Statute 1685, that the entail might be good as to some prohibitions, though bad as to the rest. The heir might, before Lord Rutherfurd's Act, be able to sell the estate for value, and yet he could not alienate it gratuitously.—*Carrick* v. *Buchanan*, 3 Bell's App. 342. The 43d section of Lord Rutherfurd's Act does not repeal that law, and was not intended to do so. The common law right of settlement still exists, whereas the Court below has practically decided, that, if an entail is defective in any one prohibition, it is bad *in toto*, both as between heirs and creditors. It would be a hardship to stretch the law to that extent, and such a construction is unwarranted. The same point was raised, but not decided, in *Cochrane* v. *Baillie*, *ante*, 685; 2 Macq. Ap. 529.

Attorney-General (Bethell), and *Anderson* Q.C., for the respondent, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, this is a case which does not admit of the least doubt in the world, not merely because the point here raised has been already decided in this very year by your Lordships, in the case of *Cochrane* v. *Baillie*, removing all shadow of doubt, if there was any doubt before upon it, but I think it is perfectly clear from the 43d clause of the act; and as to the great evil which Mr. Rolt suggests may arise from parties not being able in Scotland to make an entail disposition otherwise than according to the terms of the Statute of 1685, that great evil has been incurred, if it was an evil; but I do not see that there is any evil in it at all. Certainly the object of that statute was not to encourage Scotch entails—quite the reverse; and the language of the 43d clause seems not to admit of the least possible doubt, for not only does it say, that, if the deed is invalid and ineffectual in any one of the irritant clauses, it shall be invalid and ineffectual as regards all, but it goes on to state, that "the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under said tailzie, and no action of forfeiture shall be competent at the instance of any heir substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions." I do not see how those words can receive any other meaning than that which has been put upon them by the Court below. If it is meant to be said, that, notwithstanding these words, still the heir substitute may have a right to say, that the heir in possession shall not contravene the prohibitions, by making a gratuitous disposition, that cannot be a matter that admits of any doubt, upon the simple words and language of the statute.

In this case the Lord Ordinary first, and the Court of Session afterwards, came to the only conclusion at which they could arrive, and, so far as appears upon these papers, they came to that conclusion without any hesitation, and without much argument addressed to them upon it.

LORD WENSLEYDALE.—My Lords, I entirely concur with my noble and learned friend that the decision of the Court of Session in this case is right, and that the appeal must be dismissed.

Interlocutors affirmed, and appeal dismissed, with costs.

Appellant's Agents, Connell and Hope; and Walker and Melville, W.S.—*Respondent's Agents*, Richardson, Loch, and Maclaurin; and Mackenzie and Baillie, W.S.

AUGUST 13, 1857.

ARCHIBALD FINNIE, *Appellant*, v. THE GLASGOW AND SOUTH WESTERN RAILWAY CO., *Respondents*. (No. 2.)

Railway Lease—Contract—Toll—Jus Quæsitum Tertio—*The Kilmarnock and Troon Railway was leased by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., now incorporated with the Glasgow and South Western Railway Co., on payment of a fixed sum of rent, and right to charge for the conveyance of coals along that line at the rate of* 1½*d. per ton per mile. It was provided in the lease, that this charge was to be subject to alteration by the mutual consent of both companies; and the Kilmarnock and Troon Railway Act authorized a charge of* 2½*d. per ton per mile. Finnie, a third party, tacksman of collieries on the Kilmarnock and Troon line, and who used the line for the conveyance of his coals, applied for interdict against raising the charge, alleging that both companies had subsequently agreed to fix the charge for the conveyance of coal along the line at* 1⅛*d., and that a list of charges to this effect had been published, and the toll paid for some time at that rate, and that he, as tacksman along the line, had good right to interdict the company from departing from that charge so fixed.*

HELD (affirming judgment), *That this charge of* 1⅛*d. was not fixed in concert by the companies, in terms of the lease; but what the companies had agreed upon was,* 1⅛*d.,* not *as* toll *to be charged on traders, but as* rent, *as between themselves, and therefore that the complainer was not entitled to interdict.*

