

Monday, July 24.

(Before the Lord Chancellor (Herschell), and
Lords Watson, Morris, and Shand.)

CLYDE NAVIGATION TRUSTEES v.
LORD BLANTYRE.

*River—Navigation Trustees—Powers and
Duties—Undertaking.*

The undertaking of the Clyde Navigation Trustees was defined by the Clyde Navigation Consolidation Act 1858 to embrace, *inter alia*, "The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry-slips, approaches, embankments or river dykes, and all other works and improvements shown and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained."

Under one of the recited Acts, the Act of 1840, the Trustees of the Clyde Navigation (sec. 11) were empowered to make and maintain "a variety of works, including the quays of Erskine Ferry on the Clyde, which were authorised to be reconstructed."

By section 50 of the Act of 1840 it was enacted that "the said quays shall, at expense of the said trustees, be repaired, so that the working of the said ferry and quay shall be made as convenient, and the working thereof as easy as before" the operations of the trustees.

In an action by the proprietor of the quays at Erskine Ferry for declarator that the trustees were bound to maintain the quays, the defenders contended that their obligation under sec. 50 of the Act of 1840 was fulfilled once for all as soon as they had repaired the quays, and that sec. 11 imposed no obligation on them, but merely conferred a power. The First Division held that the construction and maintenance of the quays constituted together an accommodation work intended to compensate the owner for interference with his property, and that the pursuer was entitled to decree.

On appeal the House of Lords reversed the decision of the First Division with costs.

In January 1889 the south quay of the Erskine Ferry on the Clyde was damaged through having been struck by a steamer. Lord Blantyre, the proprietor of the quay and ferry, called on the Clyde Navigation Trustees to repair the quay, and on their repudiating liability, brought this action concluding for declarator "that the defenders are bound to maintain and keep in repair the quays or slips on the north and south sides of the river Clyde at the East Ferry of Erskine, commonly called "Erskine Ferry," and whole other works at or connected with said ferry, made, executed, and constructed under the powers and provisions contained in the Act 3rd and 4th

Victoria, chapter 118, entitled "An Act for further deepening and improving the river Clyde and enlarging the harbour of Glasgow, and for constructing a wet dock in connection with the said river and harbour," and "The Clyde Navigation Consolidation Act 1858" (21 and 22 Vict. cap. 149), now and from time to time as may be found necessary or expedient, and that at their own expense, and that the pursuer is not bound to maintain or keep the same in repair," and for decree ordaining the defenders to repair the said slips or quays.

The Erskine Ferry was one of ancient date, and the quay in question had been reconstructed and lengthened by the defenders since 1840 as part of the improvements in the navigation of the Clyde. The question mainly at issue was whether the maintenance and repair of the quay formed part of the undertaking of the defenders under their Acts.

The Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. cap. 149) defined the undertaking of the Clyde Trustees thus (sec. 76)—"Subject to the provisions of this Act, and of any agreements authorised or confirmed by the recited Acts or this Act, and to the provisions and declarations of any conveyance granted to the Clyde Trustees, the undertaking of the trustees shall, in terms of the recited Acts, consist of," *inter alia*, "the construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry-slips, approaches, embankments or river dykes, and all other works and improvements shown and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained, and the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient; and subject to the provisions of this Act and the Acts herewith incorporated, the trustees are hereby authorised and empowered to carry on and complete the whole or such and so many of the said works as to them from time to time shall seem expedient, reserving always to the proprietors of lands adjacent to the river all rights to soil acquired from the river, and other rights competent to them at common law."

Among the recited Acts, the Act 3 and 4 Vict. cap. 118, sec. 11, enacted "That the trustees appointed by or under this Act shall be, and they are hereby empowered and authorised . . . to make, execute, construct, finish, maintain, and keep in repair the additional works upon, in, or along the river, and in connection with the said harbour, delineated or represented on the map or plan hereinafter mentioned [in sec. 12], and likewise the wet dock and other works and improvements hereby authorised to be made, and for these purposes to enter upon, take, occupy and use the several respective lands, tenements, or other heritages upon, through, or adjoining to which the same are intended to be made, carried, executed, or constructed, within the boundaries or lines of works delineated on the said map

or plan, or within the limits of the after-mentioned deviation, indemnification being always made to the owners, lessees, and occupiers of such lands, tenements, or other heritages in manner hereinafter provided; reserving always to the proprietors of lands adjacent to the said river all rights to soil or ground reserved to them by the said recited Acts or this Act, or other rights competent to them at common law, except in so far as the same may be affected by the provisions of this Act." . . .

Section 50 enacted—"And be it enacted that nothing contained in this Act, or in any of the said recited Acts, shall affect or be construed to affect in any degree the established ferries of," *inter alia*, Erskine West Ferry "on the said river, but the same shall be used and enjoyed in as ample and beneficial a manner as in times past, without being subject to the payment of any of the tolls, rates, or duties granted by any of the said recited Acts or this Act, and without being subject to any other jurisdiction than that to which they were subject previously to the passing of the said recited Acts and this Act; and also that a reasonable and sufficient space, unenclosed by walls, dykes, jetties, and other works, shall be left on each side of the quays of the said ferries, for the free and convenient landing at all times of passengers, cattle, goods, and other things . . . and the said several quays shall at the expense of the said trustees . . . be repaired, lengthened, altered, or reconstructed according to the advice and report of civil engineers of eminence, where such repair, lengthening, alteration, or reconstruction shall be rendered necessary by the works carried on by the said trustees for deepening the river, under and by virtue of the said recited Acts or this Act, and so as the said ferries and quays shall be made as convenient, and the working thereof as easy as before or as nearly so as may be."

