FINNIE, ... APPELLANT.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, . . . } RESPONDENTS.

1855.
1st, 3rd, 4th, and 22nd May.

Railway Clauses Consolidation (Scotland) Act, 8 & 9 *Vict. c.* 33.

Equalization of charges, 5 *Vict. c.* 29.

Circumstances in which it was held (Lord St. Leonards dissenting) that uniformity of charge by a Railway Company was not compellable.

Whether money overpaid in case of an overcharge by a Railway Company can be recovered back;—on this question the Law Peers differ.

Attorney General v. *The Birmingham and Derby Junction Railway Company*, (2 Rail. Ca. 124,) decided by Lord Cottenham, (2 Rail. Ca. 124,) pronounced by Lord St. Leonards not "very clear or altogether satisfactory."

The Lord Chancellor and Lord St. Leonards (the only Law Peers present) being divided in opinion, the decision below affirmed; and an application by the Appellant's Counsel (relying on the precedent of *Johnstone* v. *Beattie*, 10 Cla. & Finn 83) refused. Remark by the Solicitor General.

THE minuteness of detail exhibited in the opinions of the Law Peers renders it unnecessary to do more than to state briefly the nature of the question which formed the subject of litigation.

The Appellant, Mr. Finnie, was tacksman or lessee of the Duke of Portland's coal-mines in the county of Ayr, and he instituted an action in the Court of Session for the purpose of enforcing an equalization of the rate of charge for the carriage of coals on the Respondents' railway.

The Respondents admitted that the rate of charge on the Kilmarnock and Troon line was higher than the ordinary rate, but this they attempted to justify

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by showing that the Acts of Parliament did not, in the circumstances of the case, require uniformity.

The Court of Session, on the 10th March 1853, decided that the Railway Company were right. Mr. Finnie thereupon appealed to the House.

The *Solicitor General* (*a*) and Mr. *Anderson*, for the Appellant, cited *Parker* v. *Great Western Railway Company* (*b*), *Attorney General* v. *The Birmingham and Derby Junction Railway Company* (*c*), *Stockton and Darlington Railway Company* v. *Barrett* (*d*).

The *Lord Advocate* (*e*) and Mr. *Rolt*, for the Respondents, cited *The Attorney General* v. *The Birmingham and Derby Junction Railway Company* (*f*).

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, the object of this action was to be reimbursed certain moneys which the Appellant alleged he had been overcharged by the Defenders, the Glasgow and South-western Railway Company; and with a view to obtain that repayment there was also a conclusion for a declarator as to his rights. He averred that the Company were bound to charge all persons equally, and that he had not been equally charged.

The case made by the Appellant is this: That an Act of Parliament was passed in the first year of Her present Majesty's reign (*g*), for incorporating the Glasgow, Paisley, Kilmarnock, and Ayr Railway with branches. Many of the clauses of that Act of Parliament are set out in the summons. There were certain other Acts for extending the railway, and for making branches to different places; and, finally, there was an Act of the 5th of Victoria (*h*), which was an Act amending some of the former Acts. In this last Act, a clause was inserted to which I shall presently call

(*a*) Sir R. Bethell.
(*b*) 7 Mann. & Gr. 253.
(*c*) 2 Rail. Ca. 124.
(*d*) 11 Clar. & Finn. 590.
(*e*) Mr. Moncreiff.
(*f*) 2 Rail. Ca. 124.
(*g*) 1 Vict. c. 117.
(*h*) Chap. 29.

your Lordships' attention more fully. The railway was made, with the branches, or such of the branches as are material to the present question, under the provisions of those several Acts of Parliament.

The pleadings state that there had been a railway, which was a mere tramway, for the conveyance of coals from Kilmarnock to Troon, and that by an Act passed in the 9th and 10th of Victoria (*a*), the Defenders were authorized to take a lease of this railway for 999 years, and to convert it into what is called an *edge* railway, that is, a railway on which passengers might travel. And by that Act of Parliament it was provided, that all the provisions which had been introduced into the Act of the 5th year of Her present Majesty, with reference to the Defenders' railway, the main line of railway should be incorporated with, introduced into, and form part of the provisions of the Act of Parliament for leasing this line from Kilmarnock to Troon.

