EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY, . . . } APPELLANTS.
PHILIP, ... RESPONDENT.

1857.
Feb. 19*th*, 20*th*, *and* 23*rd*.

Railway Company—Liability to take Land though Line unexecuted—Release of Company—Railway Acts enabling, not obligatory.—An incorporated Railway Company, obtained an Act for making a branch within seven years. They gave the usual notices. While their Bill was before Parliament they agreed to purchase the land of a certain owner. It was a term of this contract that it should not be enforced against the Company within the seven years, and the purchase money was to be paid when the Company on obtaining their Act should have "begun to execute the branch." The Company obtained their Act, but never executed or began to execute the branch. The seven years expired. The Court of Session held that what was stipulated for as an accommodation to the Company ought not to be turned by them into an instrument of injustice, and they were bound to execute the agreement: This decision *reversed*;—the House holding: 1. That permissive words in an Act of Parliament are not obligatory. 2. That the Company were not bound to execute or begin to execute the branch. 3. That as they had not executed or begun to execute the branch their obligation to pay the purchase money did not arise. 4. That although this might appear hard on the vendor, inasmuch as he was kept for seven years in suspense without the power of dealing with his property, yet "how did their Lordships know that that very "inconvenience had not formed an ingredient in the "price contracted for?"

THE summons of Mr. Philip, dated 29th March 1849, stated that towards the end of the year 1846 the Appellants published notices to the effect that in the then ensuing Session of Parliament a Bill would be

introduced by them to make a branch railway; and that corresponding notices were served on the owners and occupiers on the intended line, and that the plans were deposited in the usual way; the summons further stated, that in December 1846 an application was made to the Respondent by the solicitors of the Company, intimating that the proposed branch would pass through his property, and that they wished to acquire the whole of it; and that upon this proposal a sale was concluded by a "minute of agreement" as follows:—

Between Robert Philip and the Edinburgh, &c. Company, incorporated by Act of Parliament:—First, Mr. Philip, in consideration of the obligation after written, assents to the Bill presently in Parliament, and for which notices have been given, for enabling the said Company to execute a branch or extension line of railway diverging from or near to the bridge at Great Junction Street, and terminating at or near to the Upper Drawbridge, in the town of Leith. Second, the said Railway Company considering that the said line will pass through the ground and premises of Old Church Wharf, Leith, or some part thereof, belonging to Mr. Philip, whereby the remaining part of said ground and premises would be deteriorated, they agree to acquire the whole ground and premises of every description situated there, belonging to Mr. Philip, and to make payment of the sum of 11,500*l.* in full of the price thereof, and of all claims whatever competent to Mr. Philip on account of the same, and of the intended operations of the said Company relative to thereto. Third, the said Company hereby become bound to pay the said sum of 11,500*l.* to Mr. Philip, his heirs, executors, or assignees, at the first term of Martinmas or Whitsunday after the said Company, on obtaining their Act of Parliament, shall have begun to execute any part of the said railway under the powers of the said Act, and the price to bear legal interest thereafter until paid; and the Company, before taking possession of or entering on the premises, either paying or satisfying the said Robert Philip for the price thereof, and Mr. Philip to exhibit a clear title to the property, and search of incumbrances; but the expense of the conveyance in their favour, including revising fees, is to be defrayed by the said Railway Company.

The Act obtained was the 10 & 11 Vict. c. 151.; sect. 8. of which authorized the construction of the branch. The 14th section enacted, that the powers

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY *v.* PHILIP.

for the compulsory purchase of lands should not be exercised after three years; and the 15th section enacted that, the branch should be completed within seven years, and that on the expiration of such seven years the powers given for executing the branch should cease. The summons sought performance of the agreement, which the Company by their defence resisted.