Section 51—"And be it enacted that at the East Ferry of Erskine it shall not be lawful for the said trustees to erect any embankment or dyke within 150 yards on either side of either of the ferry piers or quays, and that whenever the said trustees shall cut off any part of the north pier or quay of the said ferry they shall alter and reconstruct such north pier or quay so as to make it most convenient for and in a line with the pier and quay on the south side, and whenever the said trustees shall cut off any part of the projecting point of the shore above the said north pier or quay by which an eddy upwards is formed by the ebbing tide greatly facilitating the passage of the ferry boats, the said trustees shall so cut in upon the shore between the said point and the new north pier or quay as to form a bay similar to that which now exists, and thereby preserve as far as may be practicable the same eddy tide above the north pier or quay; and at the West Ferry of Erskine it shall not be lawful for said trustees to extend the embankments or dyke so as to interfere with the free and convenient passage of the said ferry."

The pursuer pleaded—"(1) The defenders

being bound under their said Acts of Parliament to maintain and keep in repair the quays or slips of Erskine Ferry, and whole works thereat, so far as executed under the powers of their statutes, decree should be pronounced as concluded for, with expenses."

The defenders pleaded—" (2) In respect that Erskine Ferry piers form no part of the undertaking of the defenders under the said statutes, the defenders are not bound to maintain the same."

After a proof, the import of which sufficiently appears from the opinions of the Lord Ordinary and the Court, the Lord Ordinary (KINNEAR) granted decree as concluded for.

"*Opinion.*—The question raised by this action is, whether the defenders are bound to repair and maintain, as part of their undertaking, the quays and other works constructed by them under the authority of Acts of Parliament for the Erskine Ferry, of which the pursuer is the proprietor. The maintenance of these works against ordinary wear and tear would appear to carry a very trifling expenditure. But from their position in the river they are exposed to injury in consequence of vessels coming violently against them, and breaking or tearing away the stonework of the quays. They have, in fact, been materially damaged from this cause; and the pursuer maintains that the burden of repairing the damage must fall upon the defenders as part of the burden of general maintenance. The defenders, on the other hand, allege that the ferry quays are no part of their undertaking, that no obligation of maintenance is imposed upon them by their statutes, and that if the quays have been damaged by no fault of theirs, the loss must fall upon the pursuer, to whom they belong, according to the maxim *res perit domino*.

"The ferry, which is an ancient one, was provided with sufficient quays before the Clyde Navigation Acts came into force. But the pursuer's claim arises in consequence of alterations and reconstruction, which were rendered necessary by the operations of the trustees under these Acts. His existing rights as against the trustees depend upon the Act of 1858, which is the only Act now in force. But the quays in question were partly constructed under the previous Act of 1840, and it may be necessary to consider whether they formed part of the undertaking authorised by that Act.

"By the 11th section of the Act of 1840 the trustees are empowered, *inter alia*, 'to execute, maintain, and keep in repair the additional works upon, in, or along the river delineated or represented on a plan' deposited in the Sheriff-Clerk's office. The first point in controversy is, whether any alteration or reconstruction of the Erskine Ferry quays is included among the additional works so authorised, the pursuer maintaining that such alterations are delineated on the deposited plan as works to be executed, and the defenders that the quays are shown only as existing features of the river at the passing of the Act, and not as

authorised improvements. The plan cannot be read without reference to the relative sections; but reading the plan and sections together, and with the aid of the evidence of the experts who have been examined, I cannot think it doubtful that a reconstruction of the piers of Erskine Ferry on both sides of the river is represented as among the works which the promoters proposed to execute. The exact character of the proposed alterations is more clearly stated in the statutory notices served upon the pursuer. But the indications of the plan and sections are entirely in accordance with the description of the notice. They appear to me to show that the promoters of the Act desired to obtain power from Parliament to reconstruct the ferry quays, irrespective of any claim for reconstruction which might arise to Lord Blantyre in consequence of their other operations. I think the powers so desired were conferred by the 11th section of the Act, and that the trustees, in the exercise of these powers, might have reconstructed the quays as part of their improvement scheme without the consent or against the opposition of the pursuer.

“But assuming this to be so, the defenders maintain that the works executed under the Act of 1840 were not in fact executed by virtue of any power conferred by the 11th section, but at the instance of the pursuer himself, under the provisions in his favour, contained in the 50th section of the statute. If the reconstruction of the quays, as actually carried out, was in accordance with the design which the trustees took power to execute, it does not appear very material that they were not only authorised but were also compellable to effect a reconstruction. But when the pursuer made his demand under the 50th section he could not have insisted, and did not in fact insist, upon the execution of such works as were actually constructed. The ferry had been rendered unworkable by an alteration of the water level consequent upon the trustees’ operations, and all that he demanded, and all that he was entitled as of right to require of the trustees was the execution of comparatively insignificant works for the purpose of adapting the quays to the altered level of the water. But it was suggested that if the quays were to be altered at all, it might be more expedient to carry out the works authorised by the 11th section than to make a temporary alteration to satisfy the pursuer’s demand, and another and larger alteration when the river should come to be widened at that point. The result was that the works as actually constructed went beyond what the pursuer could have demanded as of right, and were carried out in accordance with the parliamentary plan and sections of 1840, except that there was an insignificant difference in the surface gradient, and that the piers on each side of the river, as at first constructed, were 75 feet within the parliamentary line. The result of the pursuer’s action of 1864 was to add 75 feet to each of the piers; and as now completed they are

thus in conformity with the design authorised by the Act of 1840.