It is further stated, that in pursuance of those provisions in the Act of Parliament, tables of charges were made as to the rate at which coal should be conveyed upon the one line and upon the other line. And it is sufficient for the present purpose to say, that the rate of toll fixed on the Kilmarnock and Troon line, the line of which the Defenders are merely the lessees for 999 years, was a higher rate than the rate which was fixed upon the main line. It is not always so—under a certain distance it is the same; but if the traffic goes beyond a certain distance, the rate of toll is higher upon the cross line than it is upon the main line; for a certain distance, I believe, it is the same rate upon both lines, but it may be taken, for practical purposes, that it is a higher rate of charge upon the cross line than that upon the main line.

(*a*) Chap. 211.

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The principal object of these railways is, to carry that coal to the sea by conveying it to Troon, Ayr, and other places on that line; and the complaint of the Appellant is, that he is charged according to the higher rate, namely, the rate upon the cross line, upon which alone his coals run when they are taken to the sea; whereas parties sending coals from the coal pits beyond Kilmarnock, and which travel a part of the distance upon the main line, are charged upon the main line at the lower rate, and at that same lower rate all the time that they are traversing the cross line, so that those persons have undue advantages over him. By the Act of Parliament of the 5th of Victoria, to which I have alluded, which regulates the main line, and the provisions of which are, by reference, incorporated in the Act of Parliament which relates to the Troon line, it is provided that the Company may, if they choose, have locomotive engines and act themselves as carriers, provided always that they make certain charges not exceeding certain amounts. "Provided always, that in whatever way the said charges are made, they shall be made equally to all persons in respect of all animals and of all goods, wares, merchandise, articles, matters, or things of a like description and quantity, and conveyed or propelled by a like carriage or engine, passing over the same portion of, and over the same distance along, the railway, and under the like circumstances, and in respect of all accommodations of a like nature afforded in respect thereto."

Now, the complaint of the Pursuer is, that in violation of that provision, for the coals coming from his collieries, which border upon the cross line (principally the two collieries which are mentioned, namely, the Annandale and Gatehead collieries), when they go wholly along that railway to Troon, or partly along

that railway, and then turn off from the cross line to the main line and go to Ayr, he is charged for so much as passes along the cross railway at a higher rate; whereas other persons bringing coals from places beyond Kilmarnock, are charged for traversing along the whole line of the cross railway at the main railway rates, which are materially lower. Therefore, he says, that the money which he has paid at the higher rate beyond what others have paid at the lower rate is an excess, that it ought to be declared that it is so, and that he should recover back the excess which he has so paid, which he calculates amounts to many hundred pounds.

His precise allegations are:—"That the charge exacted from the Pursuer for the carriage of his coals from Annandale (Kilmarnock colliery) to Ayr, a distance of five and three-quarter miles on the Kilmarnock and Troon Railway," (that is, the cross railway,) "and seven miles on the Defenders' line, being together twelve miles and three quarters, has all along been, and still is, 2*s.* 0¾*d.* per ton, while the charge from Hurlford to Ayr, six and three-fourth miles on the Kilmarnock and Troon Railway, and ten miles on the Defenders' line, together sixteen and three-fourth miles, has all along been, and still is, only 2*s.* per ton." Then he states, not exactly the same amounts, but similar differences of charge upon the Pursuer carrying coals from Gatehead colliery to Irvine, as compared with what others would pay when they brought coals to Irvine, and in the same way from Annandale colliery to Troon. Then he compares the charge, when a party brings coals along the cross line, with that which others are charged when they bring coals along the main line from another distance, namely, to Ayr; he says that they are charged again at a different rate; so that the result is, that he is charged at the

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rate; so that the result is, that he is charged at the higher rate all along, namely, at the rate of the cross line, whereas the others are charged all along at the rate of the main line, as well when they are traversing the main line as when they are traversing the cross line.

The first question is, whether this is in violation of the provisions of the Acts of Parliament. The Court of Session, first, the *Lord Ordinary*, and afterwards the Lords of Session, were of opinion that it was not a violation of those provisions of the Acts of Parliament; and, after carefully looking at the various provisions of the Acts as fully as I have been able to do, I have come to the conclusion at which the Court of Session arrived.