If two parties contract, and there is a stipulation in their contract in favour of a third party, the latter has a right to enforce the contract on the principle of jus quæsitum tertio.
But opinion expressed, that it must clearly appear, and be distinctly expressed, that this third party is to take benefit by the contract.
QUÆRE—*Whether overcharges by a railway company made in violation of the equal rates clause, and paid, can be recovered back?*[1]

The appellant was tacksman of the Annandale coalfield and Gatehead coalfield, and other coalfields, lying between Kilmarnock and Troon, on or near to the line of the Kilmarnock and Troon Railway, and he brought a suspension and interdict against the respondents, the Glasgow and South Western Railway Company, to have them interdicted and prohibited from charging a higher rate for toll than 1⅛*d.* per ton per mile for coal carried along the line, alleging that he had been in the practice, ever since the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., had acquired possession of the Kilmarnock and Troon Railway, of employing them and the respondents as carriers in conveying along the said railway, and also along their own line and branches, coals and other materials to and from his works to the harbour of Troon, he using and employing his own carriages and engines, at the said rate of 1⅛*d.* per mile, in terms of an agreement concerted between the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., and the Kilmarnock and Troon Railway Co.; and that the respondents had lately raised the rate of toll to 1½*d.* per ton per mile for the conveyance of coal thereon.

The companies had been incorporated under the name of the Glasgow and South Western R. Co., which company now held the lease of the Kilmarnock and Troon line.

The Kilmarnock and Troon Railway Act of Parliament authorized a rate of 2½*d.* per mile for carriage of coals: but the companies were alleged to have agreed in future that 1⅛*d.* should be the fixed rate of toll between them. Yet the Glasgow and South Western R. Co. had since raised the charge to 1½*d.*

The Court of Session refused the interdict and found, that the rate of 1⅛*d.* per ton per mile, was not fixed in concert by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., now represented by the respondents, and the Kilmarnock and Troon Railway Co., in terms of the provisions of the lease under which the respondents held the said railway, as the rate to be taken and charged from persons using and employing the said railway with their own engines and carriages for such conveyance; and that the list of tolls, of date 4th October 1848, was not published by the said Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., with the authority and approval of the Kimarnock and Troon Railway Co., the same not having been in any way concerted and arranged with the latter company.

Against this interlocutor the present appeal was brought to the House of Lords.

The Attorney-General (Bethell), and *Anderson* Q.C., for the appellant.—The respondents were not entitled to charge the appellant for the use of the Kilmarnock and Troon Railway a higher toll than that contained in the list of tolls published by them, dated 4th October 1848. And he can recover back the overcharge—*Parker* v. *G. W. R. Co.*, 7 M. & Gr. 253; *Att.-Gen.* v. *Birmingham Co.*, 2 Rail. C. 124; *Stockton Co.* v. *Barrett*, 11 Cl. & F. 590. The appellant's right to claim the benefit of the stipulation in the lease falls under a well known principle of the law of Scotland, which is technically characterized as a *jus quæsitum tertio*, and is thus commented upon by Lord Stair:—"It quadrates with our customs, that where parties contract, if there be any article in favour of a third party at any time *est jus quæsitum tertio*, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obligor may be compelled to perform. So a promise, though gratuitous, made in favour of a third party, that party, albeit not present nor accepting, was found to have right thereby."—Stair, B. i. tit. 10, § 8. In the same manner, when, to benefit the traders, the Kilmarnock and Troon Railway Co. consented to reduce the toll payable to them, the traders became entitled to claim the benefit of the reduction, by a reduction of the rates levied from them. The right so constituted in their favour was intimated and published to them by the table which was published by the respondents in October 1848, and which was framed in perfect conformity with the views of the Kilmarnock and Troon Co., and was a necessary result of the reduction of toll to which that company had consented. The judgment being therefore erroneous ought to be reversed.