The *Lord Ordinary* (Wood), on the ground that the agreement was conditional, and that the conditions had not been satisfied, gave judgment against Mr. Philip, and assoilzied the Defenders; but the First Division of the Court of Session recalled this interlocutor, and decided that the Company were bound to make payment to the Respondent of the 11,500*l.*, the obligation having become absolute, the learned Judges unanimously holding that the limitation of seven years in the Act expressed was a stipulated accommodation to the Company, but was not to be used by them as a loophole of escape from their obligation. In thus deciding, the following opinions were delivered :—

The *Lord President*.—It appears that Mr. Philip was inclined rather to oppose that Bill in Parliament, and the first article of agreement is that he assents to the Bill. It was to obtain this assent that the Company entered into the affair, and he did give his assent; he did more, he gave active assistance. Therefore, so far as he was concerned, he did all that was stipulated for, if he did not do more.

When this action was brought the time for completing the railway had not expired. Mr. Philip could not refuse to convey his grounds, and he could not insist for payment in that state of matters. But the time has now expired. Mr. Philip has waited, and the Railway Company say they are no longer in a condition to execute these works. They have allowed the time to pass. They cannot say they did this in ignorance of Mr. Philip's intention to make his claim. But is it a good defence in itself? Can they destroy the obligation altogether? I think it cannot, on any sound principle, be held that the obligation to pay is destroyed. It was a very important clause for the Company; the extreme limit was to the period at which they could execute their works;

and it was important to prevent their being pressed for payment prematurely within the seven years. But to say that they could deprive themselves of the power to complete the works would be to say they could destroy the obligation. Having obtained this Bill, it is the fair meaning of the obligation that they are to acquire this ground, and pay the price.

Further, the Company have availed themselves of the Act to raise funds; and they are every day availing themselves of it by keeping these funds; and not only that, but having merged these funds with the others, I think they called in the aid of the Act to the execution of the works they did execute. Now, looking to this as a condition within the power of the party to fulfil at any time, I cannot hold it to be otherwise than an intentional violation of the agreement to abstain from making these works, and so to attempt to deprive this party of his rights. It is contrary to all law. The party is entitled to ask the Court if this is a reasonable withholding of the exercise of the powers of the Act? I think Mr. Philip is entitled to insist on the agreement, even though they had not borrowed or raised money under their act at all.

Lord Ivory.—I am of the same opinion. As to the condition of payment, it is merely *morata solutio*, and the delay is rested on certain matters in the power of the Company; so that which the party had it in their power to do is to be left there, to the effect of keeping one party bound and leaving the other free if they choose. It is impossible to hold this under any legal principle. It is in respect of this agreement the Pursuer assented to the Act of Parliament.

Lord Robertson.—This is just the case of parties promising to pay when convenient. I think if they have not executed these works it was their own fault.

Lord Rutherfurd.—I concur in the opinions of your Lordships, and in the grounds on which they rest. This must depend on the agreement which is made between the Pursuer and the Company. As to one part of the case, I think it is sufficiently clear it must have been a suspensive condition that the Act of Parliament should take effect. Therefore, it is clear, before entering on the agreement, it is one which naturally carried within it, as a suspensive condition, that the Act of Parliament should be obtained, for by that means only can you get a counter party and a defender.

The Company wanted two things here; first, Mr. Philip's assent to the Bill, which he had indicated an intention of opposing. What weight his opposition might have had I do not know, but so it was; the Company wanted his assent, and they bought it. They also wanted to buy his ground, for the property would seem to be of such a nature, that by not taking the whole subject they might have incurred a greater loss than by taking part of it, and paying for severance damage. These being the things in view of the

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY v. PHILIP.

