(3) The defender Mr Harvie having been found entitled to the coal in question in a litigation with the pursuer's author, the defenders are entitled to absolvitor."

On 12th March 1889 the Lord Ordinary (KINNEAR) repelled the first, second, and third pleas in law for the defenders, and allowed the parties a proof of certain averments made in record.

On 12th April the Lord Ordinary allowed the parties a proof of their respective averments on record with reference to the property of the minerals alleged by the pursuer to have been wrongously excavated and removed by the defenders.

The defenders reclaimed, and argued—The question between the parties had been settled by the decree pronounced in the previous action. Having settled the question with the proprietor, the defenders were not bound to go into the question with a mineral tenant whose lease did not define the boundaries of the minerals thereby let. The pursuer's proper remedy was an action of damages against his author.

At advising—

LORD PRESIDENT—As regards the first and second pleas founded on the compromise agreed to by Sir Windham Anstruther, the pursuer's landlord, and certain other parties, in the action by the present defender against them, that action was an action for payment of money as the damages sustained by Mr Harvie by reason of the coal under his lands being worked out, but Mr Burns was not a party to it. The action was intimated to him, and the position he took up was that whatever might happen between the parties to the action it could not affect him, because he had got a lease from Sir Windham Anstruther, so he declined to take a part in the proceedings. It is not of any importance to inquire what would have been the effect of a judgment of the Court without a compromise having been arrived at, because what happened was that the parties compromised the action and made an agreement, as if the action had been an action of declarator that the boundaries between their lands were so and so. Of course that agreement is binding on the parties who made it, but it is not *res judicata* in a question with the present pursuer, who brings this action to recover damages for loss sustained by him owing to the working out of minerals, which he alleges to be his under his lease. The first and second pleas for the defenders are therefore I think, plainly untenable, and not to be listened to.

LORD ADAM and LORD M'LAREN concurred.

LORD SHAND was absent.

The Court adhered.

Counsel for the Defenders and Reclaimers — R. Johnstone—J. A. Reid. Agents — Buchan & Buchan, S.S.C.

Counsel for the Pursuers and Respondents—Guthrie—Low. Agent—P. Morison, S.S.C.

*Tuesday, July* 1.

## FIRST DIVISION.

[Lord M'Laren Ordinary.

## NORTH BRITISH RAILWAY COMPANY *v.* MACKINTOSH,

*Ferry—Right to Exclude Public from Use of Piers—*11 *Geo. IV. and* 1 *Will. IV. c.* 115—*Edinburgh and Glasgow Railway (Queensferry) Act* 1863, (26 *and* 27 *Vict. c.* 237).

Under the Act 11 Geo. IV. and 1 Will. IV. c. 115, the ferry at Queensferry, with all the piers connected therewith, was vested in a body of trustees, and it was declared that such piers should be used exclusively for the purpose of the ferry, and for no other purpose whatever except with the permission of the trustees in writing. By section 31 of the Edinburgh and Glasgow Railway (Queensferry) Act 1863 power was given to that company, on a certain event, to acquire from the trustees the ferry, the piers connected therewith, and all the rights and interest belonging to the trustees. Section 33 of the Act empowered the company to make byelaws for the regulation and control of the ferry and the piers connected therewith, and this was the only section which gave the company power to make byelaws, and by sec. 34 it was enacted that it should not be lawful for any person to make use of any of the piers to be acquired or constructed by the company under the Act, nor to land thereat or ship therefrom any passengers or goods except in such manner and under such conditions and regulations as should be prescribed by the company by the byelaws to be made by them; and it was declared that any person so using any of the piers without a written authority from the company, or under such regulations as should be prescribed by them, should be subject to a certain penalty.

In 1869 the trustees disponed to the North British Railway Company, who were then vested in the rights of the Edinburgh and Glasgow Railway Company, the ferry and piers connected therewith and all the rights and interest belonging to them.

In a note of suspension and interdict at the instance of the company, *held* that the company had a right to exclude the public from using the piers for any but proper ferry purposes, except under written authority from them, and interdict granted against a steamboat proprietor who persisted in using one of the piers without their written authority.

By the Act 11 Geo. IV. and 1 Will IV. c. 115, entituled an Act for the further improvement and support of the passage across the Firth of Forth, called the Queensferry, the property of the ferry of Queensferry, its piers and landing places were

vested in certain trustees therein named. By the 20th section of the Act it was provided—"And in respect that this ferry must necessarily continue to be the great line of communication between the southern and northern parts of Scotland, and that the interference of other traffic than that which belongs to a ferry will greatly injure the use of it as such, and incommode and detain the transit thereat, be it enacted that the pier of Port Edgar, and wharf or key, on the outside of Queensferry Harbour, and eastward thereof, the pier at Newhalls, Portneuk, and Longcraig, on the south side, with the landing places, havens, creeks, and communication by land therewith connected, and the east and west battery piers, and signal house pier, on the north side, and Haughend pier, to the west of the said signal house pier, with the landing places, havens, creeks, and communications by land therewith connected, including the whole of the creek or bay betwixt the west battery pier and the signal house pier, and the landing places therewith connected, shall be exclusively and solely used for the purpose of the ferry and passage, and for no other purpose whatever, unless by the permission of the said trustees in writing granted at a meeting or meetings regularly held for the purpose of granting such permissions, to be signed by not less than three of the trustees who may be present at such meeting, save and except the use of the Haughend pier, in the manner hereinbefore provided: Provided always, that the roads leading to and from the said piers and landing places shall be subject to be used in the same manner and by the same persons as the same have been and are now used; anything herein contained to the contrary notwithstanding: Provided further, that nothing hereinbefore contained shall prevent the said trustees from making such arrangements in respect of the Haughend pier, either with respect to the use or the property of the same, as may to the said trustees, at a regular meeting or meetings for the purpose, seem expedient, and for the benefit of the inhabitants of the village of North Queensferry."