Lord Advocate (Moncreiff), and *Rolt* Q.C., pleaded for the respondents.—1. The reasons of suspension and interdict stated by the appellant are unfounded and untenable, inasmuch as—(1) No table of tolls ever was fixed in concert by the two companies, in terms of, and under the provisions of, the lease. (2) The table of tolls, of 4th October 1848, was issued by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., entirely at their own hand, not only without being concerted with, but also without being submitted or even communicated to, the Kilmarnock and Troon Railway Co. (3) The table of tolls was never recognized or adopted by the Kilmarnock

[1] See previous report 17 D. 1127; 27 Sc. Jur. 566. S. C. 3 Macq. Ap. ~~177~~: 29 Sc. Jur. 537.

and Troon Co., and the tolls therein contained never became chargeable, the Kilmarnock and Troon line never having been used by any person with his own engines and carriages; and, (4) The table of tolls, of 4th October 1848, was formally cancelled by the respondents, who had the undoubted and only power to do so, and it no longer exists. 2. It is *jus tertii* to the appellant to found on the provisions of the lease of the Kilmarnock and Troon Railway, entered into between the Kilmarnock and Troon Railway Co. and the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., *Peddie* v. *Brown*, *supra*, p. 704; and even supposing he were entitled to found upon it, the alleged contract is insufficient to sustain the application for interdict. 3. By the Kilmarnock and Troon Railway Act 1846, the sole power of demanding tolls for the use of the Kilmarnock and Troon Railway was given to the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., now represented by the respondents, and the power to that effect formerly vested in the Kilmarnock and Troon Railway Co. was repealed. 4. The rates complained of being fixed by the authority, and the only authority recognized by the statute, and being less than the rates statutorily authorized, the proposed toll is in all respects legal, and the application for interdict is untenable. 5. The table of rates of October 1848, issued by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., of their own authority, having been duly cancelled, no longer exists, and cannot be enforced by the appellant, and, at all events, cannot be enforced by the present summary mode of interdict. 6. No table of tolls having ever been fixed by the two companies in concert, and the Kilmarnock and Troon Railway Co. having refused to take measures to adjust such table, or to refer the same to arbitration, as provided by the lease, the respondents were entitled to issue and exact the rates specified in the table complained of, seeing that these are within the statutory maximum, and the appellant, as one of the public, has no right to object to this, or to refuse payment of these rates.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, the question in this case arises from an application for suspension and interdict in the Court of Session, praying that the Glasgow and South Western Railway Co. might be interdicted from charging any higher rate of toll than 1⅛*d.* per ton per mile, alleged to have been fixed by the Glasgow, Paisley, Kilmarnock, and Ayr Co., (who are now represented by the respondents,) in concert with the Kilmarnock and Troon Co., and in consequence of which a list of tolls was published on the 4th October 1848.

The Lord Ordinary was of opinion with the applicant upon that point, but the Lords of Session took a different view, and against the decision of the Lords of Session the present appellant has brought the matter before your Lordships' House.

The Kilmarnock and Troon Railway Co. was established by an act of parliament, the 48 Geo. III. c. 46. The line was originally a mere coal line, and, in truth, might substantially be called the railway of the Duke of Portland. The Duke of Portland is said to have had 77 shares, Lord Eglintoun two shares, and some other gentleman one share. Substantially, it was a coal railway, for the benefit of the collieries on the line between Kilmarnock and Troon, in which the Duke of Portland was the person mainly interested as lessor.

By an act of the 7 Will. IV. and 1 Vict., a certain company was incorporated, called the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co. That was for a railway running from Glasgow by Kilmarnock down to the coast, and to Ayr, and different places along that line, and there were several acts of parliament extending that act; and eventually that company became amalgamated with certain other companies, and they are now represented under the name of the Glasgow and South Western Railway Co., and inasmuch as all the rights of the former companies have been concentrated in that company, it may be called generally the Glasgow and South Western Co.

The act of the 9 and 10 Vict. c. 211, which received the royal assent on the 16th of July 1846, authorized leases by the Kilmarnock and Troon Railway Co. to the present respondents, or those whom the present respondents now represent, upon certain terms. The 7th section of that act provided, that it should be lawful for the Kilmarnock and Troon Co. to grant in lease, upon certain considerations, and generally, upon such terms as they should think proper, the Kilmarnock and Troon Railway, and the other works, to be held under the same powers, rights, and privileges, as the original coal line. By the 14th section it was enacted, that the new company, the lessees, should be entitled to relay and reform the whole of the line, including certain portions of the line mentioned, and maintain the same as an edge railway—that is, a railway for the carriage of passengers and goods, similar to the railways which generally we have in this country. Then, by the 24th and 25th sections, provision was made as to the tolls. By the 24th section it is provided, that all powers given to the Kilmarnock and Troon Co., for the purpose of enabling them to demand or charge any tolls, should be repealed; and by the 25th section, certain new tolls were allowed to be charged upon goods conveyed upon the Kilmarnock and Troon Railway. And with regard to coal, the provision was, that the company might take for all coals 2½*d.* per ton per mile, and if conveyed in carriages belonging to the company, an additional sum of 1*d.* per ton per mile; and then, by the 26th section, the company were empowered to

