

The Court repelled the objections and found the libel relevant.

Counsel for the Crown—Mackay, A.-D.—R. V. Campbell, A.-D. Agent—Crown Agent.

Counsel for the Panel—Rhind—Hay. Agent W. Johnston, Solicitor.

HOUSE OF LORDS.

Friday March 27.

(Before Lord Chancellor, Lords Watson and Fitzgerald.)

MAGISTRATES OF PERTH v. NORTH BRITISH RAILWAY COMPANY.

(*Ante*, vol. xxi. p. 553, May 22, 1884).

Statute—Statutory Obligation to Perform an Act where no Time of Performance Expressed—Obligation to Perform Act to Satisfaction of Board of Trade—Jurisdiction—North British Railway Company New Tay Viaduct Act 1881 (44 and 45 Vict. c. cxxxvii.), sec. 21

Section 21 of the North British Railway Company New Tay Viaduct Act, which was obtained by the North British Railway Company for authority to erect a bridge over the Tay higher up the river than that which was blown down in 1879, provided that "the company shall abandon and cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 and railway No. 2; and shall remove the ruins and debris of the old bridge and all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade." *Held* (*aff.* judgment of Second Division) (1) that there was thereby imposed an absolute obligation to remove the ruins of the former bridge; (2) that the Court of Session had jurisdiction to order implement of it, the reference to the Board of Trade merely pointing to the duty imposed thereon to see that the obligation was properly discharged, and, if necessary, to exercise control over the company's operations.

Question whether the obligation ran from the passing of the Act.

Observations on the meaning of the expression "to the satisfaction of the Board of Trade."

This case is reported in Court of Session, *ante*, vol. xxi. p. 553, May 22, 1884 (11 R. 827).

The defenders the North British Railway Company appealed.

At delivering judgment—

LORD WATSON—My Lords, I am of opinion that their Special Act of 1881 imposes upon the appellant company an absolute obligation to remove the whole ruins and debris of the old Tay Bridge. Upon that point the provisions of section 21 are explicit, and I can find nothing in the words "to the satisfaction of the Board of Trade," or in the context, calculated to suggest

that the Legislature intended to confer upon the Board a discretionary power to dispense, either directly or indirectly, with the performance of any part of that obligation. So far I agree with the Lord Ordinary, and with the majority of the Judges of the Second Division; and it follows that the respondents have a clear interest and a consequent right to obtain a decree declaring and affirming the character and extent of the statutory obligation incumbent on the company. The Lord Ordinary decerned in terms of the declaratory conclusion of the summons, a form of decree which I prefer to that which was substituted for it in the interlocutor of the Inner House. The latter omits the adjective "whole," which is of the very essence of the conclusion, and adds to it the words "and that to the satisfaction of the Board of Trade." The addition appears to me to be inexpedient, because it consists of statutory words which are not necessary to the accurate expression of the proposition sought to be affirmed, and also because the true import of these words is matter of serious controversy.

The remaining points in this appeal depend upon the construction which ought to be put upon the words "to the satisfaction of the Board of Trade" as occurring in section 21. It is the contention of the respondents that these words do not relate either to the time or manner of removing the ruins of the old bridge, and that they commit to the Board of Trade no duty beyond that of expressing satisfaction or dissatisfaction with a result after the company's operations for the removal have been completed. The company on the other hand maintains, that not only the results, but the time and manner of executing the work of removal, as well as the extent to which that work ought to be carried, have all been left by the Legislature to the judgment of the Board.

The Lord Ordinary and three of the learned Judges of the Second Division were of opinion that no time being mentioned in this Act, the obligation to commence and complete the work of removal became immediately prestable. The Lord Ordinary accordingly ordained the company "forthwith" to remove the ruins and debris of the old bridge to the satisfaction of the Board of Trade. The Second Division varied that part of his interlocutor to the effect of permitting the company to use certain portions of the old bridge which are still available for the carriage of materials in connection with the construction of the new bridge.

If I were called upon to determine, with no other aid than the terms of the Act itself, within what periods respectively after its date the company were bound to commence and complete their operations for removal of the old bridge, I should have great difficulty in forming any conclusion satisfactory to my own mind. It is not, in my opinion, matter of necessary inference from its provisions that the company were to begin at once, or that they were to finish the removal of the old before commencing the erection of the new bridge. In these circumstances I should have been inclined to hold that the *onus* was on the respondents to show that there had been undue delay of the company and not that the company were bound to carry out the work of removal at once, unless they could excuse themselves on reasonable grounds. At all events, I do not think a court of law could pronounce a satisfactory

order in regard to the limits of time within which the work ought to be begun and completed without the assistance of engineering skill. But in the view which I take of the case it is not necessary to decide any of these questions at present.