By section 21 it was provided—"And be it further enacted, that it shall not be lawful for any person or persons whatsoever, except the trustees appointed by this Act, or those acting under their authority, to keep or use within the limits of the said ferry any boat or other vessel for the purpose of conveying passengers or any matter or thing for hire across the said Firth of Forth within the said limits, or in any boat or vessel within such limits to convey any passenger or other matter or thing for hire across the said Firth of Forth; neither shall it be lawful for any person or persons whatsoever, excepting the trustees appointed by this Act, or those authorised by them, to keep or use within such limits any boat or other vessel for conveying passengers, matters, or things for hire to or from any steamboat which may be passing up or down the said firth, or in any boat or vessel within such limits to convey any passenger, matter, or thing on board of any such steam vessel, or from the same, for hire; and any person offending in any of the above particulars shall forfeit and lose a sum not exceeding five pounds for every such offence."

By Sections 44 and 45 the trustees were authorised to levy certain rates for the use of the ferry, and these were the only rates which the Act gave them power to levy.

Section 31 of the Edinburgh and Glasgow Railway (Queensferry) Act 1863 (26 and 27 Vict. c. 237) enacted—"And whereas it is intended by the North British (Edinburgh, Dunfermline, and Perth) Railway Act 1863 to authorise the North British Railway Company to purchase and acquire the Queensferry passage from the trustees acting under the Act Eleventh George the Fourth, chapter one hundred and fifteen, intituled An Act for the further Improvement and Support of the Passage across the Firth of Forth, called the Queensferry, and The Queensferry Passage Improvement Act 1848: Be it enacted, That in the event of the North British Railway Company not completing the said purchase within two years after the passing of the said Act, it shall be lawful for the Company to purchase and acquire, and for the said trustees to sell and convey to the Company, the ferry upon or across the Firth of Forth established and maintained under the said Acts or either of them, and all the piers, harbours, works, accesses, lands, houses, and Property connected therewith or belonging thereto, and the right of working the said ferry, and all other rights and interests of the said trustees in or relating to the said ferry." The mode in which the price should be ascertained and paid was then provided for, and on the price being paid it was provided—"The said ferry shall be transferred to and vested in the company freed and discharged of all debts and incumbrances affecting the same or the rates leviable thereat and in respect thereof, and the Company shall have and may use, exercise, and enjoy the right of ferry and other rights and property so acquired by them, and may work the said ferry separately or in connection with the railways, and may levy thereat and in respect thereof any rates and duties not exceeding the rates and duties specified in and authorised to be levied by the said Act Eleventh George the Fourth, chapter one hundred and fifteen: Provided that the rates to be levied by the Company at and in respect of the said ferry for passengers, animals, and goods not conveyed on their railways shall not exceed the rates levied by the said trustees under the table of rates which was in force on the first day of May One thousand eight hundred and sixty-three."

Section 32 provided that after the vesting of the ferry in the Company, the Company should become responsible for the maintenance of the ferry, and be bound to make a certain number of trips daily.

By section 33 it was provided that the Company might purchase vessels, erect landing stages, and make bye-laws "for the regulation, control, and government of

the said ferry, and the piers or other works connected therewith," and this was the only section which expressly gave the Company power to make bye-laws.

Section 34 provided—"It shall not be lawful for any person, except the officers and crews of Her Majesty's ships and boats being engaged in Her Majesty's service, or except in the case of vessels driven in by stress of weather, to make use of or to land at any of the piers to be acquired or constructed by the Company under this Act, nor to lay to or alongside the same or the works or conveniences connected therewith any vessel or boat of any description, nor to attach any rope or chain thereto, nor to land thereat or ship therefrom any passengers, carriages, animals, goods, articles, or things except in such manner and under such conditions and regulations as shall be prescribed by the Company, by the bye-laws to be made by them as hereinbefore provided; and any person so using the said piers or any of them without a written authority from the Company or some person duly authorised by them or under such conditions and regulations as shall be prescribed by them, shall for every such offence be liable to a penalty not exceeding ten pounds."

The North British Railway Company did not purchase the ferry within two years of the Act authorising them to do so, but by the North British and Edinburgh and Glasgow Railway Companies Amalgamation Act 1865 the Edinburgh and Glasgow Railway Company was dissolved, and its whole undertaking, rights, and powers were transferred to and vested in the North British Railway Company, and thereafter the North British Railway Company entered into an agreement with the trustees of the Queensferry passage to purchase from them the ferry and piers, and all rights belonging to the trustees in or relating to the ferry. In pursuance of this agreement the trustees by disposition dated 20th March and registered 12th April 1869 conveyed to the North British Railway Company, their successors and assignees, the ferry across the Forth, and all the piers, harbours, works, &c., connected therewith, and the right of working the ferry, and all other rights and interests belonging to them in or relating to the said ferry, subject to the provisions of, *inter alia*, the Edinburgh and Glasgow Railway (Queensferry) Act 1863 above mentioned.