“The opinion which I have formed is, that the quays so constructed are part of the undertaking of the trustees, and must be maintained as such. Everything they were authorised to do by the Act of 1840 was a purpose of the Act and a part of the undertaking. The analogous provisions of the Railways Clauses Act have been so construed (see *Wilkinson v. Hull Railway Company*, L.R., 20 C.D. 329; *Lord Beauchamp v. Great Western Railway Company*, L.R., 3 Ch. 745); and although the language of the statutes is not identical, the principle of construction adopted in these cases appears to be applicable. It is said that the quays were reconstructed for the accommodation of the pursuer alone. This is not exactly accurate, because the public using the ferry is equally interested with the proprietor in its efficiency, and also because the trustees’ plans for the widening of the river involved an alteration in the foreshore, and a consequent reconstruction of the north pier irrespective of the necessities of the ferry. But if no one were interested but the pursuer the maintenance of accommodation works may be just as much a purpose of the Act and a part of the undertaking as the maintenance of works that are indispensable for the navigation of the river. The question depends upon the construction of the statutes; and it appears to me to be established that the quays in question are among the works ‘shewn and described on’ the parliamentary plans and sections of 1840, and part of the undertaking defined by the 76th section of the Act of 1858.”

The defenders reclaimed, and argued—The reconstruction of the quay in question did not form one of the additional works authorised by the Act of 1840. Even if it did, its maintenance and repair did not form part of the undertaking of the trustees. The 50th section of the Act of 1840, which imposed an obligation on the trustees, was fulfilled once the quays were reconstructed. The 11th section, which dealt with maintenance, empowered the trustees merely—did not oblige them. Repair and maintenance of the quay was no part of the undertaking—*Lord Blantyre v. Clyde Navigation Trustees*, March 3, 1871, 9 Macph. (H.L.) 6, 43 Scot. Jur. 250; *Lord Blantyre v. Clyde Navigation Trustees*, March 7, 1881, 8 R. (H.L.) 47.

The pursuer’s argument sufficiently appears from the opinion of the Lord Ordinary and the Court.

At advising, the opinion of the Court (LORD PRESIDENT, LORD ADAM, LORD M’LAREN, and LORD KINNEAR) was delivered by

LORD M’LAREN—The summons concludes that the defenders the Clyde Trustees are bound to maintain and keep in repair the north and south quays of Erskine Ferry, and that the defenders should be ordained forthwith to repair these quays to the satisfaction of a person of skill to be named by the Court. The Lord Ordinary has

granted the decree concluded for, and we are of opinion that Lord Blantyre is entitled to this decree.

The chief question for consideration is whether in the present condition of the channel of the Clyde these quays or piers are to be considered a part of the undertaking of the Clyde Trust, in which Lord Blantyre has such an interest that he may require the Clyde Trustees to keep the piers in repair.

This question of course depends on the terms of the Acts of Parliament which define and regulate the undertaking of the Clyde Trust. The Act from which the existing body of trustees immediately derives its authority is the Act of 1858; but the undertaking of the defenders as there defined (section 76) embraces "The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry-slips, approaches, embankments, or river dykes, and all other works and improvements shown and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained." The plain import of this description is to define the undertaking by a reference to the plans and sections and authorising enactments of the Act of 1840.

The only clauses of the Act of Parliament of 1840 which it is necessary to consider are the 11th and the 50th and 51st. The 11th section empowers the Clyde Trustees to make and maintain the works which are 'delineated or represented' on the map or plan thereafter referred to, and the 12th section amplifies this reference by setting forth the plan and sections and book of reference which together constitute the description of the new works intended to be executed under parliamentary authority. The plan and sections were exhibited at the argument, and we agree with the Lord Ordinary in holding that the piers of Erskine Ferry are those shown as part of the proposed undertaking, and that the meaning of the markings on the plan is that these piers were to be rebuilt substantially in the form and manner in which they have been actually constructed.

The 50th section of the Act of 1840 may be described as a provision inserted in the Act of Parliament for the protection of the owners of certain piers and ferries, including Erskine Ferry. As to these it is provided that the said several quays shall, at the expense of the trustees, but with the approbation and consent of the proprietors, be repaired, lengthened, altered, or reconstructed according to the advice and report of civil engineers of eminence where such repair, lengthening, alteration, or reconstruction shall be rendered necessary by the works carried on by the said trustees for deepening the river.

The defenders found on this the 50th section as being in their view a direction to them to execute once for all certain works in the nature of alterations or improvements of the ferry piers for the benefit of Lord Blantyre. Having rebuilt the piers they say that the obligation to Lord Blantyre is fulfilled, and that their powers and duties under the 50th section are at an end.

We, however, are satisfied that the obligations of the Clyde Trustees in this matter are not constituted by the 11th section only, or by the 50th section only, but by the two sections taken together.