The question lies in the very narrowest compass. It appears to me to turn entirely upon what the provisions are in the Act of the 5th of Victoria (*a*), which, by reference, was incorporated in the Act of the 8th and 9th of Victoria. The provision is, "that in whatever way the said charges are made, they shall be made equally to all persons, in respect of all animals, and of all goods, wares, merchandise, articles, matters, or things of a like description and quantity, and conveyed or propelled by a like carriage or engine passing over the same portion of, and over the same distance along, the railway, and under the like circumstances." Now, the question on this part of the case is, whether in the cases stated by the Pursuer charges have been made unequally. The provision is, "that they shall be made equally to all persons in respect of matters or things of a like description and quantity." There is no doubt that they are "things of a like description and quantity, and conveyed or propelled by a like carriage or engine." No doubt they were

(*a*) Chap. 29, sect. 28.

"conveyed or propelled by a like carriage or engine passing over the same portion of, and over the same distance along, the railway, and under the like circumstances."

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

These words, I think, in any interpretation, must be tautologous to a certain extent; because, if goods are conveyed over the same portion of the railway, literally, the same portion must mean the same distance. But the only way in which I can interpret the language used is this, that not only are they to go over the same portion of the railway, but they are to go over that, and not to go over any other distance, in order to make this clause in the Act of Parliament applicable, and, I think, that is extremely reasonable, for, if there is a railway ten miles long, and one person sends his goods along the whole of it, and another sends his goods along half of it, it may be very reasonable not to impose upon the Company making the charge the necessity of putting a charge at the same rate on the person who is going the small

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distance as on the person who is going the longer distance, for, in truth, a greater duty is or may be imposed in the first case in compelling the Company to stop the train, or compelling them to have a station at which to take the goods or passengers up. There may be inconveniences of that sort; but, without speculating as to what might have induced the Legislature to come to such a conclusion, it appears to me that in fact they have said that this obligation exists only where the parties traverse the same distance.

I hesitated a good while in coming to this conclusion, because it was the exact expression used in the former Act of Parliament, repealed in regard to the clause in which the provision occurred, and for which this clause was substituted. It looked, therefore, as if the Legislature meant, in using this expression, "passing over the same portion of, and over the same distance along, the railway," something different from what they had said before, when they said, "over the same portion only." But, on consideration, I can come to no other conclusion than that the two provisions mean exactly the same thing.

If that be so, it puts an end to the case, because I have looked at every one of the complaints made by the Pursuer; and, it appears that in no one instance does he go over the same portion, and over the same distance as the other persons who are charged at the lower rate; because, except in one instance, the other persons have traversed the whole line of railway, whereas he has never traversed more than a certain portion,—I say in all instances but one. There is one class of cases, in which, he says, coals are brought to Irvine, or somewhere thereabouts, on the cross line, which come from a more distant place. There again, however, the parties have not gone "over the same portion of, and over the same distance along, the rail-

way." It appears to me, therefore, that this Pursuer has not brought himself within the provision of that Act of Parliament which entitles him to say that the charges must be equal; and, consequently, that the Court of Session came to a right determination in assoilzing the Defenders.

If that had not been the case, a question of very great difficulty and nicety might have arisen; but it is one upon which I shall not now feel myself called upon to express any decided opinion. But, even supposing that the Pursuer had made out that the Defenders had done something in violation of that prohibition, I must not be taken as assenting to the doctrine, that they having done so, the result would have been that the Pursuer would have been entitled to recover back the difference. I do not so interpret the Cases, which were referred to, decided in the Court of Common Pleas (*a*), and I have had the advantage of speaking to several of the Judges of that Court, and I do not think they so understand it. I do not wish to commit anybody upon mere loose conversation, but on explaining to them this case, and talking it over with them, they did not seem to consider that their decision at all touched this Case. If it does, I only wish to guard myself against being supposed to unequivocally assent to the doctrine, that where a Company is bound to make equal charges, but does make unequal charges, the remedy for the person who has paid the higher charge is to recover back the difference, because I confess I see extreme difficulty in such a doctrine. Suppose a charge began to operate on the 1st of January, and there was a clear violation of the Act of Parliament by some regulation that the Company had made, (I put an extreme case,) that the Directors of

(*a*) *Parker* v. *Great Western Railway*, 7 Mann. & Gr. 253, and the cases there cited.

