing had been concerted between the parties. That was the only object in view at the time. It was argued to us, that what the Ayrshire Company agreed to was this,—that the

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Troon Railway, though kept up by them, was to be made use of for a sum that would leave them nothing at all,—that it was to go to the Duke of Portland. That would require to be very clearly indeed made out. It was not likely that the Company would give the use of the railway for nothing. It is my view of the case, that it was not "tolls" at all, but "rent," properly speaking, that was concerted about. There was no concerted table of "tolls" made or published. The parties only agreed as to the gross charge of 2*d. per* ton *per* mile. I see no act done by the Troon Company approving in the least degree of the table of 1848. It never having been executed or approved of, it was quite in the power of the South-western Company to correct it. Mr. Finnie has therefore failed to make out his case.

Lord *Cowan:* I have confined my attention entirely to the case before the Court, bearing in mind that here we have no declaratory action, but merely a petition for interdict, with its peculiar prayer. The question before us then is, whether Finnie can interdict the Railway Company from collecting tolls at a higher rate than the one alleged to have been fixed in concert? The case is a proper one for a jury, the question being whether the table of 1848 was a concerted one? and had there not been a minute of admissions, it must have gone to a jury; but the parties have left it upon the evidence we have before us. I refuse to enter upon the question what rates Mr. Finnie may be compelled to pay to the railway. We have no *termini habiles* for determining that. We have only the suspension before us; it being disposed of, parties may go on to litigate as to the amount of rates in the proper petitory action. The basis of the argument of the counsel for Mr. Finnie was the correspondence composing the agreement between the Ayrshire Company and the Duke of Portland. But as to the correspondence, I agree with your Lordship that it had only reference to the amount of "rent" to be paid to the Duke. It was a most natural question for the Ayrshire Company whether they should not reduce their rates to 2*d.*, in order to promote traffic; and this they could only do provided the Duke would cede part of his rent. That reduction was made; but had that agreement anything to do with the charges to be made by the Railway Company, in the event of a trader putting his own engines and carriages on the line? It is utterly impossible to say that the table of 1848 was engrossed in the agreement evidenced by the correspondence in 1847. It never was intended by the agreement of 1847 to give consent to a table of rates published in 1848, and under which no profit was to arise to the Company. I cannot transfer the consent from the table of 1847 to that of 1848. The only question before us is, was the table of 1848 passed in concert? and I have no sort of hesitation in saying that it was not.

The Second Division therefore altered the interlocutor of Lord *Handyside*, recalled the interdict, and

found "that the rate of one penny and one-eighth of a penny per ton per mile was not fixed in concert as alleged, and that the list of tolls dated 4th October 1848 was not published by the said Glasgow, Paisley, Kilmarnock, and Ayr Railway Company with the authority and approval of the Kilmarnock and Troon Railway Company, the same not having been in anyway concerted and arranged with the latter Company; and they condemned the Appellant in costs.

Against this judgment it was that Mr. Finnie appealed to the House, craving that the same might be reversed.

The *Attorney General* (*a*) and Mr. *Anderson* for the Appellant. The error of the Court below is that they suppose the Appellant to be precluded from founding on the lease between them and the Kilmarnock and Troon Company. But the Appellant's right is founded on a well known principle of Scotch law, thus expounded by Lord *Stair* (*b*):—"Where parties contract, if there be any article in favour of a third party, it is *jus quæsitum tertio*, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged party may be compelled to perform. So a promise, though gratuitous, made in favour of a third party, that party albeit not present nor accepting, was found to have right thereby." This doctrine was considered by your Lordships in the case of *Peddie* v. *Brown* in the month of June last (*c*). But here Mr. Finnie is not precisely in the character of a third party. He is not a stranger; he is named in the lease. The Judges below all go on a misapprehension

(*a*) Sir R. Bethell. (*b*) B. 1. t. 10. s. 5.

(*c*) *Suprà* p. 65.