The main work in this part of the Clyde is the embanking and deepening of the river channel, and this work could not be executed in its entirety without interference with the ferries. It was therefore a necessary part of the scheme of the trustees that the north and south piers of Erskine Ferry should be reconstructed, and the plan and sections show that this was to be done. But the trustees were not limited to a definite period of time for the execution of their works, and as it might happen that the ferries should be injuriously affected by operations completed before the reconstruction of the piers, and as in any case it was not intended that the trustees should have the power to indefinitely postpone the ferry improvement, the 50th section was passed giving the ferry owner a qualified right to compel the execution of the necessary improvements. Reading the 50th section as supplementary and auxiliary to the 11th section, which we conceive to be the true principle of interpretation, the reconstruction of the piers of Erskine Ferry is a part of the undertaking of the Clyde Trust, and according to the tenor of the 11th section they are to be made and maintained by the Clyde Trustees. It is not to be supposed that the trustees are bound to maintain in perpetuity every piece of work which they may construct in accordance with their powers. Where no private interest is concerned the work may be allowed to go to ruin, or may be taken down and replaced by work of a better design. But where the work executed is in the nature of a substituted pier intended to give the owner of a ferry the same kind of accommodation which he had before but in a form more convenient for the navigation of the river, the trustees cannot in our opinion separate the obligation to maintain from the obligation to execute. The construction and maintenance of the piers constitute together an accommodation work intended to compensate the owner for the interference with his property; and this is no more than the owner is reasonably entitled to; because (first), the liability to injury through collisions is very different in the case of a great navigable channel open to vessels of the largest tonnage from what it was before the deepening of the channel was begun, and (secondly), the cost of repairing the present piers is very much greater than any sum which could have been expended on the piers of the ancient ferry.

In the view which we take, it is not necessary to trace the successive alterations which have been made on the Erskine Ferry piers from time to time. All the alterations were made by the trustees in the exercise of their statutory powers, and the work is neither more nor less the undertaking of the trustees because it has undergone more than one transformation.

In the absence of any suggestion that Lord Blantyre is in any way responsible for the damage to the pier, we think that so far as he is concerned the damage must be treated as a partial destruction of the subject which the Clyde Trustees have to make good. If any claim exists against the ship which came into collision with the pier, that will be a claim on the part of the Clyde Trustees for damage to work which is under their care, and which they are bound to maintain.

For these reasons, which are substantially those assigned in the Lord Ordinary's judgment, we are of opinion that we ought to adhere to the interlocutor reclaimed against.

The Court adhered.

The Clyde Navigation Trustees appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, Lord Blantyre, who is the respondent in this appeal, is the owner of considerable property abutting upon the river Clyde; and he owns certain ferries, and amongst them a ferry known as Erskine Ferry, which has long been in use, and in connection with which there has long been a slip or quay on either side of the river. Owing to the pier or quay on the south side of the river having been struck by a passing vessel considerable damage was done. The respondent insisted that the appellants, the Clyde Trustees, were bound to repair the damage which had thus been done to the pier. The appellants denied that they were under any such obligation. Thereupon the present action was brought by Lord Blantyre to enforce his right to have the pier repaired by the appellants. The learned Judges below held that this obligation on the part of the Clyde Trustees existed, and that the action was well founded. The point now comes before your Lordships for decision.

The respondent rested his claim mainly, if not exclusively, upon a clause to be found in the Clyde Trustees Act of 1840, the 11th clause of that Act, and also upon the 76th clause of their Act of 1858. By the 11th clause of the Act of 1840 it was provided in these terms—"That the trustees appointed by or under this Act shall be and they are hereby empowered and authorised" "not only to execute and continue the several works authorised by the said recited Acts" (that is, by the Clyde Trustees' prior Acts) "but also under the provisions and restrictions hereinafter enacted to make, execute, construct, finish, maintain, and keep in repair the additional works upon, in, or along the river and in connection with the said harbour delineated or represented on the map or plan hereinafter mentioned." The case for the respondent was this, that the map or plan, the reference to which I have just read, shows that amongst the works to be executed by the Clyde Trustees was an alteration of the piers of Erskine Ferry, and that when this alteration had been effected under the provisions of the clause which I have read in the Act of 1840 an obligation arose to keep in repair, in the

terms of the statute, the additional work so effected by the trustees.

My Lords, the plan no doubt showed certain works which it was contemplated were to be executed by the Clyde Trustees; and there can be no doubt, further, that it sanctioned the removal by the Clyde Trustees of so much of the piers of Erskine Ferry as extended into the river beyond what was shown on the plan as the intended line of the river, and further, that it authorised and sanctioned an alteration of the level of those piers when a portion of them had been removed, so as to make them useful and effective in connection with the contemplated altered condition of the river. But I am at a loss to find in the clause which I have read any obligation imposed upon the Clyde Trustees to execute those works. It can hardly be contended that the Act imposed upon them an absolute obligation to execute all the works authority for which was given by the Act coupled with the plan; and the language is as plainly authorising and empowering as language can possibly be. There is no expression to be found which indicates an absolute obligation under all circumstances and in all events to execute the works; nor am I able to find any distinction which would justify the assertion that they were bound to execute the works contemplated with regard to these piers unless they were under statutory obligation to execute, as shown upon the plans, every one of the works so shown. My Lords, the words of the statute are, "that the trustees are hereby empowered and authorised" "to make, execute, construct, finish, maintain, and keep in repair." Taking the words "keep in repair," upon which so much has been rested, there are no more obligatory words in relation to the keeping in repair than there are in relation to the making and executing. Therefore, so far as the question turns upon the provisions of this section, it seems to me that the obligation contended for could only be established if it was made out not only that the work to be done to these piers was a work authorised within the meaning of this section, but that all the works authorised by this section were to be in all events executed by the trustees and thereafter kept in repair.