parties, this agreement is entered into with the Pursuer. The second head is very clear. This is, in point of fact, a complete purchase. So far as relates to sell and purchase, subject to the latent condition of the Act passing, I think you have everything there. Now, what was Mr. Philip's position the moment the Act passed? The Company had acquired his ground. He had sold it. He could not touch it, either to improve or deteriorate it. He was merely holder for the Company. A proprietor who is scheduled in a railway Act may sell his property to any one, and he may improve it, but the Pursuer here was in a different situation; he was not only scheduled upon, but was in the same position as if he had received notice, which is the completion of an inchoate transaction. Everything is fixed but the price and payments. Here the price was fixed by the parties, and the only question remaining is,—if the Company must perform its obligation? Now, suppose the agreement had not gone further, can anything be said why the Company should not perform their obligation? We are told, however, there is a third clause, and it is upon this the whole agreement is rested. This third clause fixes the period of the payment of the price already stipulated. I think it is a case simply of *morata solutio*, and I need not go over the same grounds already stated from the chair, as to the reasons of this delay. Now, I am quite willing to give effect to a potestative condition, provided it is a fair one, and within the view of the parties; but looking to this condition two questions arise, *first*, Has the condition taken place, by the Company beginning to execute their works? Now, I agree that on this point the case is not very satisfactory. I think a part of the case has been disengaged in some way. I should like very much that this part had been tried under a general issue, but the *Lord Ordinary* did remit certain points to be tried before himself. In that remit he reserves certain points. Then, when he comes to decide on these points, he reserves again the effect of various questions that might be raised. What I regard here is the fact of this Company having raised funds to the extent of upwards of 19,000*l.*, by exhausting their borrowing power and subscribing their capital. Whether the Company must not be held to have used these funds in defraying the expense of the works contemplated by the Act is a nice question, and I would feel it difficult to say that this was a siding under the Act 1844, if it was made out of funds to be raised in 1847. Now, if the question is,—Has the condition referred to not been purified? If I take this finding in the Interlocutor of 1851 alone, I would say No; but if we take it subject to the qualifications in the Interlocutor itself, and along with what we have since discovered, I am by no means prepared to say it would not be very difficult to hold the conditions as not having been purified. At the same time there is great embarrassment in this part of the case, from the shape it has been put into by the parties themselves.

But putting that out of view, holding that the Company have not begun their operations under the third head, and the condition as not purified, then there comes a question of large import in law. They have got their Act of Parliament; it is important that they have been asked to proceed upon it. They go on with their Act, they subscribe their capital, and they borrow to the extent of their whole powers. Therefore, although they are not beginning operations in the sense of the third head, they are holding by the Act, and raising money on it. They are in a condition to begin their works. They are as much able to begin their works as a private individual could be; they have got their powers, and they have got the funds. Now, in a question of potestative condition, shall I hear a party say, because there is a clause in their favour of *morata solutio*, that they shall not exercise their power? Can they say, We shall not enforce this agreement because there is a condition in our own favour, which we shall not take advantage of? The constitution of the debt is one thing, the time of payment is another. The Court might give some indulgence under this form of words, but would very soon be tired. They would not allow a party to defeat his primary obligation in that way. Where they let the time pass, and will not execute the work, they have put themselves in this position—the condition cannot take effect. Well, that is no concern of the Pursuer's here; he did everything he could. And therefore, on the whole, giving all the effect possible to this third head, I cannot read it as controlling the main part of the agreement,—the purchase and payment of the price.

The Company appealed to the House.

The *Attorney-General* (*a*) and Mr. *Anderson* for the Appellants. The obligation to take the property was conditional, and the conditions were, 1, that the Bill contemplated should pass, and, 2, that the Appellants should within the seven years begin to execute the proposed line; 3, what was sought was beyond the scope and powers of the Company under their Act. And thus the case came within principle of the decisions by this House in *Hawkes* v. *The Eastern Counties Railway* (*b*) and *Caledonian and Dumbarton Railway* v. *Helensburgh* (*c*). The contract, in the present case would, if carried out, involve a misapplication of

(*a*) Sir R. Bethell. (*b*) Session 1856.
(*c*) *Suprà*, p. 391.

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY *v.* PHILIP.

the Company's funds, and, at all events, it was a case for damages, and not for specific performance.