In May 1889 the North British Railway Company brought the present note of suspension and interdict against "Hugh Mackintosh, Queensferry Arms, South Queensferry, praying the Court to interdict, prohibit, and discharge the said respondent from making use of or landing at any of the piers at or near the passage of the Firth of Forth known as the Queensferry or the Queensferry passage and belonging said piers to the complainers, and from laying any boat or vessel to or alongside the said piers, and from attaching any rope or chain thereto; and from landing thereat or shipping therefrom any passengers, and in particular from using in any of the ways foresaid the pier called Newhalls pier situated at or near South Queensferry, excepting always in the case of any vessel driven in by stress of weather; and further, to interdict, prohibit, and discharge the respondent, either by himself or others, from allowing the steamer 'Queen Margaret' from making use of or landing at any of the said piers, and from laying the said steamer to or alongside any of the said piers, and from landing passengers at or embarking passengers from any of the said piers, especially Newhalls pier, excepting always in case of their being driven in by stress of weather; and to interdict, prohibit, and discharge the respondent from using the said steamer or any other boat for the purpose of conveying passengers for hire across or partly across the said ferry from the said pier, or from plying with said steamer or any other boat or vessel within the jurisdiction of the said ferry, or to do otherwise in the premises as to your Lordships shall seem proper."

The complainers averred—The piers in question belonged to them in virtue of the disposition and statutes above mentioned, and no one had a right, except in case of stress of weather, to use the same in any way without their consent. The respondent was owner of the steamer "Queen Margaret," and had no right or title to use the Newhalls Pier, but though repeatedly requested to desist, he persisted in using said pier, and habitually caused the Queen Margaret to use it, and landed and embarked passengers at the pier, and carried passengers in his steamer from the pier across the ferry, and plied with said steamer for hire within the jurisdiction of said ferry.

The respondent averred—He did not employ his vessel as a ferry boat—His vessel was largely employed by him in sailing with passengers round the Forth Bridge. She also went on trips up or down the Firth, as to the harbour of Queensferry, Bo'ness, and other places, and to vessels at anchor in the roads, for all which he was willing to pay not more than 1d. for each passenger landing or embarking. The charge of 6d. which was asked by the complainers was not fair nor reasonable. The respondent's right to use the pier for such navigation was secured by the common law and the Acts of 1863. The complainers had the power to pass bye-laws or regulations, subject to confirmation by judicial authority, for such traffic as his in connection with their pier, but they had neither duly made nor published any such bye-laws. They had no power to charge rates beyond those permitted in their Acts of 1863, and they had not duly made or published any table of rates so as to render him liable for any dues; nor could they charge for his passengers more by any table than 1d. per head. The present note was a wrongful attempt to exclude the respondent, and to restrict the use of the pier for such purposes as his to other persons who would pay more than he was willing to offer. Since this note was presented the complainers had, by

lease or minute of agreement, dated 28th May 1889, let, at a rent of £250 for one year to Mr John Arthur, a rival steamboat owner, the exclusive right to use the pier (*i.e.*, Newhalls Pier) for the same purposes as those of the respondent.

The respondent pleaded—"(2) The respondent having right to use the pier for purposes of navigation by virtue of the common law as well as under the provisions of the statutes, the note is unfounded and should be refused. (3) Any power of control over the respondent's use of the pier by bye-laws or table of rates not having been exercised in any due form, the note is unfounded and should be refused."

On 30th October 1889 the Lord Ordinary (M'LAREN) repelled the reasons of suspension and interdict, refused the prayer of the note of suspension and interdict, and decerned.

"*Opinion.*—This is an action of interdict at the instance of the North British Railway Company, proprietors of the Queensferry Passage, to restrain the defenders from making use of the pier at Newhalls (being one of the ferry piers) as a landing place for his steamer the 'Queen Margaret,' which is employed by the respondent for taking passengers into the open channel of the Firth of Forth where they may have a view of the Forth Bridge.

"I understand that the action has arisen out of a difference between the complainers and the respondent regarding the rates or tolls payable to the company for the use of their pier. But no question as to tolls exigible is or can be raised under this action, nor, as it appears to me, can the complainers put forward a case founded on the allegation that the use of their pier by the respondent's steamer is a hindrance to the proper working of the ferry, because it is averred on record and is not denied that since this action was raised the complainers have let at a rent of £250 for one year to Mr John Arthur, a rival steamboat owner, the exclusive right to use the Newhalls Pier for the same purposes as those for which it is used by the respondent.

"The claim of the company is founded solely on proprietary right, which they say entitles them to grant or to withhold the use of the pier as they please. The respondent contends for a qualified right on the part of the public to use the pier as a landing place for purposes unconnected with the ferry, subject to such regulations as may be enacted in the form of bye-laws under the authority of the Company's Acts, and on payment of reasonable dues or tolls for the use of the pier.

"If this had been a private pier, or an adjunct to a ferry which was private property, I should have held that the public were entitled to a reasonable use of the pier as a landing stage for casual traffic, subject to the preferable right of the owner or his tacksman engaged in serving the ferry. I should have assumed the existence of such a qualified use on the part of the public on the principle that the acquisition of a private right to a part of the sea shore is always subject to the uses of navigation, whence a right arises to any member of the public to land or embark at the pier if it is a suitable landing place for his purpose. This does not imply that a ferry pier may be used for the landing or loading of goods. It may be a very unsuitable place for such traffic, and I only contemplate such a use of the pier as is neither detrimental to it by causing appreciable wear and tear, nor an obstruction to the primary purpose of the pier—that of an adjunct to the ferry.

"In the present case, it appears from the recitals in the Acts of Parliament founded on, that the ferry or Queensferry passage was private property until the year 1809, when, by a local Act declared public, the administration of the ferry was vested in a body of Parliamentary trustees, who were empowered to acquire the heritable right of the ferry and all its adjuncts on making compensation to the owners.