demand for the use of the engines 1*d.* per ton per mile. So that they might eventually charge 4½*d.* per ton per mile, viz., 2½*d.* for toll, 1*d.* for the use of the carriages, and another 1*d.* for the use of the engines. If the goods were conveyed by the traders, as they are called,—the miners —in their own carriages, they were to pay 2½*d.*; if they were conveyed in the carriages of the company, but by their own haulage, then they were to pay 3½*d.*, and if they were conveyed altogether by the company, then all those charges together would have made 4½*d.* per ton per mile. But the 31st section provides, that where the company provide the whole, the railway, the carriages, and also the haulage, that is, the engines, then they shall charge only 3½*d.* per ton per mile.

My Lords, that act received, as I have stated, the royal assent in July 1846, and a lease was made in pursuance of the powers there granted, very shortly afterwards, on the 25th January, in the year 1847, and in that lease the Kilmarnock and Troon Railway Co. let to the Glasgow Railway Co., now represented by the respondents, their line, upon the following rent:—1*st*, A fixed sum of £375 yearly: 2*dly*, A sum equal to 1½*d.* per ton per mile on all minerals carried upon the railway, provided the same should have been raised from lands lying between the town of Kilmarnock and Troon, upon which the coal had heretofore been used to be carried. There were some other stipulations as to what should be paid upon coals from other mines, but that is not necessary further to advert to.

Then there is this stipulation:—"The Glasgow, Paisley, Kilmarnock, and Ayr Railway Co.," who are represented by the respondents, "hereby bind and oblige themselves to account for, and pay the foresaid fixed rent, and the rent calculated on the quantity of minerals carried as aforesaid to the said Kilmarnock and Troon Railway Co.:" "And it is hereby specially agreed to, that the said rent shall be calculated as if the charge on minerals per ton were one penny and one halfpenny, although the carriage should be for a shorter distance than one mile." And then there was this provision:—"And it is hereby agreed, that the said Glasgow, Paisley, Kilmarnock, and Ayr Railway Co. shall, by themselves, have power, in terms of the Railways Clauses Consolidation (Scotland) Act 1845, to fix the rates and duties to be taken or charged in respect of goods other than the toll on minerals and for passengers on the said Kilmarnock and Troon Railway, but that the tolls to be taken and charged in respect of minerals shall, as occasion may require, be fixed by the said company and by the Kilmarnock and Troon Railway Co. in concert."

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

The object of the interdict which was sought for was to restrain the Glasgow and South Western Railway from charging more than 1⅛*d.* per ton per mile upon coals conveyed along the Kilmarnock and Troon Railway. The act authorizes 2½*d.* to be charged, but the appellant contends that the charge was reduced to 1⅛*d.*, and he does so upon these grounds. By the terms of the lease, which I have read, it was stipulated that the tolls upon minerals, which, of course, would include coals, should be fixed in concert by the respondents and the Kilmarnock and Troon Co.; and then he says, that the toll was fixed in concert between the two companies at 1⅛*d.* per ton per mile.

Now, my Lords, two questions arise upon this appeal. First of all, is it true that, in point of fact, 1⅛*d.* per ton per mile was fixed as the sum to be paid as the toll? Secondly, if that be so, is the appellant entitled to an interdict in consequence of that 1⅛*d.* having been so fixed?

The Court of Session decided against the appellant on the first point—that is, on the point of fact, that there had ever been a settlement such as that for which he contends of 1⅛*d.*; and they expressed a strong opinion also on the other point, but they did not decide the case on that ground.