My Lords, in 1858 the Act was passed, upon the 76th section of which so much reliance has been placed. But before I invite your Lordships' attention to the language of that statute, it is necessary to state what had taken place in the interval between the passing of the Act of 1840 and the passing of the Act of 1858, and to call your Lordships' attention also to certain provisions contained in the Act of 1840 for the protection of Erskine Ferry. I have pointed out to your Lordships that as I read the statute the 11th clause imposed no obligation upon the Clyde Trustees in relation to Erskine Ferry, but the 50th and following sections of the Act of 1840 undoubtedly did impose an obligation upon the trustees, such an obligation as one would have expected to find. Section 50

enacted—"That nothing contained in this Act or in any of the said recited Acts shall affect or be construed to affect in any degree the established ferries of Govan, Renfrew, Erskine West Ferry," and another ferry which is mentioned, "but the same shall be used and enjoyed in as ample and beneficial a manner as in times past;" and also "that a reasonable and sufficient space unenclosed by walls, dykes, jetties, and other works shall be left on each side of the quays of the said ferries," "and the said several quays shall at the expense of the said trustees (but with the approbation and consent of the proprietors) be repaired, lengthened, altered, or reconstructed according to the advice and report of civil engineers of eminence where such repair, lengthening, alteration, or reconstruction shall be rendered necessary by the works carried on by the said trustees for deepening the river under and by virtue of the said recited Acts or this Act, and so as the said ferries and quays shall be made as convenient and the working thereof as easy as before or as nearly so as may be."

Now, my Lords, there is there a provision which imposes an obligation in relation to Erskine Ferry which is inserted for the protection of the owner of Erskine Ferry, and which, so far as I can see in the Act of 1840, alone imposes any obligation in relation to that ferry or the works in connection with it; and as I read the section, the obligation imposed is ample for the protection of the proprietor of the ferry. Unless and until any works were executed by the Clyde Trustees which made the ferry less convenient than before, it is only reasonable that they should have no obligation in relation to it. Here the quay was the private property of Lord Blantyre. The Clyde Trustees had no right to interfere with its management, or to oust him from the possession of it. All that they were entitled to do was to make certain alterations in its length and its inclination, and they were under this obligation, that whatever works they executed upon the river, even if they did not touch the pier at all, they were bound to make that pier as convenient for ferry purposes as it had been before.

In the year 1854, when the works of the Clyde Trustees for deepening and improving the navigation of the river were proceeding, communications passed between Lord Blantyre and the Clyde Trustees with reference to their obligations in respect of the pier, and ultimately it was agreed between the parties that the pier with which we are dealing should be reconstructed. It was made much broader than it had been before—in short, a new and an enlarged pier as regards its breadth was built—but the pier was not so long as it had been before; it did not even extend up to the new river line, whereas the old pier extended considerably beyond the new river line. In consideration of the fact that the new pier was to be made more commodious than it had been before in respect of its breadth, some of the material was provided by Lord Blantyre. This new

pier had been completely constructed prior to 1858, and I apprehend that the new pier remained, as the old pier was, the property exclusively of Lord Blantyre, free from any interference by the Clyde Trustees, except such interference as necessarily followed from the works executed by them in improving the navigation of the river.

In the year 1858 the next Act which your Lordships have to consider was passed. By section 76 of that Act the undertaking of the Clyde Trustees was defined in these terms—"Subject to the provisions of this Act and of any agreements authorised or confirmed by the recited Acts or this Act," "the undertaking of the trustees shall, in terms of the recited Acts, consist of the deepening, straightening, enlarging, widening or confining, dredging, scouring, improving, and cleansing the river and harbour until a depth of at least 17 feet at neap tides has been attained in every part thereof; the altering, directing, or making the channel of the river through any land, soil, or ground part of the present or former course or bed of the river; the forming and erecting on both sides of the river of such jetties, banks, walls, sluices, and works, and such fences for making, securing, continuing, and maintaining the channel of the river within proper bounds as the trustees shall think necessary; the cleansing, scouring, and opening any other streams, brooks, or watercourses, which now fall into the river, and the digging and cutting the banks of the same for improving the navigation of the river; the digging, cutting, removing, carrying away and using such earth, gravel, stones and other materials in, upon, or out of the said land, soil, or ground, as the trustees shall think fit, either for improving the navigable channel of the river or for bringing in any other streams, brooks, or watercourses to the river, or for bringing up a greater quantity of tidal water in the river; the erection, repair, and maintenance of wharves, transit sheds, warehouses, cranes, workshops, and other works connected with the river and harbour;" "the construction and completion of the several wet docks or tidal basins, quays, wharves, ferry slips, approaches, embankments or river dykes, and all other works and improvements shown and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained." Now, the words upon which reliance is placed are these—"the construction and completion of 'quays' and all other works and improvements shown and described on the several plans and sections referred to in the recited Acts." It is said that this pier or quay was shown on those plans, and that therefore it became a part of the undertaking of the Clyde Trustees; and then, supposing that to be established, reliance is placed upon the words which follow—"And the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient."

Now, my Lords, no doubt that section would vest in the trustees or continue

vested in them all such powers as they had under any of the prior recited Acts in relation to the matters mentioned in so far as those powers were still subsisting and had not lapsed in point of time. There can be no doubt, therefore, that the authority conferred upon them by any prior Act which was still operative continued under this Act. But, my Lords, for the reasons which I have already expressed to your Lordships, I am unable to entertain the view that the fact that the prior Act gave authority, for the purpose of improving the navigation of the river, to remove the ends of these piers, and to alter their inclination, made these piers a part of the undertaking, of the Clyde Trustees. The power to execute certain works in relation to them was no doubt part of the undertaking, but that the piers themselves, which were the exclusive property and under the exclusive management of Lord Blantyre, became part of the Clyde Trustees' undertaking, I am, I confess, quite unable to see. And it is to be observed that the obligation to repair is only in these terms—"The repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient," indicating to my mind clearly that as to these works which the trustees were authorised to execute it was left to them to determine what part of their undertaking should be executed, at what particular time, what part it was expedient in the public interest to continue, what part it was expedient to abandon, and what part it was necessary or expedient to repair, maintain, and improve; because it is to be observed that if there be an obligation to repair I suppose it must be argued also that there is an equal obligation to improve, inasmuch as the language used in relation to both these matters is precisely the same.