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of the Appellant's contention. He does not maintain that the "tables" were to be "in concert," but that the "tolls" were to be "in concert."

The *Lord Advocate* (*a*) and Mr. *Rolt* for the Respondents. There is really no *jus quæsitum* in Mr. Finnie. It was beyond the power of the Company to give the Kilmarnock and Troon Company a voice in the question of tolls. The agreement gives the public no right to put it in force. In point of fact, the tolls never were fixed in concert by the Companies as here alleged; and no table of tolls having been fixed, and the Kilmarnock and Troon Company having, as appears from the proceedings, refused to do anything for the adjustment of such table, and having moreover declined to refer the matter to arbitration, as allowed by the lease, we apprehend it follows that the Respondents were entitled to exact the rates objected to, so long as they kept within the maximum limited by Statute. The Appellant is but one of the public, and as such is in no position to complain.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

My Lords, The question in this cases arises upon a note of suspension and interdict, praying that the Glasgow and South-western Railway Company might be prohibited from charging any higher rate of toll than $1\frac{1}{8}d.$ per ton per mile, alleged to have been fixed by the Glasgow, Paisley, Kilmarnock, and Ayr Company (who are now represented by the Respondents), in concert with the Kilmarnock and Troon Company, and in consequence of which a list of tolls was published on the 4th October 1848.

The *Lord Ordinary* was of opinion with the Appellant upon that point, but the Lords of Session took

(*a*) Mr. Moncreiff. (*b*) Lord Cranworth.

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a different view; and against the decision of the Lords of Session the present Appellant has brought the matter before your Lordships' House.

The Kilmarnock and Troon Railway Company was established by an Act of Parliament, the 48th George III. chapter 46; the line was originally a mere coal line, and in truth might substantially be called the railway of the Duke of Portland. The Duke of Portland is said to have had seventy-seven shares, Lord Eglintoun, I believe, two shares, and some other gentleman one share; substantially it was a coal railway for the benefit of the collieries on the line between Kilmarnock and Troon, in which the Duke of Portland was the person mainly interested as lessor.

By an Act of the 7th of William IV. and the 1st of Her present Majesty, a certain company was incorporated, called the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company; that was for a railway running from Glasgow by Kilmarnock down to the coast, and to Ayr and different places along that line; and there were several Acts of Parliament extending that Act, and eventually that Company became amalgamated with certain other Companies, and they are now represented under the name of the Glasgow and South-western Railway Company; and inasmuch as all the rights of the former Companies have been concentrated in that Company, it may be called generally the Glasgow and South-western Company.

The Act of the 9th and 10th of Victoria, chapter 211, which received the Royal Assent on the 16th of July, 1846, authorized leases by the Kilmarnock and Troon Railway Company to the present Respondents, or those whom the present Respondents now represent, upon certain terms.

The 7th section of that Act provided, that it should be lawful for the Kilmarnock and Troon Company to

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grant in lease upon certain considerations, and generally upon such terms as they should think proper, the Kilmarnock and Troon Railway, and the other works, to be held under the same powers, rights, and privileges as the original coal line.

By the 14th section it was enacted, that the new Company, the lessees, should be entitled to re-lay and re-form the whole of the line, including certain portions of the line mentioned, and maintain the same as an edge railway, that is, a railway for the carriage of passengers and goods, similar to the railways which generally we have in this country.

Then by the 24th and 25th sections, provision was made as to the tolls. By the 24th section it is provided that all powers given to the Kilmarnock and Troon Company for the purpose of enabling them to demand or charge any tolls should be repealed; and by the 25th section certain new tolls were allowed to be charged upon goods conveyed upon the Kilmarnock and Troon Railway; and with regard to coal, the provision was that the Company might take for all coals $2\frac{1}{2}d.$ per ton per mile, and if conveyed in carriages belonging to the Company an additional sum of $1d.$ per ton per mile. And then, by the 26th section, the Company were empowered to demand for the use of the engines $1d.$ per ton per mile, so that they might eventually charge $4\frac{1}{2}d.$ per ton per mile, viz., $2\frac{1}{2}d.$ for toll, $1d.$ for the use of the carriages, and another $1d.$ for the use of the engines. If the goods were conveyed by the traders, as they are called,—the miners,—in their own carriages, they were to pay $2\frac{1}{2}d.$, if they were conveyed in the carriages of the Company, but by their own haulage, then they were to pay $3\frac{1}{2}d.$, and if they were conveyed altogether by the Company, then all those charges together would have made $4\frac{1}{2}d.$ per ton per mile. But the 31st section provides that