The *Lord Advocate* (*a*) and Mr. *Rolt* for the Respondent.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

My Lords, this case has been very fully and ably argued; and, if it had been necessary, I certainly should not have shrunk from entertaining or investigating the question of a mere technical nature on the pleading which has been raised in the argument; but it is very satisfactory to my mind to feel that we are not driven to that necessity. It is extremely unfortunate when questions of a merely technical nature are carried through all the stages of the Courts of Scotland, and ultimately brought to your Lordships' House, and your Lordships feel yourselves bound to decide the matter, without settling that which is the real substantial question between the parties. At the same time, it has not been the habit of your Lordships' House, since I have been connected with the hearing of appeals, ever to warp the law for the purpose of doing what appears to be justice to the parties, by means of disregarding those rules of procedure which are essential in general to the administration of justice.

In this case, the substantial question between the parties is, whether or not the Company entered into a contract with Mr. Philip, to purchase at all events from him the property in question, for the sum of 11,500*l.*; or whether, looking at the terms of the contract, the true meaning of it was that they were to purchase if they should obtain authority to make the railway, and should make that railway, the terms being that they should get an Act of Parliament, and

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

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY *v.* PHILIP.

Lord Chancellor's opinion.

begin to make the railway ;—I dare say the anticipation of the parties was, that if they began to make it, they certainly would continue, and conclude the making of it. This is not like the case of a railway which is intended to run over 100 miles, where it frequently happens that when the company have made about fifty miles of the line, they have no funds to go on with, and there the line stops. This is a line less than a mile in length, and was to be for the convenience of an existing railway. The question with the Company would be, if they obtained the power to make the railway, whether they were minded to make it. Of course, if they began to make it, it was almost certain that they would finish it.

Now, the terms of the contract are these :—First, "Mr. Philip, in consideration of the obligation after written, assents to the Bill presently in Parliament." Secondly, "The Railway Company, considering the line will pass through the ground and premises of Old Church Wharf, Leith," (that is Mr. Philip's property,) "or some part thereof," "whereby the remaining part of the ground and premises would be deteriorated, they agree to acquire the whole ground and premises of every description situate there, belonging to Mr. Philip, and to make payment of the sum of 11,500*l.* in full of the price thereof, and of all claims whatever competent to Mr. Philip on account of the same, and of the intended operations of the said Company relative thereto."

Now, if it had stopped there, there could be no doubt that, upon the construction of that sentence, it would amount to a contract (whether in the most formal language we need not stop to inquire), binding the Company to purchase from Mr. Philip the whole ground and premises belonging to him, for the sum of 11,500*l.* But it was to be a purchase, it must be

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY v. PHILIP.

borne in mind, to enable the Company to make their railway.

Lord Chancellor's opinion.

Now, when we come to the third head, we find that it is in these terms: "The said Company hereby become bound to pay the sum of 11,500*l.* to Mr. Philip, his heirs, executors, or assignees, at the first term of Martinmas or Whitsunday after the Company, on obtaining their Act of Parliament, shall have begun to execute any part of the said railway under the powers of the Act, and the price to bear legal interest thereafter" (that is, from the time they begin to make the railway) "until paid; and the Company, before taking possession of or entering on the premises, either paying or satisfying the said Robert Philip for the price thereof; and Mr. Philip to exhibit a clear title to the property."

Now, what is the effect of that third item in the contract, connected with the items which precede it? I will not say that I have not had some doubts, in the course of the argument, upon this contract. In all informal contracts it is always very difficult to satisfy oneself completely of what has been the intention of the parties, or rather, what is the meaning of the terms which they have used. But, looking at this contract, I have come to the conclusion that what the parties must have meant was this,—that if the Company obtained the Act of Parliament (that was certainly a condition), and if they made the railway, then they should pay 11,500*l.* to Mr. Philip for his premises. That 11,500*l.* should either be paid the moment they commenced the railway, or, at all events, it was to bear interest from that time; and it should actually be paid to him before they entered upon or took any part of his property.

My Lords, I come to that conclusion upon several grounds. In the first place, that there was some

condition is plain. Perhaps it may be right (as was said at the Bar) that that condition would have been a condition implied, if it had not been expressed; but there is an expressed condition that they should first obtain their Act of Parliament, for the terms are that they shall become bound to pay 11,500*l.* "at the first term of Martinmas or Whitsunday after the Company, on obtaining their Act of Parliament, shall" do so and so. If they did not obtain their Act of Parliament it is impossible to suppose that it was at all meant that anything then should be paid to Mr. Philip. That has not been argued.