My Lords, in the year 1864 the respondent was not satisfied with the condition of the pier, and he claimed that it should be lengthened so as to stretch much further into the river than it did. The right to have the alteration made was rested by him, and properly rested, upon section 50 of the Act of 1840, to which I have called attention, or perhaps it would be more accurate to say upon the corresponding section (I think it is No. 88) in the Act of 1858, because the Act of 1840 having been repealed, the provision to which I have referred for the protection of Erskine Ferry was re-enacted in terms in the subsequent Statute of 1858. In the year 1864 Lord Blantyre brought an action for the purpose of enforcing this right, and ultimately his right was maintained in this House, and the limit to which the piers were to extend into the river was fixed by a skilled person to whom there had been a remit from the Court below, and fixed in relation to the rights conferred upon Lord Blantyre by section 50 of the Act of 1840, or by section 88 of the Act of 1858. In consequence of the view adopted by the engineer to whom the matter was remitted, a decree in accordance with

which was afterwards made by the Court, the pier was lengthened and made to extend into the river to about the river line shown upon the plan of 1840; but the contention of Lord Blantyre was that it ought to have extended beyond that line.

Now, what obligation is there on the part of the Clyde Trustees to repair that pier thus extended as I have described? I have said that it has been rested upon the statutes of 1840 and 1858. I am unable, with all respect to the learned Judges in the Court below, to find in either of those statutes any such obligation. When the words in section 50 of the Act of 1840 and in the corresponding section of the Act of 1858 are carefully examined, they seem to me strong to negative the existence of such a right, inasmuch as there is a provision for repairing the quay or pier at Erskine Ferry, but the obligation is confined to those cases in which the ferry had been or should thereafter be prejudicially affected by the navigation works which the trustees were authorised to execute.

My Lords, Lord Kinnear, the Lord Ordinary, expressed the opinion "that the quays so constructed are part of the undertaking of the trustees and must be maintained as such. Everything they were authorised to do by the Act of 1840 was a purpose of the Act and a part of the undertaking. The analogous provisions of the Railways Clauses Act have been so construed; and although the language of the statutes is not identical the principle of construction adopted in these cases appears to be applicable." I think it right to say, with all respect, that I do not think that any light is thrown upon this case by the decisions referred to of *Wilkinson v. The Hull Railway Company*, and *Lord Beauchamp v. The Great Western Railway Company*, and that those decisions upon the construction of the Railways Clauses Act do not, in my opinion, at all assist the contention of the respondent.

Lord McLaren, in delivering the judgment of the Inner House, took the view that the 50th section of the Act of 1840 was to be regarded as supplementary and auxiliary to the 11th section—a view in which I am unable to concur. As I have already said, I think that the 11th section conferred full powers upon the trustees in relation to the navigation of the river, but did not impose any obligation upon them to execute any works in connection with this pier. The 50th section did impose a distinct obligation upon them in favour of the respondent. The learned Lord was not prepared to maintain the contention "that the trustees were bound to maintain in perpetuity every piece of work which they might construct in accordance with their powers." He considered that there was no such obligation "where no private interest was concerned." "But," he said, "where the work executed is in the nature of a substituted pier intended to give the owner of a ferry the same kind of accommodation which he had before, but in a form more convenient for the navigation of the river, the trus-

tees cannot, in our opinion, separate the obligation to maintain from the obligation to execute." But, my Lords, for the reasons which I have given, I can find no obligation to execute works save under the 50th section of the Act of 1840; I find no such obligation in the 11th clause, and therefore I do not think that it is a question of separating the obligation to maintain from the obligation to execute, but of showing that the obligation to execute, which, as I have said, in my view arises only under the 50th section, carries with it also an obligation to repair, when the section does impose an obligation to repair, but only for a limited purpose and in limited terms.

My Lords, for these reasons I am, with all respect for the learned Lords in the Court below, unable to adopt the view which found favour with them, and I move your Lordships that the judgment appealed from be reversed.

LORD WATSON—My Lords, in January 1889 a steam vessel on her way down the Clyde ran into and injured the south pier or quay of Erskine Ferry, which is the property of Lord Blantyre, the respondent. The appellants declined to repair the damage, whereupon this action was brought against them by the respondent for declarator to the effect that they are bound at their own expense to maintain and keep in repair the quays or slips on the north and south sides of the river at Erskine Ferry. The First Division of the Court, affirming the judgment of the Lord Ordinary (Kinnear), have given the respondent decree of declarator as craved, mainly upon the ground that these quays, although belonging to the respondent, have been made part of the statutory undertaking with which the appellants are entrusted, and as such must be maintained and repaired by them in all time coming.

The controversy thus raised necessarily depends upon the terms of the Acts by which the Clyde Navigation Trust has been constituted. I have come to the conclusion that these statutes have been misconstrued by the learned Judges of both Courts below. The reasons assigned in the note of the Lord Ordinary, and in the opinion of Lord McLaren, who delivered the judgment of the Inner House, appear to me to ignore the essential distinction which the statutes make between works necessary to the undertaking which the trustees are authorised to execute at their own hand and at their own discretion, and works which consist in the alteration of private property not required in the interest of the undertaking but of the proprietor, and as to which they have no discretion, being compellable to execute such works at the instance of the proprietor.