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where the Company provides the whole—the railway, the carriages, and also the haulage, that is the engines, —then they shall charge only $3\frac{1}{2}d.$ per ton per mile.

My Lords, that Act received, as I have stated, the Royal Assent in July 1846, and a lease was made in pursuance of the powers there granted very shortly afterwards, on the 25th January in the year 1847, and in that lease the Kilmarnock and Troon Railway Company let to the Glasgow Railway Company, now represented by the Respondents, their line upon the following rent: First, a fixed sum of 375*l.* yearly; secondly, a sum equal to $1\frac{1}{2}d.$ per ton per mile on all minerals carried upon the railway, provided the same should have been raised from lands lying between the towns of Kilmarnock and Troon, upon which the coal had heretofore been used to be carried. There were some other stipulations, as to what should be paid upon coals from other mines, but these it is not necessary further to advert to.

Then there is this stipulation: "The Glasgow, Paisley, Kilmarnock, and Ayr Railway Company," who are represented by the Respondents, "hereby bind and oblige themselves to account for, and to pay the foresaid fixed rent, and the rent calculated on the quantity of minerals carried as aforesaid to the said Kilmarnock and Troon Railway Company;" "and it is hereby specially agreed to that the said rent shall be calculated as if the charge on minerals per ton were $1\frac{1}{2}d.$, although the carriage should be for a shorter distance than one mile." And then there was this provision, "And it is hereby agreed that the said Glasgow, Paisley, Kilmarnock, and Ayr Railway Company shall by themselves have power in terms of the Railways Clauses Consolidation (Scotland) Act, 1845, to fix the rates and duties to be taken or charged

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in respect of goods other than the toll on minerals, and for passengers on the said Kilmarnock and Troon Railway, but that the tolls to be taken and charged in respect of minerals shall, as occasion may require, be fixed by the said Company and by the Kilmarnock and Troon Railway Company in concert."

That was an important provision for the Kilmarnock Railway Company, representing, in truth, the Duke of Portland, because it was his interest that there should be no excessive charge made for the carriage of coals along that line, as it might induce his tenants, the lessees of the coal mines, to carry their coals by some other route:

The object of the interdict which was sought for was to restrain the Glasgow and South-western Railway Company from charging more than a $1\frac{1}{8}d.$ per ton per mile upon coals conveyed along the Kilmarnock and Troon Railway. The Act authorizes $2\frac{1}{2}d.$ to be charged, but the Appellant contends that the charge was reduced to $1\frac{1}{8}d.$, and he does so upon these grounds. By the terms of the lease which I have read it was stipulated that the tolls upon minerals, which of course would include coals, should be fixed in concert by the Respondents and the Kilmarnock and Troon Company, and then he says that the toll was fixed in concert between the two Companies at $1\frac{1}{8}d.$ per ton per mile.

Now, my Lords, two questions arise upon this appeal. First of all, is it true that in point of fact a $1\frac{1}{8}d.$ per ton per mile was fixed as the sum to be paid as the toll? Secondly, if that be so, is the Appellant entitled to an interdict in consequence of that $1\frac{1}{8}d.$ having been so fixed?

The Court of Session decided against the Appellant on the first point; that is, on the point of fact that there had ever been a settlement such as that for

which he contends, of a $1\frac{1}{8}d.$, and they expressed a strong opinion also on the other point, but they did not decide the case on that ground.

