

sary result of extending it to servants of the testator's establishment like the pursuer. I do not think any intention to limit the class of servants who benefitted can be drawn from that marginal jotting at all. But even if it could, I do not think that a properly executed deed can be affected by any such addition which is unauthenticated. It is not necessary, however, to determine that now if my other view be right that no inference whatever of an intention to point out a particular class of servants can be drawn from this marginal jotting at all. But I think further that it is quite clear that he did not mean to limit his bounty to domestic servants, for the first one on the list—the factor—is not in any way a domestic servant; he is the leading legatee of the class to be benefitted under this head of the will, which is wound up by a bequest to "other servants." I think that expression as thus used would have extended to a secretary, certainly to a librarian, to a piper—if the piper would condescend to be anything but master—in short, to anyone who had been employed in his establishment and in his service for four years before his death. But this view does not by any means signify that he meant it to extend to the labourers on his estates who were paid daily wages, even though they had been employed regularly in his service for four years before he died. I think there is a manifest distinction between servants on his establishment and labourers on his estates. But it is not our business to draw the line or give a precise definition which shall include "servants" as used here, and exclude all others. It is enough to find that the testator meant it to include such a servant as the pursuer, who I think is entitled to prevail, and receive his legacy.

**LORD CRAIGHILL**—I entirely concur. The testator here says "to each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years, one year's wages," and the question is, What was his intention? If the defenders can show that he meant to limit this legacy to a particular class of servants in which the pursuer is not included, then undoubtedly he must fail in his claim. But the opinion which I have formed from reading the clause is that the testator did not mean to limit these legacies to one particular class of servants, but that it was his purpose that they should extend to servants of more than one class, who had been four years in his service at the time of his death. The question then is, Was this blacksmith one of those whom he intended to benefit? The Lord Ordinary's view is that the clause in the will is controlled by the note on the margin, and that the result of giving effect to that note is to exclude the pursuer's claim. I agree with Lord Young that the words of the will cannot be affected or controlled by such an unauthenticated writing on the margin. But we do not require to decide that, for the figures will not suit either the construction of the pursuer, or that of the defenders; the calculation will not square with the one interpretation on the other. Besides, we do not know when it was made, or what was the number of the testator's servants when it was made, and if we do not know then we cannot tell on what basis the calculation was made. Unless we have as a condition of our interpretation the number of

servants of each class in the testator's service at the time the calculation was made, we cannot say on the inclusion or exclusion of what classes of servants it was based, and so must disregard these figures altogether. On the whole matter, therefore, I think the pursuer is entitled to his legacy.

**LORD RUTHERFURD CLARK**—I have had some difficulty with this case, but am inclined to agree with your Lordships.

The Court recalled the Lord Ordinary's interlocutor and ordained the defenders to pay to the pursuer the sum of £59, 16s.

Counsel for Pursuer (Reclaimers)—Rhind—R. K. Galloway. Agents—M'Caskey & Hutton, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Thursday, May 22.

## SECOND DIVISION.

[Lord Adam, Ordinary.]

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF PERTH v. THE NORTH BRITISH RAILWAY COMPANY.

*Statute—Statutory Obligation to Perform an Act where no Time of Performance Expressed—Act 44 and 45 Vict. c. 137 (The North British Railway (New Tay Viaduct) Act 1881), sec. 21—Obligation to Perform Act "to Satisfaction of Board of Trade"—Jurisdiction.*

Section 21 of the above Act, which was obtained by the North British Railway for authority to erect a bridge over the Tay higher up the river than one which had been blown down in 1879, provided—"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 (diss. Lord Young)* (1) that the obligation so imposed ran from the passing of the Act; (2) that the Court had jurisdiction to order implementation of it, the reference to the Board of Trade merely pointing to the duty imposed on them to see that the obligation was properly discharged; and (3) that equitable considerations of expediency suggested the limiting the removal to those portions of the bridge which were not connected with either side of the river by a continuous railway.