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the Company were charged twopence a ton, whereas other persons were charged threepence a ton; I suppose something to be done that would be in direct violation of the Act, supposing that rule to have come into operation on the 1st of January, and that up to the 1st of June parties ran their coals at that higher rate of threepence a ton; can it be said, that because on the 1st of June the Directors began to run and be charged at a lower rate, the other parties might recover back the monies that they had paid in the meantime? I do not quite see my way to any such conclusion. It may be, that when the case is argued, I shall be convinced that that is right; I only wish to guard myself against being supposed unequivocally to assent to what is supposed to be the doctrine laid down in that Case, which was decided in the Court of Common Pleas. I confess I do not so understand it; if that is to be the interpretation, as it is said to be at the Bar, I think it is a Case that requires much reconsideration.

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

Lord St. Leonards' opinion.

The Lord ST. LEONARDS:

My Lords, I very much regret that I cannot concur in the view which my noble and learned friend has taken of this case. It will not alter the determination of the House; but it may be useful that I should state the grounds on which I differ from my noble and learned friend, with a view to show to the Company what I believe to be the true principle by which they

ought to be guided; and the principle which would probably guide the Legislature in this respect if the Company ever had occasion to apply for any addition to their powers.

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

It is impossible to understand the true bearing of the point to be decided, without looking a little to the different Acts of Parliament, for they vray very much,

(*a*) See *suprà*, Lord Chancellor's remarks, p. 185.

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

This tramroad being in existence, by the Act of the 1st of Victoria, chapter 117, which was passed in the year 1837, the Glasgow and Ayr Railway Company, (as I may call them shortly,) the present Railway Company, were established as a railway company, and were directed to make equal charges. Your Lordships will see the terms in which that is expressed in section 171; and it is very important to draw your Lordships' attention to the words of that provision. It was provided, "That, save as herein-after excepted, the aforesaid rates and tolls to be taken by virtue of this Act shall at all times be charged equally, and after the same rate per mile in respect of all passengers, cattle, goods, matters, or things, and after the same rate per ton per mile, throughout the whole of

the said railway, in respect of the same description of articles, matters, or things; and that no reduction or advance in the said rates and tolls shall either directly or indirectly be made partially or in favour of or against any particular person or company, or to be confined to any particular part of the said railway; but that every such reduction or advance of rates and tolls upon any particular kind or description of articles" "shall extend to all persons whomsoever using the same," and so on. That appears to me, I admit, to militate too much against the action of the Railway Company; but it had started with that strong ground, that there must be equality, and not only equality, as is here pointed out, in like circumstances, but there is an express provision that no reduction or advance shall be made directly or indirectly in favour of any one person or company at the expense of the other.

There is a provision in the same Act for making a branch from a part of the Troon Railway, if the Kilmarnock and Troon Railway Company did not themselves make it; there was a provision that this Company should furnish a railway from Barrassie Hill to Troon Harbour.

Then, in Section 172 of the same Act, the 1st of Victoria, it is enacted, that if the Company, that is, the large Company, shall make this branch from Barrassie Hill to Troon, "it shall be lawful for the Company to charge such tolls or duties per mile on coals or other articles carried upon the said branch railway to or from the Kilmarnock and Troon Railway as the Company shall determine, not being higher than shall be charged in respect of any other part of the railway hereby established, nor higher than the rates and duties charged by the said Kilmarnock and Troon Company upon other portions of their line." So that,

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if the Glasgow and Ayr Company had made that branch, and finished off the Kilmarnock and Troon line, they would have been bound to charge equal rates in the way there pointed out, and which would have prevented the present litigation.

Then came the Act of the 3rd of Victoria (*a*), and there also the charges are regulated by the clauses which have been read so often, but not too often. The object of this Act was to alter and amend the Glasgow and Ayr Act; and, by the 18th section of that Act, it is again enacted, but in different words, "that, save as by the said Act or this Act excepted, the charges by the said recited Act authorized to be made for the carriage of any passengers," and so on, "shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line only, and under the same circumstances." Then comes this clause, which is an absolute clause, "That no reduction or advance in any charge for conveyance by the said Company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the said railway as aforesaid." That gives the most positive direction that there shall be an equality as between persons or companies using the railway, but there is a particular provision that they are to be equal, and to use the same portion of the line. That, as it strikes me, was meant to meet this case. For example, suppose that starting here, from the nearest railway, two persons went from London to Kingston, that one

(*a*) Cap. 53.

stopped there, and the other went beyond; the one who went beyond would have gone over the same portion of the line as the other. There is no doubt about that. The one would not have gone over the whole distance traversed by the other; but they would both have gone over the same portion; they would both have gone over the entire space from the London terminus to the Kingston station. But here, as in the other Act, there is this express provision; after stating the cases in which there shall be equality, the Legislature then state that there shall be no advance, and no diminution, and no favour shown to the one person or company at the expense of the other.