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My Lords, I have considered the case with the best attention in my power, and in my opinion the Court of Session came to a correct conclusion upon the point of fact, which was the first point.

From the time when the Ayrshire Company took possession of the Troon line under the lease, the traffic on that line was conducted by them exclusively by their own engines and their own carriages, and they charged $2\frac{3}{4}d.$ per ton per mile for the coals. This was less than by the Act of Parliament they were entitled to charge; for they were entitled to charge for carrying coals along the railway when they supplied haulage, carriages, and railway, $3\frac{1}{2}d.$; but, in fact, they only charged $2\frac{3}{4}d.$ But soon after the opening of the line it was found that this charge of $2\frac{3}{4}d.$ was more than, in all probability, could be profitably maintained, because rival lines were threatened. And then a long negotiation took place between the agents of the Duke and the agents of the Respondents' Company, in which the question was discussed whether it was not for their common interest to reduce the charge, so that instead of charging $2\frac{3}{4}d.$ something less than that should be charged; and the result of that negotiation, which is to be found in a number of letters of a very desultory character, was, that the two Companies, or rather the Duke of Portland, on the one side, and the Respondents' Company on the other, entered into an agreement, it being a matter in which they had a common concern; and by that it was agreed that the Company should reduce that charge of $2\frac{3}{4}d.$ to a charge of $2d.$, and they did it upon these terms; that if that were done, the Duke and the Company should divide the loss equally, the Duke agreeing, that instead of

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taking $1\frac{1}{2}d.$ per ton per mile, which under the lease he was entitled to, he would take $1\frac{1}{8}d.$, throwing off $\frac{3}{8}$ths of a penny. The Company, on the other hand, agreed that instead of receiving what they had received, which would have been $1\frac{1}{4}d.$, they would throw off $\frac{3}{8}$ths, and take only $\frac{7}{8}$ths of $1d.$: and so the Duke taking $1\frac{1}{8}d.$, and they taking $\frac{7}{8}$ths of $1d.$, that would make $2d.$ as the gross charge.

After some discussion this was agreed to, and the charge was fixed at $2d.$ a ton per mile, and though the table of charges was not set up until October 1847, it was agreed that this charge should have a retrospective operation to the preceding month of May, when the negotiation had been, in truth, concluded. And accordingly the traders who used the line for the purpose of carrying their coals were informed that those who had paid tonnage at the advanced or higher rate would be entitled to a reduction from the month of May, so as to make the payment which had been made since May that which it would have been according to the new rate fixed in October. A calculation was accordingly made, and it was found that there had been paid by the traders in respect of this additional $\frac{3}{4}d.$ an excess of above 2,000*l.* That was divided into two equal parts; one half was paid, no doubt, by the Duke, and the other half by the Company. That was in October 1847.

In October 1848, the Ayrshire Company set up a table of tolls properly so called, for the former table which had been set up had related merely to the $2d.$ per ton per mile which the Company would charge, including the toll for the use of the railway, the engines, and carriages. In October 1848, the Ayrshire Company set up a table of tolls, in which they described the toll for the coals at $1\frac{1}{8}d.$ per ton per mile. That was what the Duke was to receive from

them: they fixed this toll at the same sum that they had agreed to pay to the Duke, viz., $1\frac{1}{8}d.$ instead of $1\frac{1}{2}d.$ per ton per mile.