Section 76 of the Act of 1858 defines the undertakings of the trustees. It is only necessary to refer to that portion of it which is said to embrace the respondent's quays, piers, or slips at Erskine Ferry. It runs thus—"The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry slips, ap-

proaches, embankments, or river dykes, and all works and improvements shown and described on the several plans and sections referred to in the recited Acts and thereby authorised to be made and maintained; and the repair, maintenance, and improvement of the whole of the said works from time to time, as may be found necessary or expedient, and subject to the provisions of this Act and the Acts herewith incorporated, the trustees are hereby authorised and empowered to carry on and complete the whole, or such and so many of the said works as to them from time to time shall seem expedient." The whole tenor of the clause indicates the understanding of the Legislature that the various authorised works which are particularly described were works within the control and discretion of the trustees in this sense, that the latter were free to maintain or not to maintain, to repair or not to repair, to improve or not to improve them, as they might judge expedient owing to financial or other considerations. It creates no obligation to execute works in favour of the respondent or any third party.

The respondent relied upon the provisions of section 11 of the Act of 1840 as establishing that the piers in question are works shown and described in plan and section within the meaning of the Act of 1858. By that clause the trustees are empowered and authorised to execute, maintain, and keep in repair certain additional works delineated on a map or plan and sections deposited with reference to the Act. The plan shows the river lines within which the trustees were authorised to remove all obstructions, and dredge to the required depth; and it also shows that a portion of each pier at Erskine Ferry extends into the river beyond these lines, and was therefore liable to removal. There is a power to deviate from these lines to an extent not exceeding 40 yards; but it has not been exercised at that part of the river. The cross-sections indicate those portions at the end of each pier which the trustees are authorised to remove; and also that the portions which they were not authorised to remove were to be reduced in level by the trustees in order to afford suitable access to and from the ferry-boat.

The statutory power and authority of the trustees with respect to the removal of these piers within the river lines of 1840 has been exhausted for more than thirty years. There is at present no work which they could execute in terms of that authority if they were so inclined. The existing piers, and notably the south pier, are not those shewn in the plan and sections incorporated with the Act of 1840, but new structures which the trustees have either erected or aided in erecting, not by virtue of any discretionary power conferred upon them by section 11 of that Act, but under the compulsion of clauses inserted in it, and also in the Act of 1858, in the interest of the respondent, and for the protection of his private property. The appellants have no power or authority whatever

in regard to these piers, which they can neither use nor interfere with. They stand upon foreshore, of which the respondent is feudal owner, and he can alter or reconstruct them in any way he may think fit so long as his operations do not interfere with the navigable waterway of the Clyde, which it is the duty of the trustees to maintain.

Beyond what is contained in section 11 and relative plan and sections the Act of 1840 makes no provision with respect to the south pier of Erskine Ferry. Section 51 provides for the alteration and reconstruction of the north pier whenever the trustees cut off any part of it so as to bring it into a convenient line with the pier and quay on the south side. Section 50 contains provisions applicable to other ferries, which were extended to Erskine Ferry by section 88 of the Act of 1858. The latter clause exacts that nothing in the Act contained shall affect the established ferry of Erskine, and also that its quays shall be repaired, lengthened, altered, or reconstructed at the expense of the trustees, according to the advice and report of civil engineers of eminence, "where such repair, lengthening, alteration, or reconstruction shall be rendered necessary by the works carried on by the trustees for deepening the river, under and by virtue of the recited Acts and this Act."

Before the Act of 1858 was passed the trustees had removed that part of the south pier which lay to the north of the river line of 1840. They had also, with the consent of the respondent, but without prejudice to any claim he might have against them, removed a considerable portion of the pier to the south of that line, and had constructed a new pier with materials partly contributed by the respondent which did not come up to the river line, and was of much larger dimensions than the pier shewn in the plan and sections. In 1864 the respondent brought an action against the trustees, which was finally disposed of by this House in 1884, in which he obtained a decree ordaining the trustees to construct what was practically a new south pier. His claim was preferred and maintained in respect of the obligation laid upon the trustees by section 88 of the Act of 1858, and it was upon that footing that the House gave judgment in his favour.

The provisions of section 88 do not assist the respondent's argument that the trustees are bound to maintain and keep in repair the quays of his ferry. On the contrary, they appear to me to impliedly negative that contention by expressly providing that the trustees shall be bound to repair if and when repair is rendered necessary by their operations upon the river. The existing south pier, which has been altered and reconstructed in compliance with the judgment of 1884, is in no statutory sense an authorised work, either under the Act of 1840 or that of 1858. It is not shown, and could hardly have been shown, on the plans and sections incorporated with the earlier of these Acts, seeing that its design and dimensions were then unknown and could not be ascertained until the trustees'

future operations on the *alveus* of the river had so nearly approached completion as to enable an engineer to judge what structure would be suitable in the altered condition of the tideway.

The Lord Ordinary appears to rest his judgment upon the opinion which he entertained that the "quays in question are among the works shown and described on the Parliamentary plans and sections of 1840, and part of the undertaking defined by the 76th section of the Act of 1858." Lord M'Laren, speaking for himself and the other Judges of the First Division, goes a good deal further. He lays it down as law that "when the work executed is in the nature of a substituted pier intended to give the owner of a ferry the same kind of accommodation which he had before, but in a form more convenient for the navigation of the river, the trustees cannot, in our opinion, separate the obligation to maintain from the obligation to execute." I cannot assent to the rule thus enunciated, which so far as I know has no authority to support it. I should have thought that in all such cases the burden of maintenance and repair must be upon the *dominus* of the subject, unless it is shown to have been shifted to the undertakers by the terms of their statute.