Then came the Act of the 5th of Victoria (*a*), which was passed in the year 1842, and that was also to amend and alter former Acts. Section 28 of that Act is the clause upon which so much difficulty has arisen. Your Lordships will see that as these different Bills were brought into Parliament, the Company have very adroitly contrived, upon every occasion, to lessen their liabilities, and to extend their power of charging, by introducing different words, so as to enable them to have, as they will now be decided to have, the power of establishing as gross an inequality of charge as one can well conceive.

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

(*a*) Cap. 29.

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there is this limitation, that the charges shall be equal upon everybody, and that prevents an abuse of the power, independently of any question as to whether they are limited to any particular amount. The clause states that they are to charge as they think proper, "provided always, that in whatever way the said charges are made"—(I beg your Lordships' attention to these words)—"they shall be made equally to all persons in respect of all animals and of all goods, wares," and so on, "of a like description and quantity, and conveyed or propelled by a like carriage or engine, passing over the same portion of, and over the same distance along, the railway, and under the like circumstances."

Now, to stop there, I think those words were introduced to meet what I have already stated, the case of persons or goods travelling over the same portion of the railway, but not the same distance along the railway; and here, therefore, for the first time, these words were added, in order to meet that case, "and over the same distance along the railway, and under the like circumstances, and in respect of all accommodations of a like nature afforded in respect thereto; and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person."

Now they want a measure or rule by which they are to be governed in their equal charges, and Parliament gives them a measure. It gives them a standard where the circumstances are precisely equal in the one case to the other; and where the two cases are equal to each other, they shall be subject to exactly the same rule, and be liable to exactly the same charge; but these words are not to be rejected, "in whatever way the charges are made there is to be no reduction or

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

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Then there is the Scotland Clauses Act (*a*), which provides for equality also. It is the Common Clauses Act, the Consolidation Act as applied to railways, and that is embodied in and applied to this very Act which we are now considering. And by the 8th and 9th of Victoria, chapter 33, section 83, it is enacted, that there shall be equal charges "in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances." There is not a word about distance; "and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway;" so that the public Act is quite as precise as the particular private Acts, in order to prevent inequality.

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

Then the Act of the 9th and 10th of Victoria, chapter 211, was the Act of Parliament which gave powers to the Kilmarnock and Troon Company to lease their railway to the Glasgow and Ayr Company, and

(*a*) 8 & 9 Vict. cap. 33.

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under section 25, they were restricted as to their power of taking toll. There was nothing peculiar in that Act of Parliament, but the provisions of the 8th and 9th of Victoria, the Scotch Act, it is very material to observe, were extended to this Act, and, therefore, in point of fact, the general clauses of the Scotch Act do bear upon, direct, and influence the proceedings, and ought to do so, of the Company under this particular Act.

Now we come to a very important matter, and that is, the lease which was granted in pursuance of this Act of Parliament. In pursuance of this Act of Parliament, the Kilmarnock and Troon Company did lease that Kilmarnock and Troon Railway, then being, as I have already stated, a mere tramway worked, as I understand, by a stationary engine, and, therefore, haulage only being practised. A lease for 999 years was made to this Company. Now, in point of fact, they hold that railway under that lease, and whether the decision below be right or wrong, it proceeded upon a wrong ground, which I believe everybody has given up, because it proceeded upon this ground, that the Glasgow and Ayr Railway Company held that property under that lease, by which they were bound to pay, not only a fixed rent, but also a tollage rent, which was to be estimated by the quantity of coal raised upon this very railway, from a point in which the Pursuer is himself interested up towards Kilmarnock; whatever coals were raised, there was a tollage paid, and that was the measure of the rent to be paid by the Company. Now, the Court below held that that was a circumstance which entitled the Company to charge those persons who lived upon the line of the Kilmarnock and Troon Railway a sum beyond that which was charged upon the main line, so as to cover