The question is whether this toll had been fixed in concert between the two Companies? If it had been so fixed, then it would not be competent, according to the terms of the lease, to either party to alter it. But if it had not been so fixed, but was the mere act of the Respondents, the Glasgow and South-western Company, they might alter it at their pleasure. That is the main question, whether this had been so fixed in concert, and I entirely concur with the Court below, the Court of Session, in thinking that this had never been fixed in concert with the Duke. All that had been agreed upon with him was that if the Company reduced the general charge for the carriage of coal from $2\frac{3}{4}d.$ to $2d.$, he would agree to reduce his toll charge from $1\frac{1}{2}d.$ to $1\frac{1}{8}d.$ It had no reference to what the Company was to charge for mere toll, and it is obvious that they might very well afford to give $1\frac{1}{8}d.$ per ton per mile to the Duke, if he received $\frac{7}{8}$ths of a penny for the haulage, and for the use of their carriages; but they could not possibly intend to bind themselves to receive only $1\frac{1}{8}d.$ if the whole was to be paid to the Duke, and they were to receive nothing at all, because in cases in which the Company does not furnish the carriages and haulage, but merely supplies the railway, and receives only the toll properly so called, if they were to hand the whole of that over to the Duke, their position would be this, that they must keep up the railway, with all the expenses incidental to it, and receive nothing at all. It is impossible that that could have been contemplated, and in my opinion that is clearly not the result of the negotiation that took place. Therefore upon the point of fact that this was

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not a toll fixed in concert between the two parties, I think the Court of Session was perfectly right.

That is all that it is necessary to say, but I must add that I think it pretty clear also, that even if this ha been agreed between these parties, it is a matter in which no third person could have come before your Lordships, complaining that he was damnified, because the agreement between those parties had not been properly carried into effect. It was suggested that this was in the nature of a *jus quæsitum tertio*. It seems to me impossible to contend that it is so. This matter was considered in the present Session of Parliament in your Lordships' house. The *jus quæsitum* must be not merely a *jus* in which the *tertius* is interested, but it must be a *jus* that was intended to be beneficial in some way to a third person. Now, here the object was to make an arrangement between the owners of these two lines. It is true, that if the owners of the two lines reduced their toll, every person who used the railway would be benefited by it, but they are not the "*tertii*" within the sense and meaning of that rule. It was contended that this was meant for the benefit of the lessees of the mines on the line of railway. Even if that were so, it would be extremely doubtful whether the doctrine of *jus quæsitum tertio* would apply. But it is quite obvious that, if this is a *jus quæsitum tertio* at all, the whole public is the *tertius*, because every one of the public would have a right to use this railway, and everyone therefore would be just as much interested in the question as the lessees of the mines upon the line of railway.

Upon the whole, therefore, in my opinion the Court below came to a perfectly correct conclusion, and the result is that I have now only to move

your Lordships that this Appeal be dismissed with costs.

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Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, there are two questions in this case. The first, whether Mr. Finnie, the Appellant, can found on the lease granted by the Kilmarnock and Troon Railway Company, which I will afterwards call the Troon Railway Company, to the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company, which I will subsequently call the Ayrshire Company, which the Respondents now represent, on the ground that the lease contained a *jus quæsitum tertio* in his favour; and secondly, if he could, whether he has made out the case which was necessary to support the prayer of his petition for suspension and interdict. If either of these questions is decided against the Appellant, he must fail in the suit.

Having fully considered the judgment of the *Lord Ordinary* and those of the Judges of the Second Division, and the subsequent judgment of Lord *Ardmillan* in the action between the two Companies, and the elaborate arguments at your Lordships' bar, I must say that I think that both these questions ought to be decided against the Appellant.

The doctrine of the *jus quæsitum tertio* is very distinctly explained by Lord *Stair*. He says, "It is likewise the opinion of Molina, and it quadrates with our customs, that when parties contract, if there be any *article in favour of a third party* at any time, *est jus quæsitum tertio*, which cannot be recalled by either or both of the contractors; but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform." And the several instances that he cites from the decisions of

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the Court of Session under the head of *jus quæsitum tertio* explain his meaning to be, that where there is an express stipulation in a contract in favour of any one, it is in effect an agreement between those parties that the stipulation shall be performed with him, and though the person in whose favour it is made is not a party to the agreement nor at the time assenting to it, he may afterwards adopt the agreement in his favour, and sue upon it.

It is not necessary, I think, that the stipulation should be in favour of a named party (though the instances given in the decisions are such), for I conceive that if the party or parties are sufficiently described, and the stipulation is clearly meant to be in his or their favour, it will be enough to entitle the person or persons so described to sue.