My Lords, I have considered the case with the best attention in my power, and, in my opinion, the Court of Session came to a correct conclusion upon the point of fact, which was the first point. From the time when the Ayrshire Company took possession of the Troon line under the lease, the traffic on that line was conducted by them exclusively by their own engines and their own carriages, and they charged 2¾*d.* per ton per mile for the coals. This was less than by the act of parliament they were entitled to charge, for they were entitled to charge for carrying coals along the railway, when they supplied haulage, carriages, and railway, 3½*d.*, but, in fact, they only charged 2¾*d.* But soon after the opening of the line it was found, that this charge of 2¾*d.* was more than, in all probability, could be profitably maintained, because rival lines were threatened. And then a long negotiation took place between the agents of the Duke and the agents of the respondents' company, in which the question was discussed, whether it was not for their common interest to reduce the charge, so that, instead of charging 2¾*d.*, something less than that should be charged; and the result of that negotiation, which is to be found in a number of letters of a very desultory character, was, that the two companies, or rather the Duke of Portland on the one side, and the respondents' company on the other, entered into an agreement, it being a matter in which they had a common concern, and by that it was agreed, that the

company should reduce that charge of $2\frac{3}{4}d.$ to a charge of $2d.$; and they did it upon these terms, that, if that were done, the Duke and the company should divide the loss equally—the Duke agreeing that, instead of taking $1\frac{1}{2}d.$ per ton per mile, which, under the lease, he was entitled to, he would take $1\frac{1}{8}d.$, throwing off the $\frac{3}{8}d.$ The company, on the other hand, agreed that, instead of receiving what they had received, which would have been $1\frac{1}{4}d.$, they would throw off $\frac{3}{8}d.$, and take only $\frac{7}{8}d.$; and so the Duke taking $1\frac{1}{8}d.$, and they taking $\frac{7}{8}d.$, that would make $2d.$ as the gross charge.

After some discussion this was agreed to, and the charge was fixed at $2d.$ a ton per mile, and although the table of charges was not set up until October 1847, it was agreed, that this charge should have a retrospective operation to the preceding month of May, when the negotiation had been in truth concluded. And accordingly, the traders who used the line for the purpose of carrying their coals were informed, that those who had paid tonnage at the advanced or higher rate would be entitled to a reduction from the month of May, so as to make the payment which had been made since May that which it would have been according to the new rate fixed in October. A calculation was accordingly made, and it was found, that there had been paid by the traders, in respect of this additional $\frac{3}{4}d.$, an excess of about £2000. That was divided into two equal parts; one half was paid, no doubt, by the Duke, and the other half by the company. That was in October 1847.

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

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

That is all that it is necessary to say; but I must add, that I think it is pretty clear also, that even if this had been agreed between these parties, it is a matter in which no third person could have come before your Lordships complaining that he was damnified, because the agreement between those parties had not been properly carried into effect. It was suggested, that this was in the nature of a *jus quæsitum tertio*. It seems to me impossible to contend that it is so. This matter was considered in the present session of parliament in your Lordships' House.[1] The *jus quæsitum* must be not merely a *jus* in which the *tertius* is interested, but it must be a *jus* that was intended to be beneficial in some way to a third person. Now, here the object was to make an arrangement between the owners of these two lines. It is true that if the owners of the two lines reduced their toll, every person who used the railway would be benefited by it, but they are not the *tertii* within the sense and meaning of that rule. It was contended, that this was meant for the benefit of the lessees of the mines on the line of railway. Even if that were so, it would be extremely doubtful, whether the doctrine of *jus quæsitum tertio* would apply. But it is quite obvious that, if this is a *jus quæsitum tertio* at all, the whole public is the *tertius*, because every one of the public would have a right to use this railway, and every one, therefore, would be just as much interested in the question as the lessees of the mines upon the line of railway.

Upon the whole, therefore, in my opinion, the Court below came to a perfectly correct conclusion, and the result is, that I have now only to move your Lordships that this appeal be dismissed with costs.

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[1] See *Peddie* v. *Brown*, *ante*, p. 704.

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

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

The doctrine of the *jus quæsitum tertio* is very distinctly explained by Lord Stair, i. 10, 5, where he says—"It is likewise the opinion of Molina, and it quadrates with our customs, that where parties contract, and there be any article in favour of a third party at any time, it is *jus quæsitum tertio* which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obligor may be compelled to perform." And the several instances that he cites from the decisions of the Court of Session under the head of *jus quæsitum tertio*, explain his meaning to be, that, where there is an express stipulation in a contract in favour of any one, it is, in effect, an agreement between those parties that the stipulation shall be performed with him, and though the person in whose favour it is made is not a party to the agreement, nor at the time assenting to it, he may afterwards adopt the agreement in his favour, and sue upon it.