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

Now, it is material to consider what the provisions of this lease were, because, although I admit that the rights of the landlord under that lease, the landlord being the Kilmarnock and Troon Railway Company, could not be brought into question here, yet it is very important in adjudicating upon this Case to ascertain what were the terms upon which the Glasgow and Ayr Company obtained this Kilmarnock and Troon Railway. Let us see what those terms were. They

were to pay a fixed sum, ascertained by the tollage in the way I have mentioned, and then comes this most important clause. In regard to the haulage charges, they say, "that it is further agreed to, that the gross charge to be made by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company" (that is, the principal Company) "against the traders for haulage of minerals for any given distance on the said railway" (that is, the Troon Railway, it is admitted to mean the Troon Railway, and it cannot mean anything else) "shall never exceed the gross charge for haulage of minerals" (in course of being conveyed to Troon), "for the like or any greater distance on the main line of the Glasgow and Ayr Railway." Then, lower down, there is another provision as to the charge. If you look at that, you will find that which is very important. There must be an equal charge. There must not be an excess of charge. The gross charge must not exceed the gross charge in going to Troon, for the like or any greater distance on the main line of the Glasgow and Ayr Company. So that the tollage charged upon coals coming along the main line is to be the measure of the charge upon the Kilmarnock and Troon line for conveying coals. The one is to pay sixpence, we will say, for going seven miles along the main line, carrying coals to Troon, and you are not to charge persons who are upon the green line (the Kilmarnock and Troon line) more than sixpence for the same distance. But, beyond that, you are not to charge as a gross charge for haulage on the green line (the Kilmarnock and Troon line) more than you would charge for the greater distance on the main line: not only your charge on the Troon line is not to exceed the charge for an equal distance on the main line, but you must never have a lower charge on the

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main line than you have on the green line; you must not charge more upon the Kilmarnock and Troon line, whatever the distance be, than you charge even for any greater distance upon the main line.

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

The way in which they have managed it is this:—They issue, as they are bound to do, tables of rates under their Act of Parliament. I need not stop to observe, that for short distances the rates are the same; but after short distances they have one rate, a higher charge upon the Kilmarnock and Troon than they have upon the main line. They issue two separate tables,—the one for the Kilmarnock and Troon line, and the other for the Glasgow and Ayr line. That is right enough according to the Act of Parliament. Nobody, as I understand, finds fault with

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those two tables, standing, as they do, separately. They are justified by their powers in doing that, although they are not justified by the circumstances under which they have increased the toll. But we will consider them as both properly issued. They do not adhere to that which they are bound to furnish under the Act of Parliament. Without notice to the public, they break in upon the very tables by which they are bound to be guided, and which are to be the guiding rule of the Company, for, instead of stating, as they ought to do, that those Kilmarnock and Troon rates are only to apply where the Kilmarnock and Troon people run over the line, and that when persons come to the main line, then at once the rates are to drop; the tables do not tell you a word about that: those tables are a violation of the Act of Parliament. They mislead the public. If they had stated the thing as they ought to have stated it upon the face of the tables, the inequality would have been manifest. They were bound to state it. They have evaded the Act of Parliament. They have committed a breach of their duty in the way in which they have levied these tolls, without reference to the question of law, which I am not now adverting to. They have created that inequality, and they have attempted so to arrange it that the inequality should not appear upon the face of the tables. I defy anybody to draw those tables as they ought to be drawn, without showing the inequality upon the face of them.

Then, is or is not that an infringement within these Acts of Parliament? If I understand the principle of the Acts of Parliament, it clearly is not simply that you are to look at the words of the Acts, which state that things which are equal to each other are to be charged alike, but you are not at liberty to strike out

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from all those Acts of Parliament those clauses which emphatically declare that there shall be no advance nor diminution, so as to favour, directly or indirectly, one to the prejudice of the other. Now has that been done here? That is a simple question of law. The question of fact admits of no doubt; because there is no equality, and no pretence of equality. They do not pretend that there is any equality. The Troon people, those who are upon the cross line, can neither go to Irvine Harbour, nor can they go to Ayr or to Troon; they can go nowhere without paying an extra large charge, which is imposed upon that line ,and imposed, according to the table, upon the whole world passing that way, but according to the doctrine and practice of the Company, imposed only upon that particular line. Then they are bound to pay it; but is not that an advancing, directly or indirectly, of the tolls upon those particular persons for the benefit of others? What is the position of parties upon the other line? If they come from any distance, either short or long, if the come merely from Kilmarnock, travelling upon that portion of the principal line, running from Kilmarnock to join the Troon line—a very short portion —the moment they reach the green line they are actually exonerated from charge upon the green line, and they are allowed to run over the whole of that green line at the lower rates. It is impossible to tell me that that is not an infraction of the Act of Parliament. It is contrary to the very words and the principle of those Acts. I look at the principle. I never would break in, and I have never, in the course of my official life, broken in upon what I believe to be the true construction of words. But, it is the duty of a Court of Justice to make words which have a certain import bend to the justice of the case; and it is very

seldom, indeed, that any man who is master of the law cannot, without breaking in upon the law, make the rule bend so as to meet the justice of the case.