"The trust was reconstituted, and further powers were granted to the trustees by a local Act passed in 1830 (11 Geo. IV., cap. 115). This Act contains the clause quoted in the complainers' fourth statement of facts, whereby, on the narrative that 'the interference of other traffic than that which belongs to a ferry will greatly injure the use of it as such, and incommode and detain the transit thereat,' it is enacted that the piers and landing places there described 'shall be exclusively and solely used for the purpose of the ferry and passage, and for no other purpose whatever, unless by the permission of the said trustees in writing.' It is evident that the use of the pier for which the respondent contends would not have been permissible during the period of the administration of the ferry by a board of trustees.

"The acquisition of the Queensferry passage by the North British Railway Company came about this way. In the year 1863 (the North British Railway Company and the Edinburgh and Glasgow Railway Company being then separate Companies) each of these companies obtained Acts of Parliament for the extension of their respective undertakings, and in each of these Acts reference is made to the Queensferry passage. The substance of the enactments is that if the North British do not purchase or otherwise acquire the ferry from the trustees of the Queensferry passage within two years after the passing of the Act, the Edinburgh and Glasgow Railway Company may purchase, under the conditions and provisions of the Act with respect to such ferry.

"The North British did not acquire the ferry within the period of two years there mentioned, but after the amalgamation of the Edinburgh and Glasgow Railway Company with the North British, the latter company, in the exercise of its Parliamentary powers, purchased the ferry from the trustees, and obtained a disposition from them which is in process. It does not seem to be very material whether the North British did so as in right of the Edinburgh and Glasgow Railway Company or in their own right, which was not absolutely cut off by the expiration of the period of two years,

but was only subordinated to the preferential right then given to the Edinburgh and Glasgow Company. The material question is whether the railway company in taking over the ferry came under all the duties and obligations and succeeded to all the privileges of the Parliamentary trustees? As a general rule a railway company acquiring property for the purposes of its undertaking, take an unincumbered heritable estate, and is in no way affected by trusts or conditions qualifying the right of its authors. In the present case I should consider that the North British Railway is not affected by the trusts of the previous owners, except in so far as the enabling Act of Parliament made these trusts a qualification of the company's right.

"Under the North British Railway Company's Act (section 36), it is provided that the public are to have an equal number of passages (including passages in connection with the railways), and equal facilities of passage as on 1st January 1863, and that the rates to be levied should not exceed the rates levied by the trustees at that date. Similar provisions are contained in the Act giving the Edinburgh and Glasgow Railway Company purchasing powers (sections 31 and 32).

"Coming to the question of the exclusion of other traffic at the ferry piers, there is a very noticeable difference of expression between the 20th section of the statute of 11 Geo. IV. and the cognate provisions of the Acts obtained by the two railway companies. The provision in the Act obtained by the ferry trustees amounts to an absolute exclusion of all other traffic than that of the ferry, while in the two railway Acts it is contemplated that there may be such traffic subject to regulations or bye-laws to be made by the Company acquiring the pier. The question is whether the railway company has the power of excluding the public from the use of the pier for vessels other than ferry boats, or whether the company is only empowered to regulate such use.

"There is again a difference of phraseology in the Acts obtained by the Edinburgh and Glasgow Company and by the North British. The enactment quoted by the respondents, section 34 of 26 and 27 Vict. cap. 237 (the Edinburgh and Glasgow Railway Act), may be read consistently with the latter construction, and my opinion is that in such a question that construction is to be preferred which is most favourable to public right. I accordingly read this section as only prohibiting the irregular use of the pier by the public—I mean the use of it in a manner contrary to the regulations which the company is empowered to make. According to this construction the action will fail, because the company have made no regulations, and therefore the use of the pier is unrestricted. I am confirmed in this opinion by considering the terms of the corresponding section of the North British Railway Company's Act, in which there is no ambiguity (26 and 27 Vict. cap. 213, sec. 38). It is there provided in unqualified terms, with reference to the new piers which that company was empowered to construct, that it shall not be lawful for any person (with the exception of Her Majesty's service and ships driven by stress of weather) to land thereat, or to ship therefrom any passengers, &c., 'unless with the consent of and in such manner and under such conditions and regulations as shall be settled by the company.' It is evident that the framers of these Acts of Parliament, when they meant to take an unqualified power of excluding the public, knew how to express the power, and I have difficulty in conceiving that such language as that of the 34th section of the other Act of the same year could have been chosen in the design of claiming an equivalent power. At all events, as this is an Act obtained on the petition of a private company it is to be construed *fortius contra proferentem*, and I think the respondent has a good answer under this section, that he has not contravened any regulation made by the company, and that he is in the lawful exercise of a public right."

The complainers reclaimed, and argued—The trustees in whom the ferry and piers were vested prior to 1863 had undoubtedly a right to exclude the public from the use of the piers. The complainers were now in the trustees' place, and had under the Acts which empowered them to acquire the ferry and piers to exclude the public from using the piers except with the written authority or under such regulations as they should prescribe.

The respondent argued—At common law the public had a right to free navigation, and to bring boats to shore anywhere. The public right had been excluded by the Act which vested the ferry and piers in the trustees, but it was not excluded under the Railway Acts. The railway company had not acquired from the trustees all the rights possessed by them, but only the right of ferry. The company had the power to make bye-laws to regulate the use of the piers, but they had not exercised it, and therefore the use of the piers was regulated by common law right of the public.

At advising—

LORD PRESIDENT—This is a process of suspension and interdict brought by the North British Railway Company for the purpose of having the respondent restrained from using the piers connected with the ferry passage at Queensferry. The whole question depends upon the construction of certain clauses of Acts of Parliament, and it is therefore necessary at once to go to these in order to explain the grounds of the judgment at which I have arrived.

