Upon that ground, it appears to me that the judgment of the Court below is perfectly right, and that it ought to be affirmed.

Interlocutors affirmed, and appeal dismissed, with costs.

Appellant's Agent, James Bell, S.S.C.—*Respondents' Agents,* Webster and Renny, W.S.

FEBRUARY 23, 1857.

THE EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY, *Appellants, v.* ROBERT PHILIP, *Respondent.*

Agreement—Contingent Obligation—Construction—Railway—*A party entered into an agreement with a railway company, in which he assented to a bill then before parliament, for making a branch, which, if carried into effect, would touch his property, the company binding themselves to pay £11,500 for his property at the first term "after the said company, on obtaining their act, shall have begun to execute any part of the said railway." The company obtained their act, and borrowed money under the powers; but they did not execute any part of the works.*

HELD (reversing judgment), *That the obligation to pay was contingent on the company beginning to execute any part of the railway; and as that condition had never been purified, the company were not bound to implement their agreement.*[1]

In 1846 the company then incorporated under the name of the Edinburgh, Leith, and Granton Railway Company, (now amalgamated with the Edinburgh, Perth, and Dundee Railway Company,) published the usual notices that an act of parliament would be applied for in the ensuing session, for authority to make a branch railway from the line of the then existing Leith branch to the upper drawbridge in the town of Leith. The property situated at Old Church Wharf, in the parish of North Leith, belonging to the pursuer Robert Philip, merchant in Leith, as heritable proprietor, was included in the notices as required for the purposes of the undertaking. In December 1846 the agents of the railway company informed the pursuer, that, as the intended line would run through the middle of his property, it was the wish of the company to acquire the whole of his property; and, with the pursuer's permission, the company procured a survey and valuation of his property. After some negotiation, an agreement was entered into, whereby the Company agreed to pay Mr. Philip £11,500 in full of all claims on account of the intended operations of the company. The pursuer, Mr. Philip, then assented to the bill, and it was passed in 1847. But the railway was never made.

The Court of Session held that the obligation became absolute to pay the £11,500, and the defenders were liable to pay that sum.

The defenders appealed, maintaining that the interlocutors of the Court of Session should be reversed, because,—1. According to the sound construction of the minute of agreement of 21st and 22d January 1847, the sale of the respondent's property, or the agreement on the part of the appellants to acquire the same, was conditional, *first*, upon the passing of the act therein referred to; and, *second*, upon the appellants beginning to execute the railway under the powers of the said act; and the appellants were not bound to pay the stipulated price until the first term of Whitsunday or Martinmas after beginning to execute the railway. 2. The respondent having in his first action against the appellants founded on the said agreement as conditional upon their beginning to execute the railway, and joined issue with them upon the question, whether the said condition had been purified; and the said issue having been tried by the Lord Ordinary, under the act 13 and 14 Vict. cap. 36, § 48, and decided by his Lordship against the respondent, the second action, libelling upon the agreement as absolute and unconditional, was incompetent. 3. Having regard to the facts conclusively found by the Lord Ordinary in his interlocutor of 11th February 1852, the subsequent interlocutor of the 6th March 1852 was well founded, and ought to have been affirmed by the Court. 4. The respondent is barred, by his judicial statements in the first action, and the whole proceedings in that action, from maintaining that the minute of agreement in question was absolute, and not dependent upon the appellants beginning to execute the railway. 5. In any view, a decree for specific performance is not warranted by the facts and circumstances of the case, the respondent's proper remedy being an action of damages for breach of contract.

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[1] See previous report 10 D. 1065; 26 Sc. Jur. 580. S. C. 2 Macq. Ap. 514: 29 Sc. Jur. 242.

The respondent maintained, that the contract of sale of January 1847 was not conditional in its nature; and it was not in the option of the appellants, by declining to make the railway or otherwise, to prevent the stipulations in that contract from becoming obligations enforceable against them to the effect and in the manner set forth in the interlocutor appealed from.

Attorney-General (Bethell), and *Anderson* Q.C., for the appellants, contended, that the true construction of the agreement was, that it was conditional on the passing of the act, and on the company beginning to make the railway; and that the condition had not been purified.—*Preston* v. *Liverpool, Manchester, &c. Railway Company*, 5 H. L. C. 605; *Webb* v. *Direct London and Portsmouth Railway Company*, 1 De G. M. & G. 521; *Lord James Stewart* v. *London and North Western Railway Company*, 1 De G. M. & G. 721; *Gage* v. *Newmarket Railway Company*, 18 Q. B. 457; *Bland* v. *Crowley*, 6 Exch. 522. (There were other points raised as to the competency of the second action, but the judgment did not proceed upon them.)

Lord Advocate (Moncreiff), and *Rolt* Q.C., for the respondent, referred to the same cases, as also to *Hawkes* v. *Eastern Counties Railway Company*, 5 H. L. C. 379, and the cases there cited.

Counsel for the appellants, in reply, were stopped.

LORD CHANCELLOR CRANWORTH.—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 more technical nature, on the pleadings which have been raised in the arguments; 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 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; 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 begin to make the railway. I dare say the anticipation of the parties was, that if they begun 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 50 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 begun 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: *Second*, 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, 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. But it was to be a purchase, it must be borne in mind, to enable the company to make their railway. 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 to Mr. Philip, his heirs, executors, or assigns, 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 began 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 to Mr. Philip for his premises. That £11,500 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.

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 "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 not 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 stopped from deciding such a point merely because it was inconvenient in point of language; but it seems to me, that all reasoning shews 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 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 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? 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 was the price which Mr. Philip was minded to contract that he would take for it, taking upon himself all the burden and inconvenience of being unable, in the mean time, 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 never 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 until they had put themselves in a condition to make the railway, viz., 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 that the cause be remitted, with a declaration that they ought to have assoilzied the defenders from the conclusions of both summonses, with expenses.

Lord Wensleydale.—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 any opinion upon any of those questions, except the second. With regard to the first and the last, they are purely questions of Scotch law. Upon these questions I pronounce no opinion at all; but upon the second question, which is as to the construction of the contract, 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—which made me doubt whether the conclusion that I had come to was the proper conclusion, it being against the opinions of those four learned Judges.

But this is a matter, which is 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 which is to be construed, and to construe it according to the ordinary grammatical sense and meaning of the words, taken in conjunction 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[1] in which the judgment was delivered (and an excellent judgment it was) by the late Chief Justice Jervis, 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 into this contract? I think it can hardly be supposed that they did, unless there were clear words shewing 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 shew that the purchase was to depend upon a condition. The commencement of the agreement, upon which the Court ultimately relied, is absolute. It is—(Reads the agreement).—That fixed the price, but there is no day of payment mentioned except that which follows. 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; therefore 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.

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, according to the true construction of the terms of this contract, looking especially at the condition in which the company were, viz., that they were under no obligation to make the railway at the time they entered into this contract, I cannot conceive that they meant to abandon that right, which they might exercise with reference to their general interests, and to undertake to pay, at an indefinite time, the price for this land. Therefore, I conceive, 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.

Interlocutor reversed, with a declaration.

Stodart Macdonald, Edinburgh, and Webster and Wardlaw, London, *Appellants' Agents.*—William Anderson, Leith, and Dodds and Greig, London, *Respondent's Agents.*

[1] The case here referred to is the *York and North Midland Railway Co.* v. *The Queen*, 2 E. & B. 68.