In 1870 the North British Railway Company introduced a bill into Parliament for authority to construct a railway with a bridge for carrying it over the river or Firth of Tay above Dundee. The bill was opposed by the Magistrates and Council of Perth as the conservators of the river

Tay so far as it is within the county of Perth, on the ground that the construction of the bridge would seriously affect the navigation of the river. This opposition was however withdrawn in consideration of certain stipulations made by the company (who made a payment in respect of the interruption to traffic during the erection of the bridge, and undertook certain yearly payments thereafter) and the bill was passed on 1st August 1870. The bridge was erected in terms of The North British Railway and Tay Bridge and Railway Act 1870 (33 and 34 Vict. c. 135). It was opened for public traffic in June 1878, and on the 28th December 1879 a considerable portion of it was blown down. In 1881 the North British Railway Company introduced another bill for the purpose of obtaining powers to construct a railway upon a viaduct across the river a little higher up than the site of the old bridge. This bill was also opposed by the Magistrates and Council of Perth, but in consideration of minute of agreement by which the promoters agreed to insert in it certain clauses, the opposition was withdrawn. The bill passed upon 18th July 1881, and became The North British Railway (New Tay Viaduct) Act 1881. Section 21 is in the following terms:—"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." The clause then provided for the sale within ten years, under the Railways Clauses Consolidation Act 1845, of the site of the abandoned portion of railway leading to the old bridge so far as not required. The railway company proceeded to obtain contracts for the erection of the new bridge.

This action was raised in July 1883 by the Magistrates and Council of Perth as representing the corporation of the City and as conservators of the river against the North British Railway Company, to have it declared that "the defenders are bound to remove the ruins and debris of the bridge and railway over the river or Firth of Tay, at or near the town of Dundee, commencing in the parish of Forgan, in the county of Fife, and terminating in the parish and royal burgh of Dundee, in the county of Forfar, erected and made by them in virtue of the powers conferred upon them by the Act 33 and 34 Victoria, chapter 135, and particularly to remove the piers, cylinders, cut-waters, and all other portions of the said bridge and railway situated in the channel of the river or Firth of Tay, and the whole ruins and debris connected therewith, and all obstructions interfering with the navigation of the said river caused by the said bridge: And the defenders ought and should be decreed and ordained, by decree foresaid, to remove the said ruins and debris of the said bridge and railway, with all piers, cylinders, cut-waters, and other portions thereof, and all obstructions to the free and uninterrupted navigation of the said river caused by the said bridge, and that within such period as our said Lords shall appoint, and at the sight and to the satisfaction of the Board of Trade: And failing the defenders doing so within such time as shall be so fixed, our said Lords ought

and should grant warrant to authorise and empower the pursuers forthwith to remove the same at the sight and to the satisfaction of the Board of Trade foresaid; and the defenders ought and should in that event be decreed and ordained, by decree foresaid, to make payment to the pursuers of the whole costs and expenses to be thereby incurred, as the same may be ascertained in the course of the process to follow hereon; reserving always to the pursuers their claim for damages in respect of the non-removal or delay in removing the said ruins and debris of said old bridge, and of the obstruction or interference with the navigation of said river thence arising."