Prior to the year 1863 the Queen's ferry was vested in a body of Parliamentary trustees with very large powers, and their rights were regulated, first, by an Act passed very early in the century—in 1809, I think—and subsequently by the 11 Geo. IV. and 1 Will. IV. cap. 115. The clause of that statute which requires special attention is the 20th, which enacts thus—"And in respect that this ferry must necessarily

continue to be the great line of communication between the southern and northern parts of Scotland, and that the interference of other traffic than that which belongs to a ferry will greatly injure the use of it as such, and incommode and detain the transit thereat, be it enacted that the pier at Port Edgar, and the wharf or quay on the outside of Queensferry Harbour and eastward thereof, the pier at Newhalls, Portneuk, and Longcraig, on the south side, with the landing places, &c., and the east and west battery piers and signal house pier on the north side, and Haughend pier to the west of the said signal house pier, with the landing places, creeks, &c., shall be exclusively and solely used for the purpose of the ferry and passage, and for no other purpose whatever, unless by the permission of the said trustees in writing, granted at a meeting or meetings regularly held for the purpose of granting such permissions, to be signed by not less than three of the trustees who may be present at such meeting, save and except the use of the Haughend pier in the manner hereinbefore provided," which is a matter of no interest in the present case. Now, the effect of this was to operate an exclusion of the public from all the piers connected with the ferry passage, and in that respect it was an abrogation of the common law of navigation, because no pier can be erected upon a part of the seashore without having the effect—if that pier is to be exclusively used by one person or set of persons—of preventing the landing of vessels and passengers and goods at that part of the seashore upon which the pier is erected. This is therefore necessarily in regard to all those parts of the seashore upon which the piers were erected, an abrogation, as I said before, of the common law of navigation. Of course that is not a thing that will be lightly enacted, except for an important public object, but Parliament at that time thought the object so important, the ferry being the direct line of communication between the north and south of Scotland, and forming as it were a part of the great highway from the south to the north, that they esteemed it a reasonable and an expedient provision that there should be such a complete exclusion of strangers from the nse of these piers and quays as would secure a prefectly free use of the passage to all comers.

Now, that being the nature of the right and of the powers vested in the Queensferry trustees by the Statutes of 11 Geo. IV. and 1 Will. IV., the next question comes to be, whether the railway company as coming in their place have in all respects the same rights and powers, including the power of exclusion which was vested in the original trustees. The 31st section of the 26 and 27 Vict. cap. 237 is the enactment which shows what was transferred from the one body to the other, and it appears to me so important that I must take the liberty of reading a little in detail the provisions of that Act. It enacts that "in the event of the North British Railway Company not completing the said purchase within two years, it shall be lawful for the Company (that is, the Edinburgh and Glasgow Company, in whose right the North British now are) to purchase and acquire, and for the trustees to sell and convey to the Company, the ferry upon or across the Firth of Forth established and maintained under the said Acts or either of them,"—that includes the Acts to which I have referred as vesting the ferry and the piers in the former trustees—"and all the piers, harbours, works, accesses, lands, houses, and property connected therewith or belonging thereto, and the right of working the said ferry, and all other rights and interests of the said trustees in or relating to the said ferry." Now, these are very comprehensive words "all other rights and interests of the trustees in or relating to the said ferry." And then there is a provision as to the price to be paid, and the mode in which the amount of the price is to be settled. And then follow these words —"the said ferry shall be transferred to and vested in the Company freed and discharged of all debts and incumbrances affecting the same, or the rates leviable thereat and in respect thereof, and the Company shall have and may use, exercise, and enjoy the right of ferry, and other rights and property so acquired by them, and may work the said ferry separately or in connection with the railways, and may levy thereat and in respect thereof any rates and duties not exceeding the rates and duties specified in and authorised to be levied by the Act 11 Geo. IV. c. 115, provided that the rates to be levied by the company at and in respect of the said ferry for passengers, animals, and goods not conveyed on their railways shall not exceed the rates levied by the trustees" under a certain table of rates. Now, I cannot read that 31st section of the Act of 1863 without coming to the conclusion that it was the intention of the Legislature to transfer from the old body of trustees to the railway company their whole undertaking, if I may so express myself, just as it stood in the original trustees. And it is not surprising that it should be so, because the same motive which led to the legislation of 11 Geo. IV. and 1 Will. IV. was still in operation. The ferry was still a part of the great highway between the north and south of Scotland. It still formed a part of that line of communication. And therefore the same reasons which led the Legislature in 1830 to give an exclusive right to all the piers connected with the ferry to this body of trustees were still in existence in conferring the same rights and powers on the company to which the ferry was now to be entrusted for public purposes. It may no doubt very well be that other parts of this Act of 1863 may have the effect of derogating from the full meaning and effect of the words in this 31st section, and therefore it becomes necessary to advert more particularly to the 34th section of the same statute, because it expressly enacts an exclusion of persons who might otherwise use the seashore at those places from the occupation or use of any of the