I shall now endeavour to state what I conceive to be the true import and effect of the expression "to the satisfaction of the Board of Trade." I do not think it imposes a positive obligation upon the company to make an application to the Board before they proceed to remove the old bridge. On the contrary, it appears to me that the company might, if they chose, begin and finish the work of removal without first ascertaining the views of the Board. In that case I doubt whether the Board could actively interfere with their operations unless these were either so planned or so conducted as to cause unnecessary and avoidable obstruction to the navigation of the Tay; but the company would run the risk of the Board's disapproval of the result of these operations which might involve further and it might be costly operations. It seems to me that it would be at least a prudent course for the company to submit their scheme for the removal of the old bridge, including the proposed time and manner of its execution, to the Board of Trade for its consideration. If the scheme submitted met with the deliberate approval of the Board, I should think it would be exceedingly difficult to satisfy any Court that in carrying it into effect the company were either unreasonably delaying to execute the operations directed by the Act, or executing them in a manner injurious to navigation generally, or to the interests represented by the respondents. It is true that, according to a very strict interpretation of the words of section 21, the function thereby intrusted to the Board of Trade might be confined to an examination of the *abovus* of the Tay after the work of removal is finished, and an expression of opinion as to its having been done satisfactorily or not. But having in view the fact that the Board is a department of the State charged with the interests of navigation, and so entitled, irrespective of the provisions of the Tay Bridge Act of 1881, to compel performance by the company of their statutory obligation, and to prevent any unnecessary obstruction to navigation during its performance, I cannot doubt that the Legislature expected and intended that the Board should give all parties interested the benefit of its advice, and should exercise, if necessary, some control over the operations of the company. I need hardly add that I see no reason whatever to doubt that the Board is willing and ready to act upon that footing.

Hitherto the Board has not been approached by the appellant company except for the purpose of obtaining permission to leave part of their statutory obligation unperformed. In preferring that request the company obviously had in view the possibility of their ultimately obtaining a favourable judgment upon the main question raised in this action. The Board however declined to act on the assumption that it had power to dispense with the removal of any part of the ruins and *debris*, and in giving its sanction to plans for the erection of the new bridge has with great propriety added the proviso that such sanction shall be without prejudice to the questions arising in this appeal.

In these circumstances, whilst I am not pre-

pared to say that it would be altogether incompetent, I am of opinion that it would be inexpedient to do more at present than to ordain the company to remove the whole ruins and *debris* of the old bridge in terms of section 21 of the Act. The better course in my opinion would be merely to pronounce decree of declarator and *quoad ultra* to continue the cause. The interests of the respondents cannot suffer from the adoption of that course. A decree ordaining in general terms the removal of the ruins in terms of the Act would be of very little avail without the word "forthwith," which I do not think they are in present circumstances entitled to have inserted, because it might unduly fetter the discretion of the Board of Trade. If the company should fail or unduly delay to apply to the Board of Trade, or if they should proceed to execute the work at their own hand, so as to cause obstruction to navigation, or if they should after obtaining the sanction of the Board to some scheme of removal, fail to execute it, or in its execution fail to observe conditions attached to such sanction, then I conceive the respondents might upon application to the Court below obtain an effective remedy in this action.

I therefore think the respondents ought to have decree in terms of the first conclusion of their summons and that *quoad ultra* the cause ought to be continued. I also think that substantial success being with the respondents they ought to have their costs in this House.

I accordingly move that the interlocutor of the Second Division of the 22nd May 1884 be varied by inserting in the first and declaratory decerniture the word "whole" before the words "ruins and *debris*," and by deleting the words "and that to the satisfaction of the Board of Trade" at the end of said decerniture, and also by deleting the second and mandatory decerniture; that the said interlocutor, and also the interlocutor of the Second Division of the 11th June 1884, be affirmed, and that the appellants be ordered to pay to the respondents their costs of this appeal.

LORD FITZGERALD—My Lords, I entirely concur, and have nothing to add.

LORD CHANCELLOR—My Lords, I also entirely agree in the opinion that has just been delivered.

Interlocutor of the Second Division of 22nd May 1884 [*vide ante*, vol. xxi. p. 558] varied by inserting in the first and declaratory decerniture the word "whole" before the words "ruins and *debris*" and by deleting the words "and that to the satisfaction of the Board of Trade" at the end of said decerniture, and also by deleting the second and mandatory decerniture, and subject to these alterations affirmed.

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Counsel for Respondents—Davey, Q.C. — J. P. B. Robertson. Agents—Irons, Roberts, & Lewis, S.S.C.—William Robertson & Co., Westminster.