For these reasons I concur in the judgment which has been moved.

LORD MORRIS—My Lords, I concur.

LORD SHAND—My Lords, I so entirely agree with the observations which have been made by your Lordships who have preceded me that I shall only add a few remarks in confirmation of your Lordships' views. I think it important to notice here that the claim which is made is certainly a most unusual and I think I may say an extraordinary claim in this sense, that it is a claim that the owner of a property who is in full enjoyment of it and deriving the entire profits of it, shall have that property maintained at the expense of other parties altogether. The claim as made in the conclusion of the summons is certainly a very wide one; for although what gave occasion to the action being raised was the circumstance that the pier of Erskine Ferry had been injured on two occasions, I think, by ships which had come in contact with it, what is asked in this conclusion is that it shall be declared that there is a perpetual obligation resting upon the Clyde Trustees to maintain and keep in repair the quays on the north and south sides of the river Clyde in favour of the pursuer and his heirs in the property of Erskine, a claim which in truth includes all repairs which might be rendered necessary in all time coming caused by the ordinary traffic or even wear and tear occurring from weather and otherwise. This claim is put forward when the state of matters is that the Clyde Trustees have no right of property whatever in this subject. They did not make any purchase or take any land belonging to the pursuer for the purposes of their undertaking here. On the contrary, he

remains the sole and uncontrolled proprietor, and, as your Lordships have observed, he is entitled to change these piers at his will. Under such circumstances I should say it is obvious that an extraordinary obligation such as is alleged must be very clearly made out; it is not to be readily or easily inferred certainly by implication. One would expect that when an obligation of this kind was to be constituted at all, that one party should maintain another person's property, that obligation would be given in the Act of Parliament expressly as an obligation in favour of Lord Blantyre and his heirs for all time coming. My Lords, I need not say that there is nothing of that kind in this Act; but I go further—I venture to think that even by implication we are unable to discover in the sections which have been founded upon any such obligation. There is, as your Lordships have observed, what one would naturally expect in a case of this kind, an obligation that in so far as the operations of the Clyde Trustees on the bed of the river are injurious to this property, and the result is that works are required to be performed, those works shall be done by the Clyde Trustees. In section 50 of the Act of 1840, which I think merely repeats a similar section in the Act of 1825, and which is again I think in almost identical terms repeated by section 88 of the Act of 1858, there is the obligation expressed which one would naturally expect; it is that the pier shall be repaired, lengthened, and reconstructed where such works shall be rendered necessary by the works which have been carried on by the Clyde Trustees. That, however, in the section to which I have referred, seems to be an obligation which the Legislature contemplated might be fulfilled once for all. At all events the section is entirely silent, so far as its obligatory force is concerned, as regards any obligation of maintenance and repair. The obligation is to make and repair when the works render it necessary, and there the obligation ceases.

My Lords, that being the only obligation that one can find in express terms, the only remaining question is—"Is there anything in any of the other sections of the Act which by implication imposes such an obligation?" The two sections which have been referred to, and which your Lordship on the woolsack has so fully narrated, are section 76 of the Act of 1858 defining the undertaking, and section 11 of the Act of 1840. Now, with regard to the first of these sections, section 76, it is true that "quays, wharfs, ferry slips," and other works are expressly mentioned, but they are mentioned in the same paragraph with a great many other works which the trustees are carrying on. First of all, there are operations in the bed of the river; then the clause authorises them to make and maintain "wet docks or tidal basins, quays, wharfs, ferry slips, approaches, embankments," and so on. If the argument be good that there was an obligation upon the trustees to keep those slips and quays belonging to Lord Blantyre in repair, it

would be very difficult to say that the same obligation does not apply to the other subjects mentioned in this clause. My Lords, I agree with your Lordships that these are merely words which enable or authorise the trustees to carry out these particular works; and indeed they are all limited by the words at the conclusion, "from time to time as may be found necessary or expedient." Accordingly, while no doubt this clause defines the undertaking, I think that in so far as it defines the undertaking it merely expresses what is empowered to be done, and there is no term of obligation requiring maintenance or requiring the trustees to do what they do not find necessary or expedient.

My Lords, in like manner section 11 of Act of 1840 is of the same character. There is there again a power, if the trustees desire it, to shorten the piers and to reconstruct and repair them. It might have been found, as the trustees proceeded with their operations that no such shortening or reconstruction or repair was required, and if so, they certainly were not bound to do it; but if they do interfere with the pier and reconstruct it, which is a matter they are empowered to do, I can see no obligation whatever of future maintenance.

As your Lordship upon the woolsack has observed, Lord Kinneir, the Lord Ordinary put the point upon which he thinks the case turns in a sentence which your Lordship read to this effect—"The opinion which I have formed is that the quays so constructed are part of the undertaking of the trustees, and must be maintained as such. Everything they were authorised to do by the Act of 1840 was a purpose of the Act and a part of the undertaking." My Lords, in the last of these sentences I entirely concur, that what they were authorised to do was a purpose of the Act and a part of the undertaking; but I cannot agree with his Lordship in the first of those sentences in which he says that because they were authorised to do these works the opinion which he has formed is "that the quays so constructed are part of the undertaking of the trustees, and must be maintained as such." I see nothing in the nature of an obligation of maintenance in either of those clauses; and that being so, I agree with your Lordships in thinking that the decision of the Court of Session must be reversed.

The House reversed the decision of the First Division with costs.

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