ferry piers. The 34th section enacts that "it shall not be lawful for any person, except the officers and crews of her Majesty's ships and boats being engaged in her Majesty's service, or except in the case of vessels driven in by stress of weather." Now, these exceptions were of course in operation previously under the management of the old trustees, and therefore they throw no light whatever on the construction of the statute, because of course any exclusion of this kind could never have been contemplated as excluding either the ships and boats of the Royal Navy or vessels in distress; and therefore these words may be taken out of the clause as really having no particular operation or effect on its construction. Taking them out, then, the clause runs thus—"It shall not be lawful for any person to make use of or to land at any of the piers to be acquired or constructed by the company under this Act, nor to lay-to or alongside the same, or the works or conveniences connected therewith, any vessel or boat of any description, nor to attach any rope or chain thereto, nor to land thereat or ship therefrom any passengers, carriages, animals, goods, articles, or things." So far the words of exclusion are about as emphatic and comprehensive as they could very well be imagined to be. But then there follows an exception, and it is upon the terms of this exception that the argument for the respondent mainly depends—"Except in such manner and under such conditions and regulations as shall be prescribed by the company by the bye-laws to be made by them as hereinbefore provided." I need not follow that reference to the hereinbefore provided, because it is just the general power of making bye-laws. Then the clause proceeds—"Any person so using the said piers or any of them without a written authority from the company or some person duly authorised by them, or under such conditions and regulations as shall be prescribed by them, shall for every such offence be liable to a penalty not exceeding £10." Now there are three parts of this last portion of the clause that require attention. There is first of all the exception "except in such manner and under such conditions and regulations as shall be prescribed by the Company." It was contended that the Company were bound to make byelaws for the purpose of defining under what conditions and qualifications persons might be allowed to resort to these piers. I cannot adopt that construction of the exception. I think, on the contrary, it is very much within the discretion of the Company whether they will make any such byelaws. If they come to the conclusion that it is not expedient in the public interest that there should be any resort to these piers at all, I apprehend under this statute it is quite within their powers so to resolve and to act upon that resolution. But then, even supposing that such regulations were made, and supposing it were to be held for the sake of argument that they were bound to make such regulations, there follows this, that any person so using the said piers or any of them without the written authority of the Company shall be liable to a penalty. Therefore, even if such byelaws had been made and were in operation, nobody could be allowed to resort to these piers without the written authority of the Company or somebody authorised by them. There only remains one other portion—the last—of this clause which requires attention—"any person so using the said piers or any of them without a written authority from the Company or some person duly authorised by them, or under such conditions and regulations as shall be prescribed by them, shall for every such offence," and so forth. Now, at first sight these last words "or under such conditions and regulations as shall be prescribed by them" look as if they were mere redundancy—a sort of repetition in shorter words of the provision before—that they may be used under such conditions and regulations as shall be prescribed by the Company. But after consideration I am satisfied that that is not the meaning of these words. I think they mean this—that if the Company shall see fit in any particular case to enter into an arrangement with an individual owner of a boat or steamer they may make a bargain with him for the use of one or more of these piers. In short, the three points contemplated in this section are:—in the first place, that the Company may make regulations for the use of these piers by the public in general, or they may make special arrangements with particular individuals, but in all these cases the persons using or proposing to use the piers must have a written authority from the Company. For these reasons, I have come to the conclusion that this interdict ought to be made permanent, differing therein from the Lord Ordinary who came to an opposite conclusion, perhaps by attaching, if I might venture to suggest so from the terms of his note, a little too much importance to the common law right of navigation which, for the reasons I have already stated, was, I think, suppressed as regards these piers from at least the year 1830 downwards.

Lord Adam—The respondent here claims a right as one of the public to use the south pier at Queensferry, and he proposes to pay for the use of it by his steamer a certain sum per passenger, which he seems to consider sufficient. On the other hand, the North British Railway Company say—"You, as one of the public, have no right whatever to use these piers, which belong to us, and we accordingly seek to have you interdicted from so using them." And accordingly the question raised in this case is, whether the respondent, as one of the public, has a right to use this pier, not for the proper ferry purposes, but for other and general purposes, or whether the North British Company, apart from what I may call proper ferry purposes, have a right to exclude the respondent and everybody else from access to and use of these piers. I agree with your Lordship that in considering this case it is not necessary to go further back in the history of this ferry than the