Then in the same sentence it is said, "on obtaining their Act of Parliament," after they "shall have begun to execute any part of the railway." Now, although the obtaining of the Act of Parliament is a condition expressed (and if it had not been expressed, it might have been said that it was implied from what follows,) it is said that the words after they "shall have begun to execute any part of the railway" are but a condition. I think, in the first place, that it is an inconvenient method of dealing with a contract of this kind, to say that one member of a sentence is conditional, and the other is not conditional. If we saw clearly that that was the sense, of course we should not be estopped from deciding such a point, merely because it was inconvenient in point of language; but it seems to me that all reasoning shows that this must have been what they contemplated. In the first place, unless the price was a low price, it was absurd to suppose that the Company would pay 11,500*l.* for this property if they did not want it for the purpose of their railway. It is said, on the other hand, that it is very hard on Mr. Philip; for until the Company have determined whether they will or will not make their railway, he cannot satisfactorily

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY v. PHILIP.

Lord Chancellor's opinion.

deal with this property. That is perfectly true; but how do your Lordships know that that very inconvenience did not form an ingredient in the price contracted for, of 11,500*l.*? I have looked through the papers to see whether there was any statement anywhere as to what was the supposed value of this property, and I find nothing of the sort. I must infer, therefore, that the 11,500*l.* was the price which Mr. Philip was minded to contract that he would take for it, taking upon himself the burden and inconvenience of being unable in the meantime to dispose of his property. That which seems to me to settle the matter is this, that, most unquestionably, no time of payment is expressly fixed until the Company shall have begun to make their railway. Then, supposing they do not ever make their railway, Mr. Philip is driven to say that at the end of the time when their power of making the railway had ceased, viz., at the end, I think, of seven years, or whatever the time was, then it was to be considered that the condition had ceased, and that the contract had become absolute. That is a mere gratuitous introduction into the agreement of something which is not found there.

Upon the ground, therefore, that the probability was that the Company never would intend to purchase anything unless they were making the railway, and that by the terms of their contract they were certainly not to pay the 11,500*l.* until they had put themselves in a condition to make the railway, namely, till they had obtained their Act of Parliament; and, secondly, that the time of payment was not to arrive until they had begun to make the railway, I have come to the conclusion that the agreement was, as the Pursuer, Mr. Philip, from the first seems to have considered it, a conditional agreement. I intimated

some time ago that we were clearly of opinion that the condition, if it was a condition, has never been purified; that the *Lord Ordinary* was quite right upon that ground. This, therefore, was a conditional agreement, the condition of which has never been purified, and, consequently, nothing becomes payable under it.

The course, therefore, which I propose to take is to move your Lordships that the Interlocutor of the Court of Session be reversed, and the cause be remitted with a declaration that they ought to have assoilzied the Defenders.

Lord WENSLEYDALE:

Lord Wensleydale's opinion.

My Lords, in this case several questions have been argued at your Lordships' bar with very great distinctness and ability. I feel that it is quite unnecessary to pronounce my opinion upon any of those questions, except the second, which is as to the construction of the contract; and I certainly formed an opinion pretty early in the case, which I was only restrained from expressing in stronger terms by my great respect for the learned Judges in the Court below, with one of whom I was personally acquainted, and for whom I have always entertained the highest esteem, from my knowledge of his eminent judicial qualities, I mean Lord *Rutherfurd.* This made me doubt whether the conclusion that I came to was the proper conclusion, it being against the opinions of those four learned Judges.

But the matter is one common both to the Scotch and the English Law; and it is to be decided upon principles equally belonging to both. I think our duty is to look at the terms of the contract, and to construe it according to the ordinary grammatical sense and meaning of the words, taken in conjunction

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY *v.* PHILIP.