By a stipulation in favour of a third party I understand an agreement that something is to be done or permitted for the benefit of a third person clearly ascertained, who though not a party to the contract, may afterwards come in and insist upon its performance, and in the meantime the actual parties cannot revoke it.

The instances quoted by Lord *Stair* are of this character. If in this case the stipulation between the two Companies had been that Mr. Finnie *nominatim* or the tenant of the Annandale Coalfield, should carry all the coals from that coalfield at a less toll, or at a toll previously fixed by the two Companies, that would have enabled Mr. Finnie to insist on his *jus quæsitum tertio* and sue the Glasgow Railway Company; but there is no such stipulation as this, directly for the benefit of any third person.

The two Companies contract with a view to their own interest as companies to secure the greatest toll

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to the Ayrshire Company, and the greatest rent to the Troon Company. The Duke may have been chiefly influenced by his own interest in trying to keep the charges low, and so by increasing the coal trade of his tenants to increase his own royalties; but the benefit to Mr. Finnie and the other coal owners is incidental to the intended benefit of the Railway Company, and it may be of the Duke, but it is not the immediate object of the parties. Mr. Finnie is named, it is true, in the lease, but merely as a part of the description of the estate, the coals from which are to form part of the measure of the rent, not as a party for whose benefit a stipulation is made. There is, in effect, no stipulation at all in this case in favour of a third person, in the sense in which that word is to be properly understood. Everyone who chooses to use the road might, if Mr. Finnie was entitled to insist, equally insist on a *jus quæsitum tertio.*

I may remark on this part of the case, that I do not think it possible to support the claim of Mr. Finnie to found on the lease, on the ground that the lease being granted pursuant to the Statute 9 & 10 Vict. c. 221, is to be considered as part of the Statute, as if the Statute had enacted expressly what the parties agreed to. This view of the case appears to have occurred to Lord *Handyside*; but I must own that I cannot concur in it. I think, therefore, that Mr. Finnie's claim to found on the lease cannot be sustained.

The next question is whether the allegation in the note of suspension has been proved by the suspender to the extent to which it was necessary for him to prove it, as that note is the petition "to interdict, prohibit, and discharge the said Respondents from taking and charging from the complainer, when using and employing the Kilmarnock and Troon Railway,

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with carriages and engines properly constructed, any higher rate of toll, in respect of the conveyance of coals thereon, than the rate of 1*d.* and $\frac{1}{8}$th of a 1*d.* per ton per mile fixed in concert by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company, now represented by the Respondents, and the Kilmarnock and Troon Railway Company, in terms of the provisions of the lease under which the Respondents hold the said railway as the rate to be taken and charged from persons so using and employing the said railway for such conveyance, and contained in a list of tolls published by the said Glasgow, Paisley, Kilmarnock, and Ayr Railway Company, in compliance with the provisions of their Acts, on or about the 4th day of October 1848, with the authority and approval of the Kilmarnock and Troon Railway Company, and that so long as the said rate shall be the existing legal rate of toll for the time for the use and employment of the said railway in respect of the conveyance of coals thereon as aforesaid."

If in order to sustain this petition it is necessary to prove, from its peculiar form, that the toll of $1\frac{1}{8}d.$ was not only paid in concert, but also inserted in a list of tolls published by the Ayrshire Company with the authority and approval of the Troon Railway Company, then I think it is perfectly clear that the Appellant could not succeed, because there really can be no question that both Companies did not agree upon the table of tolls, whatever may be said as to their having agreed to fix the amount of the toll itself. The table of the 11th October 1848 was certainly not put up with the concurrence of the two Companies, or agreed to by the Troon Company.

But I conceive, that in order to support this petition, it would be enough for the Appellant to prove

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that a toll of $1\frac{1}{8}d.$ per ton per mile for the use of the railway for the conveyance of coals on the Kilmarnock and Troon Railway, with carriages and engines properly constructed, was fixed in concert by the Ayrshire Company and the Troon Company in the terms of the provisions of the lease.