Act of 11 Geo. IV., the 20th section of which makes it perfectly clear that when this ferry and the piers and other works in connection with it were in the hands of trustees the public had no right to use or have access to the piers for any such general purpose as the respondent, as one of the public, now insists that he has. That clause provides that the piers, "and the landing places therewith connected, shall be exclusively and solely used for the purpose of the ferry and passage, and for no other purpose whatever, unless by the permission of the said trustees in writing granted at a meeting held for the purpose." It is quite clear therefore under this Act that no one of the public, unless fortified by a permission in writing from the trustees, could have insisted on using the pier for any general purpose other than ferry purposes. If so, the question is, how, when, and in what manner has this right, which was certainly extinguished by the 11th of Geo. IV. become revived in respect of the ferry and piers having become by statute the property of the railway company. That leads us to consider the Act by which the railway company acquired their right, and I agree with your Lordship that the most important section of that Act is the 31st. Now, the subject sold by that section is the right of ferry, all the piers and works connected with the ferry, and all other rights and interests of the said trustees. Nothing can be more extensive than that, and the price is to be fixed by agreement or arbitration. Well, the price was paid, and a disposition granted by the trustees to the railway company. That being so, observe what the position of the parties here was. The railway company had acquired a right to the ferry and works connected therewith, and thereby had acquired a monopoly. On the other hand, beyond all question the public had certain rights in the ferry which required to be regulated. The company required special powers to levy rates from the public, and the public interest on the other hand required to be protected. And this Act proceeds to do so. I refer to that particularly, because it appears to me that the 31st and subsequent clauses refer only to proper ferry rates, and to no other kind or description of rate whatever. This becomes a very material consideration when we come to the inference which it is suggested should be drawn from the 34th section. By the 31st section the company get power to enjoy the right of ferry and other rights of property, and may work the ferry separately or in connection with the railways, "and may levy thereat and in respect thereof any rates and duties not exceeding the rates and duties specified in" and authorised by the 11 Geo. IV. The only rates and duties authorised by that Act are those specified in the 44th and 45th sections, and these are proper ferry rates, and nothing else. There is this further qualification, that the rates to be levied by the company shall not exceed the rates levied by the trustees at the date of the transfer, 1st May 1863. That is introduced for the benefit of the public. There is also by the 32nd section a provision in favour of the public, viz., that the company are bound to maintain the ferry as a public ferry, and to perform a certain number of trips daily. The Act therefore is still dealing with it as a proper ferry, and not as an article of private property purchased by the railway company. By the 33rd section the company has power to purchase vessels and erect landing-stages for working the ferry, and that section also contains the only power that I can find in the Act as to making bye-laws. They "may from time to time make all necessary bye-laws for the regulation, control, and government of the said ferry, and the piers or other works connected therewith." It is not a power to make general bye-laws or to levy rates excepting as connected with the use of these works for the ferry in which the public were interested. Then as to section 34, on which the whole case of the respondent is rested, it appears to me that that is a clause not to give any right to the public which they had not before, but simply and solely for the protection of the railway company. "It shall not be lawful for any person to make use of or to land at any of the piers to be acquired or constructed by the company under this Act, &c., "except in such manner and under such conditions and regulations as shall be prescribed by the company by the bye-laws to be made by them as hereinbefore provided." Now, I rather differ from the construction put by your Lordship on this clause, because to my mind that last portion of it refers to the bye-laws which they were entitled to make by the immediately preceding section, viz., bye-laws with regard to the regulation, control, and government of the ferry, and the piers or other works connected therewith—that is connected with the ferry. This clause becomes quite intelligible on that reading of it, because it goes on "and any person so using the said piers or any of them without a written authority from the company, or some person duly authorised by them, or under such conditions and regulations as shall be prescribed by them," which I think means the conditions and regulations mentioned in the previous part. And therefore the meaning of this 34th section is that no person shall use or land at any of the piers, &c., except in such manner as shall be provided by the bye-laws—that is to say, except for the purpose of using it as one of the public for ferry purposes. If they do that they are within their right. "And any person so using the said piers"—I read these words as meaning using them by landing at them—the general use of them—"without a written authority from the company, or some person duly authorised by them," &c., "shall be liable to a penalty;" but from any one using them as the public have a right to use them for ferry purposes under regulations made by the company no penalty is to be exacted. That is my construction of that clause of the statute. I think that throughout the Act there is no power given to the railway company to make any bye-laws or to fix any rates or duties which they are entitled to levy for any other purpose whatever

than proper ferry purposes. In my view it is not in their power to levy rates or to lay down bye-laws, and make conditions and regulations for the payment or levying of rates for the use of the pier for any general purposes, such as it is said they are bound to do in this case. I do not think that is the meaning of it. In my view clause 34 or clause 33 contains no reference whatever to prescribing conditions and regulations for the use of the pier for any other than ferry purposes, and if that be the meaning of it, then it can afford no inference that because they were to make certain rules and regulations for ferry purposes that recognises the right of the public to use these piers for general purposes. If clause 34 recognised an obligation to make bye-laws to regulate the use of the piers for general purposes by the public, I should have thought that these rules and regulations or bye-laws suggested must apply equally to all the public. If the public had a right to the use of the piers for general purposes, which it was within the power of the railway company to regulate and to exact dues for, I should think that must be applicable to all the public use of the piers equally and generally. But that is not so, because according to this Act, although they might make all these regulations for the use of the public, they have still the power by a writing under their own hands to allow anybody to use the piers. A power of that sort is to my mind quite inconsistent with the supposed power or duty or obligation on the part of the railway company to lay down general rules and regulations and to make bye-laws for the use of these piers by the public, the public having a right to do so. Accordingly my view of the clause is that there is nothing in it which implies a revival of the public right which formerly was extinguished to the use of these piers. Supposing that I am wrong in that construction of the statute, and supposing the words "except in such manner and under such conditions," &c., imply a power in the railway company to make bye-laws to regulate the use of the piers by the public for general purposes, then as that is merely a power and nothing else, I agree with your Lordship that the mere existence of a power on the part of the railway company to make bye-laws if they choose does not imply an obligation upon them.

LORD M'LAREN—This case depends primarily on the construction of the 34th section of the Edinburgh and Glasgow Railway Act, under which the North British Railway acquired possession and control of the Queensferry passage. I say it depends primarily upon that clause, because of course we have also to take into account the preceding statutes and such right as the public have at common law to the use of a ferry for purposes other than the strict purpose of crossing from one side to the other. Now the 34th section of the Act referred to is I think an ambiguous clause. It is capable of two readings, either of them I think quite reconcileable with the language used. It may either mean a general prohibition of traffic by the public with a conditional exception, or it may mean the recognition of a general right on the part of the public, with a faculty in the company to exclude by putting the provision in this clause in force. To express myself more fully, I think the two readings are either that as at the date of the passing of the Act no member of the public shall have right to use the ferry pier, but that the company may thereafter make bye-laws and regulations which should have the effect of admitting the public, or it may mean that the public may continue to use the right which they are supposed to have had, but shall only do so under such bye-laws and regulations as the company may prescribe. Now, it is easy to choose a meaning out of two that are equally consistent with a clause, but it is not always easy to be sure that one has chosen the right meaning. I, in the circumstances, and considering the case as Lord Ordinary, naturally looked to see whether the public had any antecedent privilege which might support the construction of the clause that was favourable to them. There is authority in our law that where a ferry is constituted by charter or immemorial use, the public nevertheless are entitled to use the pier and appendages for purposes of navigation, and keeping this in view I rather thought that the construction of the clause which was favourable to the right of the public was the golden casket, which I arrived at by supposing that the right of the public was only suspended by the Act vesting the ferry in Parliamentary trustees, and that on the expiration of that Act the public right would revive. The claim of the company to exclude the public, or rather to give the use of the pier to such persons as they might prefer, excluding others, is certainly inconsistent with the general spirit of railway legislation, and that appeared to me to be the inferior construction of the two. But after rehearing the case and consideration of all its aspects in consultation with my colleagues, I am satisfied that the effect of the Act vesting the ferry in Parliamentary trustees was entirely to extinguish any right which the public might theretofore have had in the ferry pier for other than ferry purposes, and consequently that the railway company took the piers freed from the burden of public use which might in ancient times have attached to it. That being so, and there being no existing right in the public at the time when the North British Company acquired the pier, I rather think that the literal meaning of the words of the 34th section is the one that must be chosen, and that certainly does not give any express right of use, except to persons who want to cross the ferry, and at the same time most certainly gives the railway company a right to exclude. I may say that I rather incline to hold that the reference in the 34th section to bye-laws and regulations is to the immediately preceding section, in which a power is given to make such bye-laws, but it is not of very much consequence whether