Lord Wensleydale's opinion.

with the facts and circumstances existing at the time, and which are to be looked at in order to interpret the contract. So doing, I confess I think it is quite clear that this was a contract which was never meant to take effect unless the Railway Company determined to exercise their powers under the Act of Parliament. It is perfectly clear that it was conditional upon the Company obtaining the Act. And it is clear, upon the face of the contract itself, that that was to be, not an Act of Parliament obliging, but an Act of Parliament enabling them to make a branch railway from the Leith Branch to the Leith Docks.

Now it has been very clearly settled, though in the first instance there was some doubt about it, that these enabling Acts are not compulsory. It was solemnly decided by the Court of Error, of which I formed a part, in a case in which the judgment was delivered (and an excellent judgment it was) by the late Chief Justice *Jervis* (*a*), that permissive words in an Act of Parliament are not obligatory. Consequently, at the time this contract was entered into, it was perfectly competent for the Defenders to decline to make the railway, even although they had obtained the Act for carrying it into effect, if they thought it more conducive to their interests to decline to do so. Now, that being so, are we to suppose that at the time when they entered into this contract they wholly abandoned the power which they had of declining to make the railway, and that they determined at all events from the first, whatever the consequences might be, to enter

(*a*) *Reg.* v. *York and North Midland Railway Company*, 1 Ell. & Black. 858, where it was held by the Exchequer Chamber that no duty is cast on the company to make their line,—the words of these Railway Acts being enabling, but not obligatory. The Court of Queen's Bench, with Lord Campbell at their head, had previously decided the contrary.

into this contract? I think it can hardly be supposed that they did, unless there were clear words showing that they absolutely, unconditionally, and unequivocally meant to purchase the property from Mr. Philip. Instead of that, we find words in the latter part of this contract clearly to show that the purchase was to depend upon a condition. The agreement fixes the price. There is a positive obligation to pay the money, provided the Company obtain the Act of Parliament, which is clearly a condition, and provided they "shall have begun to execute any part of the railway under the powers of the said Act;" there is no other time for the payment of the money stipulated except that. It was a condition on the part of the Company to pay the money before taking possession of the property, or the money was to bear legal interest from that date. The payment of interest would date from the first term of Martinmas or Whitsunday after they had determined to execute the Act of Parliament, and had commenced making the railway under it. But it was to be accelerated in case the company should choose to take possession of, or enter on the premises before that; then the money was, at all events, to be payable at the next Martinmas or Whitsunday term after they had begun to make the railway under the powers of the Act; they were not to take possession of or to interfere with the land without paying the money.

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY v. PHILIP.

Lord Wensleydale's opinion.

Now, reading all these clauses together, finding no time stipulated for the payment, except the fixed day dating from the commencement of the making of the railway under the Act, I cannot conceive that they were bound to pay, unless they began to make the railway under the Act of Parliament.

Therefore, I concur entirely with my noble and learned friend in pronouncing an opinion that,—(ac-

EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY v. PHILIP.

Lord Wensleydale's opinion.

cording to the true construction of the terms of this contract, looking especially at the condition in which the Company were, namely, that they were under no obligation to make the railway at the time they entered into this contract,) that they did not mean to abandon that right which they might exercise with reference to their general interests, and undertake to pay at an indefinite time the price for this land.—I therefore am of opinion that the Court of Session has miscarried in the construction of the instrument in question. I need not say any more upon the other part of this case, except that I am quite clear, as I have already expressed my opinion, that the *Lord Ordinary* was perfectly right in the conclusion to which he came upon the facts found before him, and that the proper conclusion to come to was, that the Company had never executed any part of the railway under the powers of their Act. I therefore entirely concur with my noble and learned friend in recommending your Lordships to pronounce judgment for the Appellants.

Interlocutor appealed against reversed, with a Declaration (*a*).

WEBSTER AND WARDLAW.—DODDS AND GREIG.

(*a*) See *Sir W. Anstruther* v. *East of Fife Railway*, *suprà*, vol. 1, p. 98.