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

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

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

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

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

The next question is, whether the allegation in the note of suspension has been proved by the suspender to the extent to which it was necessary for him to prove it, as that note is the petition "to interdict, prohibit, and discharge the said respondents from taking and charging from the complainer, when using and employing the Kilmarnock and Troon Railway with carriages and engines properly constructed, any higher rate of toll, in respect of the conveyance of coals thereon, than the rate of $1\frac{1}{8}d.$ per ton per mile, fixed in concert by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., now represented by the respondents, and the Kilmarnock and Troon Railway Co., in terms of the provisions of the lease, under which the respondents hold the said railway, as the rate to be taken and charged from persons so using and employing the said railway for such conveyance, and contained in a list of tolls published by the said Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., in compliance with the provisions of their acts, on

or about the 4th day of October 1848, with the authority and approval of the Kilmarnock and Troon Railway Co., and that so long as the said rate shall be the existing legal rate of toll for the use and employment of the said railway, in respect of the conveyance of coals thereon, as aforesaid."

If, in order to sustain this petition, it is necessary to prove from its peculiar form that the toll of 1⅛*d.* was not only paid in concert, but also inserted in a list of tolls published by the Ayrshire Company, with the authority and approval of the Troon Railway Co., then I think it is perfectly clear that the appellant could not succeed, because there really can be no question that both companies did not agree upon the table of tolls, whatever may be said as to their having agreed to fix the amount of the toll itself. The table of the 4th October 1848 was certainly not put up with the concurrence of the two companies, or agreed to by the Troon Company.

But I conceive that, in order to support this petition, it would be enough for the appellant to prove that a toll of 1⅛*d.* per ton per mile for the use of the railway for the conveyance of coals on the Kilmarnock and Troon Railway, with carriages and engines properly constructed, was fixed in concert by the Ayrshire Company and the Troon Company, in terms of the provisions of the lease.

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

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

The lease of the Kilmarnock and Troon Co. to the Ayrshire Co., January 1847, made pursuant to the act 9 and 10 Vict. c. 221, reserves a fixed rent of £375 yearly, and a fluctuating rent, namely, a sum equal to 1½*d.* per ton per mile on all minerals carried on the railway, provided the same shall have been raised from lands between Kilmarnock and Troon. And then, there is a stipulation, no doubt in order to secure the traffic along the railroad being continued, that the gross charges for haulage of minerals to Troon should not exceed that along the main line of the Ayrshire Company, and for the same purpose, no doubt, that the tolls on minerals shall, as occasion may require, be fixed by the Ayrshire and Troon Railway Co. in concert, and shall never exceed the tolls that were actually levied by the Troon Company immediately antecedent to the 16th July 1846, and the Ayrshire Company are to keep accurate books, in order, of course, to ascertain the rent. It is perfectly clear on the wording of this lease, that no toll, as such, would be due to the Troon Company. All the tolls are to belong to the Ayrshire Company. The 1½*d.* per ton per mile is a rent payable to the Troon Company, varying, of course, with the quantity carried; and as it is the interest of that company that as great a quantity as possible should be carried along it, they stipulate for the power to fix the tolls, and also that the tolls should never exceed the tolls they actually levied before, because the increase of them would naturally tend to diminish the quantity carried, and so lessen the rent payable. If the two companies could not agree to reduce the tolls, at all events they were to remain at the previous rate. I agree with Lord Ardmillan, that the term "tolls" in this lease, being the same word as is used in the Railway Acts, is, by the interpretation clause therein, to be taken to mean "any toll, charge, or other payment, payable for any passenger," &c., or for any goods, matter or thing conveyed along on the railway, and is to be understood in that sense in this lease; and therefore that the two companies were to concert together, not merely the toll for the use of the railway as such, but also all the charges for the carriage of goods; and the two companies did proceed to adjust these. But the question is, whether these companies ever did agree to the amount of the toll "for the use of the railway," to be paid by those who use their own means of conveyance?