we hold these to be the same, or whether the reference is to new regulations of a kind which the company could make of itself, and which did not require the sanction of the Board of Trade, because in any case they have a general dispensing power by giving written authority to whomsoever they please to use the pier, and that power is only controlled by the prior right of persons wanting to use the ferry—a right which I should imagine nowadays has become of very secondary importance. I therefore concur with your Lordships in the opinion that the interlocutor should be recalled and decree given interdicting the respondent from the use of the pier.

LORD SHAND was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the reasons of suspension, and interdicted the respondent in terms of the prayer of the note.

Counsel for the Complainers—Comrie Thomson—C. S. Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Respondents—V. Campbell—F. T. Cooper. Agents—Wylie & Robertson, W.S.

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*Wednesday, June* 25.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## KYD (GORRIE'S TRUSTEE) *v.* GORRIE.

*Bankrupt—Lease—Adequate Consideration—Act* 1696, *cap.* 5.

A father, in the knowledge that he was insolvent, granted a lease of a shop to his son at a yearly rent of £7. It was proved that the fair rent was £12. In terms of the lease the son had expended about £12 in repairs, and it was admitted that he had no claim against his father for repayment of this sum. *Held* that the lease fell to be reduced under the Act 1621, cap. 18.

In September 1888 the affairs of John Gorrie, potato merchant, Perth, became embarrassed, and he endeavoured to arrange a private settlement with his creditors. He failed however to effect this, and upon 15th January 1890 he presented a petition for sequestration to the Sheriff of the county at Perth, and sequestration was awarded on the same day.

Upon 17th November 1888 he wrote the following letter to James Dunbar, writer, Glasgow—"Since I saw you on Wednesday, things are going farther against than I expected. I have been in difficulties for this last two months and have been negotiating with my creditors for a settlement private, and fully expected it till a few days ago, and now I am afraid I will be forced into sequestration. My reason for wanting a lease for my son of his shop was that my business could be carried on in his name. Can you make a lease that will be good in those circumstances, say for five years instead of three, and send it on at once. I will get it signed here. Your attention to this will oblige."

The lease, which was for five years, was accordingly prepared and executed, and thereunder the son, William James Gorrie, entered upon the occupation of a shop, 23 Princes Street, Perth, where he carried on the trade of a cycle agent. The yearly rent was £7, and William James Gorrie was taken bound to repair and keep up the premises.

George Kyd, auctioneer, Perth, was appointed trustee upon Gorrie's sequestrated estate, and he sold the subjects in Princes Street by public roup for £100. The buyers were not aware then of the existence of the lease. W. J. Gorrie refused to leave the premises upon being served with the usual warning by the burgh officer. The magistrates declined to grant a summary warrant of ejection on the ground that the lease was *ex facie* regular, and the purchaser refused to pay the price until he got possession, and threatened an action of damages against the trustee.

Kyd brought an action of reduction of the lease against William James Gorrie. He averred—"The said pretended lease under reduction was so granted by the said John Gorrie when he was insolvent in favour of the defender, his son, a conjunct and confident person with the said John Gorrie, gratuitously and without any consideration, in fraud and to the prejudice of the said John Gorrie's creditors. The said lease is thus null and void under the Act 1621, cap. 18, and also at common law. The rent stipulated for under the said pretended lease is considerably below the true annual value of the subjects thereby pretended to be let; and if the said pretended lease was granted in security of a prior debt or obligation, it is reducible under the Act 1696, cap. 5, and the 'Bankruptcy (Scotland) Act, 1856,' section 110, or one or other of the said Acts."

The defender averred—"(2) In November 1887, the said John Gorrie let the said shop to the defender for five years from Martinmas 1887 in consideration of the yearly rent of £7, and of the defender's painting and flooring the said shop at his own expense, and the said John Gorrie at the same time agreed to execute a formal lease in the defender's favour. (3) The defender entered into possession of the said shop about 20th November 1887. Because of its unfinished state, he could only use it for lumber and keeping poultry until February 1888. He then had it painted and floored at his own expense, the cost being £12, 11s. or thereby. The said possession was under the said agreement of lease, and the said expenditure was made by the defender only on the faith of that agreement."

The pursuer pleaded—"(1) The lease libelled is null and reducible under the Act 1621, cap. 18, in respect that it was a gratuitous alienation granted by the said John Gorrie when insolvent to a person conjunct and confident with him, without true, just,