It is true that after such a toll had been agreed upon, it could not be collected until a table of tolls had been duly published, and it is probably in this sense that the Judges use the expression that the lease requires a table to be concerted between the two Companies. Certainly that which was to form the table of tolls must have been duly concerted between the two Companies before it could be obligatory; but if it had been so concerted, the publication of the toll in a table by the Ayrshire Company alone would be sufficient. The question then is, has there been a toll concerted between the two Companies simply for the use of the railroad, to be paid by those who use their own carriages and engines? The *onus probandi* lies upon the Suspender to prove that fact.

Upon a full consideration of the correspondence between the two Companies, upon the construction of which this question depends, I am of opinion with the Judges of the Second Division of the Court of Session that this fact is not proved.

The lease of the Kilmarnock and Troon Company to the Ayrshire Company, January 1847, made pursuant to the Act 9th and 10th Victoria, cap. 221, reserves a fixed rent of 375*l.* yearly, and a fluctuating rent, namely, a sum equal to $1\frac{1}{2}d.$ per ton per mile on all minerals carried on the railway, provided the same shall have been raised from lands between Kilmarnock and Troon. And then there is a stipulation, no doubt in order to secure the traffic along the railroad being continued, that the gross charges for haulage of

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minerals to Troon should not exceed that along the line of the Ayrshire Company, and for the same purpose no doubt, that the tolls on minerals shall, as occasion may require, be fixed by the Ayrshire and Troon Railway Company in concert, and shall never exceed the tolls that were actually levied by the Troon Company immediately antecedent to the 16th July 1846, and the Ayrshire Company are to keep accurate books, in order, of course, to ascertain the rent. It is perfectly clear, on the wording of this lease, that no toll as such would be due to the Troon Company; all the tolls are to belong to the Ayrshire Company. The $1\frac{1}{2}d.$ per ton per mile is a rent payable to the Troon Company, varying, of course, with the quantity carried, and as it is the interest of that Company that as great a quantity as possible should be carried along it, they stipulate for the power to fix the tolls, and also that the tolls should never exceed the tolls they actually levied before, because the increase of them would naturally tend to diminish the quantity carried, and so lessen the rent payable. If the two Companies could not agree to reduce the tolls, at all events they were to remain at the previous rate. I agree with Lord *Ardmillan* that the term "tolls" in this lease, being the same word as is used in the railway Acts, is by the interpretation clause therein to be taken to mean "any toll, charge, or other payment payable for any passenger," &c., or for any goods, matter, or thing conveyed along on the railway, and is to be understood in that sense in this lease, and therefore that the two Companies were to concert together, not merely the toll for the use of the railway as such, but also all the charges for the carriage of goods. And the two Companies did proceed to adjust these, but the question is, whether these Companies ever did agree to the amount of the toll *for the use of the railway* to

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be paid by those who use their owns means of conveyance.

It is obvious that the rent due to the Troon Company never could be reduced without the Duke's consent, and the question of the reduction of rent was independent of the rate of tolls, understood in the sense I have just explained, to be paid to the Ayrshire Company for the use of the railway and otherwise.

The negotiations with the Duke of Portland, as representing the Troon Company, for an alteration of charges began in the year 1847, and were conducted by the agents of both parties. In the first instance, it was found that the maximum rates for limestone included in the term "minerals" allowed by the Act of 1846, was 2*d.* per ton per mile, for toll, haulage, and the use of waggons, for which 1½*d.* would have to be paid to the Troon Company by the lease; so that the Ayrshire Company would have no more than ½*d.* per ton per mile for the use of waggons and haulage, which would not cover the expense of haulage alone. Application was therefore made to the Duke's agents, to strike limestone out of the class of minerals altogether. It is suggested also, at the same time, that the high rate of toll on the Troon line is likely to injure the Duke's coal trade.