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

The negotiations with the Duke of Portland, as representing the Troon Company, for an alteration of charges, began in the year 1847, and were conducted by the agents of both parties. In the first instance, it was found that the maximum rates for limestone, included in the term minerals, allowed by the act of 1846, was 2*d.* per ton per mile for toll, haulage, and the use of waggons, for which 1½*d.* would have to be paid to the Troon Company by the lease, so that the Ayrshire Company would have no more than ½*d.* per ton per mile for the use of waggons and

haulage, which would not cover the expense of haulage alone. Application was therefore made to the Duke's agent to strike limestone out of the class of minerals altogether. It is suggested also at the same time, that the high rate of toll on the Troon line is likely to injure the Duke's coal trade.

The Ayrshire Company were always desirous of preventing the establishment of a competing line then projected from Kilmarnock to Ayr, and were anxious to reduce the charges on the whole of their line, in order to prevent competition. A negotiation between the agents continued some months, with a view to a new arrangement with the Duke, and it finally resulted in an alternative offer by the Ayrshire Company to the Duke of Portland, one branch of which was, that these dues should be reduced to 2*d.* per ton per mile, payable by those using the line, and that this sum should be divided in the proportion of 1⅛*d.* to his Grace, and ⅞*d.* to the company—that is, in truth, that the payment for rent under the lease should be 1⅛*d.* per ton per mile, which latter proposal appears to have been accepted by the Duke's agent.

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

Much correspondence subsequently took place between the agents as to the proper form of the agreement. A difficulty arose as to the reduction upon coals not carried to Troon. That difficulty was formally settled by the agreement on the part of the Duke to make the reduction of the dues on the Kilmarnock and Troon line universal. All the parties then agreed, that the reduction of the total charge upon the carriage of minerals to the customers should be to 2*d.* per ton per mile, and the reduction of the payment to the Duke, representing the company, from 1½*d.* to 1⅛*d.* per ton per mile; but that payment to the Duke was not toll for the use of the road, for no toll was due to him, it was only rent of the railroad in proportion to the quantity of minerals carried; and after the agreement with his Grace, it was perfectly immaterial to him what toll the Ayrshire Company charged to those who used the line simply for the use of it, provided they did not charge for that use and carriages and haulage together, greater rates than 2*d.* per ton per mile, which they had agreed not to do. The Troon Company, in fact, had never in these negotiations taken into consideration the toll to be paid by those who used the railroad simply for the use of it, and never meant to fix it under the provisions given by the lease, though they did mean to limit the total charge.

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

The Ayrshire Company published the table of 11th October 1848, stating the toll to be 1⅛*d.* per ton per mile on all coals, &c., but this was really not in fulfilment of an agreement with the Troon Company, and therefore was not connected with them, being fixed by the Ayrshire Company alone, and might be revoked by them, and it was revoked. Whether the Troon Railway Co. might not have brought an action against the Ayrshire Company for charging more altogether than 2*d.* per ton per mile, is not part of the present question.

It is only on the ground that 1⅛*d.* per ton per mile was agreed to by the two companies as a toll for the use of the railroad that the suspender can succeed. I think he has not made out that proposition.

Much stress was laid upon the Troon Company having paid back the excess above 1⅛*d.* per ton per mile to the Ayrshire Company for an overcharge from the 15th May 1847, and which was returned by the Ayrshire Company to the coal traders, as if this was an admission by both companies, that they had agreed to the reduction of the toll as such. It appears to me not to have that effect. An assent by the Troon Company to reduce its rent from a bygone time, and the Ayrshire Company to reduce their charges to the traders in proportion from the same time, and to allow such reduction to the traders who had paid too much, will explain the transaction equally well; and it appears to me really to be the true state of the case. Therefore, I am of opinion with my noble and learned friend, that this judgment ought to be affirmed, with costs.[1]

Interlocutor affirmed, with costs.

Appellant's Agents, Maitland and Graham; Walker and Melville, W.S.—*Respondents' Agents*, Grahame, Weems, and Grahame; Gibson-Craig, Dalziel, and Brodie, W.S.

[1] See a previous case between the same parties on another point, *ante*, p. 520.