Hard cases, it is said, make bad law, and so they do. If words have an unnatural import given to them, if the rule of law is twisted and damaged in order to reach a particular hardship, nothing can be worse. But a Court of Justice, when they are making a fair construction of the rule of law, of words difficult to construe, bend them so as to meet the real justice of the case. Here there can be no doubt of the justice of the case. The effect of what is done is, to benefit the coal owners off the cross line at the expense of those who are upon that line, and they are able, therefore, to carry their coals from a greater distance upon the main line to Troon Harbour, and in that way to the sea, than the parties upon the Troon line can carry their coals, who are damaged accordingly. That, of course, takes away the benefit of that railway to the persons who are upon that branch. It actually makes them pay more, in many cases, for carrying coal to Troon Harbour from their own line than other persons pay who carry from a considerable distance along the main line andthat cross line.

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

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My Lords, there are no cases upon the subject. There was a case very much relied upon which was before my Lord *Cottenham*, and which was supposed to have some bearing upon this case. But I confess, after a very attentive consideration of that case, with great respect to that very learned Judge, I do not think the judgment in that case is very clear or altogether satisfactory; but I think the facts entirely distinguish it from the case before your Lordships. It is the case of the *Attorney General* v. *Birmingham and Derby Junction Railway Company* (*a*). There was a railway from the London and Birmingham Railway at Hampton-in-Arden to Derby. It was a connexion by a branch with the London and Birmingham Railway. It was thirty-eight miles. The Railway Company charged 8*s*. for a passenger going to or from Hampton-in-Arden to Derby; they charged the same both ways; but they charged 2*s*. if passengers were proceeding along the London and Birmingham Railway from London to Derby, or from Derby to London, but 8*s*. as before when the passenger was from or to any place short of London. The object of that was to obtain passengers from the Midland Railway, which saved eleven miles. It was insisted that the decision of Lord *Cottenham*, in this case, showed that these charges were proper charges. In the first place, you will observe that there was an equality of charges upon the Hampton-in-Arden line both ways. It was only when London was the terminus that the fare was lowered, and it was lowered to every one. It was not that a passenger starting from Hampton-in-Arden paid 8*s*., and another starting from another part paid 2*s*. There was a difference, but there was no inequality. I think, there-

(*a*) 2 Rail. Ca. 134.

fore, that in no respect does that case touch this. But, that was a case in which a difference of charge might be fairly made. It was not at the expense of one person or company to the benefit of another person or company; but it was an arrangement with reference only to the railway itself, and there was no infringement, in point of fact, of the benefit of Hampton-in-Arden in the way which has occurred in this case. But in this case the result is, that the coal owners are damaged, no doubt very seriously, by the course which has been taken by this Company, and the decision of your Lordships will give them authority to do this.

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

Mr. *Solicitor General*: Will your Lordships forgive me for asking, that the House will take the course that it took in the case of *Johnstone* v. *Beattie* (*a*), when the noble and learned Lords being equally divided, it was agreed that instead of moving (which would be

(*a*) 10 Cla. & Finn. 83, where in May 1843, the LordChancellor Lyndhurst and Lord Cottenham being on one side, and Lord Brougham and Lord Campbell on the other, it was ordered that the cause should be re-argued in the presence of *further* Peers. On the 16th May 1843, Lord Langdale attending, a re-argument took place; and the result gave a majority of three (the Lord Chancellor Lyndhurst, Lord Cottenham, and Lord Langdale) to two (Lord Brougham and Lord Campbell).

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the natural consequence) that the appeal be dismissed, it was ordered that the consideration of the case should stand adjourned. That was the course then taken, and there was a re-argument. I have here a report of the case.

Lord ST. LEONARDS: There can be no doubt about it. It is impossible to do that.

Mr. *Solicitor General:* My Lords, this amounts to a complete denial of justice.

Interlocutors affirmed.

MAITLAND AND GRAHAM.—GRAHAME, WEEMS, AND GRAHAME.