The Ayrshire Company were desirous of preventing the establishment of a competing line then projected from Kilmarnock to Ayr, and were anxious to reduce the charges on the whole of their line, in order to prevent competition. A negotiation between the agents continued some months, with a view to a new arrangement with the Duke, and it finally resulted in an alternative offer by the Ayrshire Company to the Duke of Portland, one branch of which was that these dues should be reduced to 2*d.* per

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ton per mile, payable by those using the line, and that this sum should be divided in the proportion of $1\frac{1}{8}d.$ to his Grace and $\frac{7}{8}d.$ to the Company; that is, in truth, thatthe payment for rent under the lease should be $1\frac{1}{8}d.$ per ton per mile, which latter proposal appears to have been accepted by the Duke's agent.

Accordingly the Duke, on the 13th May 1847, through his Counsel, the late Mr. Talbot, announced his intention to the Committee on the Kilmarnock and Ayrshire Bill, that he would reduce the rates on the Troon line to $2d.$ per ton per mile, and the Committee in consequence reported that the preamble of the Bill was not proved.

Much correspondence subsequently took place between the agents as to the proper form of the agreement; a difficulty arose as to the reduction upon coals not carried to Troon. That difficulty was formally settled by the agreement on the part of the Duke to make the reduction of the dues on the Kilmarnock and Troon Line universal. All the parties then agreed that the reduction of the total charge upon the carriage of minerals to the customers should be to $2d.$ per ton per mile, and the reduction of the payment to the Duke, representing the Company, from $1\frac{1}{2}d.$ to $1\frac{1}{8}d.$ per ton per mile; but that payment to the Duke was not toll for the use of the road, for no toll was due to him, it was only rent of the railroad in proportion to the quantity of minerals carried; and after the agreement with his Grace it was perfectly immaterial to him what toll the Ayrshire Company charged to those who used the line simply for the use of it, provided they did not charge for that use, and carriages and haulage together, greater rates than $2d.$ per ton per mile, which they had agreed not

to do. The Troon Company, in fact, had never in these negotiations taken into consideration the toll to be paid by those who used the railroad simply for the use of it, and never meant to fix it under the provisions given by the lease, though they did mean to limit the total charge.

It is true that in the course of the correspondence, the rent and toll for the use of the road at the time of the lease having been the same, the writers of some of the letters treated the reduced rent payable to the Troon Company as a toll payable to them, but this was an inaccuracy of expression; in truth, it was only the rent payable to the Troon Company which was really the subject of the bargain between the two Companies, by whatever name it may have been called.

The Ayrshire Company published the table of 11th October 1848, stating the toll to be $1\frac{1}{8}d.$ per ton per mile on all coals, &c.; but this was really not in fulfilment of an agreement with the Troon Company, and therefore was not connected with them, being fixed by the Ayrshire Company alone, and might be revoked by them, and it was revoked. Whether the Troon Railway Company might not have brought an action against the Ayrshire Company for charging more altogether than $2d.$ per ton per mile is not part of the present question.

It is only on the ground that $1\frac{1}{8}d.$ per ton per mile was agreed to by the two Companies as a toll for the use of the railroad that the Suspender can succeed. I think he has not made that proposition out.

Much stress was laid upon the Troon Company having paid back the excess above $1\frac{1}{8}d.$ per ton per mile to the Ayrshire Company for an overcharge from the 15th May 1848, and which was returned by the Ayrshire Company to the coal traders, as if this was an admission by both Companies that they had agreed

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to the reduction of the toll as such. It appears to me not to have that effect. An assent by the Troon Company to reduce its rent from a by-gone time, and the Ayrshire Company to reduce their charges to the traders in proportion from the same time, and to allow such reduction to the traders who had paid too much, will explain the transaction equally well; and it appears to me really to be the true state of the case. Therefore, I am of opinion, with my noble and learned friend on the woolsack, that this judgment ought to be affirmed with costs.

Interlocutor affirmed, and Appeal dismissed with Costs.

MAITLAND AND GRAHAM—GRAHAME, WEEMS, AND GRAHAME.