The pursuers stated—" (Cond. 7) At the time of the passing of the last-mentioned Act [that of 1881] there remained in existence certain portions of the old bridge. The portion of the old bridge which fell was in or near the centre of the river, and the landward portions at either end are still standing. The piers which supported the part which fell are also still standing. With a view to the support of the old bridge the defenders had from time to time placed large quantities of rubble stone and other materials around or near the piers, and these stones and other materials still remain along with the ruins and debris of the former bridge in the bed of the river. The said piers are supported by large cylinders about 30 feet in diameter at the level of about 5 feet below low water-mark. Above that level the piers are hexagonal, and measure 16 feet from north to south and 30 feet from east to west. The standing and fallen portions of the bridge, and the rubble and other material foresaid, are calculated to cause and do cause serious injury and inconvenience to the navigation and danger to vessels. The centre line of the new bridge is proposed to be 60 feet to the westwards of the centre line of the old bridge, and the piers of the new bridge are proposed to be 40 feet long from east to west and 16 feet wide from north to south. If the cylinders and piers of the old bridge are left standing, the length of the old and new piers, together with the spans between them, will be 99 feet from east to west." " (Cond. 8) It is proposed by the defenders that the new piers shall be placed so that the old and new piers shall be at right angles to the longitudinal axis or line of the new bridge. The length of obstruction thereby caused from east to west as before mentioned, with such a narrow width as 16 feet, would cause very great difficulty to the navigation of the river were the current of the river at right angles to the line of the bridge, and therefore parallel to the line of the piers. The set of the current in the Firth of Tay is, however, from south-east to north-west. The water therefore flows in an oblique direction through the openings of the bridge, and there is thus a large divergence which requires to be specially provided for."

The defenders stated as follows:—" (4) By the said Act of 1881 the Board of Trade alone are entitled to require any part of the old bridge to be removed. The ruins and debris of the old bridge, and all obstructions interfering with the navigation caused by the old bridge, have, in accordance with the instructions of the Board of Trade, been removed by the defenders to the satisfaction of said Board. By the Acts and agreements before-mentioned, and the payments therein stipulated for, the pursuers have been

amply compensated for any possible interference with the traffic on the river Tay due to the erections or existence of the said bridges." "(5) The parts of the old bridge and the railway connected therewith which are still standing are in excellent condition and repair. The Parliamentary plans and estimates for the new bridge were prepared, estimated, and formed on the basis that these parts of the old bridge would be used in connection with the construction of the new bridge, and the contract for the new bridge was entered into on that footing. The Board of Trade, in virtue of the powers vested in them by the said Act of 1881, approved of the plans for the new bridge, and have sanctioned and acquiesced in the construction thereof being proceeded with, all in the full knowledge that the said parts of the old bridge still standing were to remain, and to be used in connection with the construction of the new bridge. Since the construction of the new bridge was begun (in June 1882) the standing portions of the old bridge have been so used, and, *inter alia*, they have been and are being used for the conveyance of materials to the new bridge. In this way the river is saved from a large amount of obstruction which would otherwise inevitably arise from the use of steam-tugs, barges, pontoons, and stagings which are now unnecessary. In thus using the standing portions of the old bridge the defenders are acting in accordance with the invariable custom of engineers and contractors in building bridges." "(8) The Act of 1881 allows the defenders five years for the completion of the railway therein mentioned. Even if the defenders were bound by said Act to remove the whole of the said old bridge, they would not be bound to do so before the expiry of five years from the passing of the said Act of 1881, viz., 18th July 1881."

The pursuers pleaded—“(1) The defenders are, by virtue of the minute of agreement entered into between them and the pursuers, and also in respect of the provisions of The North British Railway (New Tay Viaduct) Act 1881, bound to remove the ruins and debris of the old Tay Bridge, and all obstructions to navigation caused by that bridge, and the pursuers are entitled to decree of declarator accordingly. (2) In respect the said ruins and debris of the old bridge form an interference with and obstruction to the free navigation of the river Tay, the pursuers, as representing the Corporation of the city of Perth, and as the conservators of the river, are entitled to decree against the defenders, ordaining them to remove the said obstructions to the navigation. (3) Failing the defenders implementing said decree the pursuers are entitled to warrant to execute the necessary works, and to decree for the expenses thereof against the defenders.”

The defenders pleaded—“(1) The pursuers have not set forth and do not possess sufficient title or interest to sue the present action. (3) The Board of Trade being satisfied with the defenders' actings in the matters alleged, the defenders should be assolizied. (6) The action is premature, and ought to be dismissed in respect, 1st, the portions of the old bridge still remaining are useful for the construction of the new bridge, and are in fact used in connection therewith, and especially are being so used as to diminish the interference with the river, which would inevitably arise from the construction of

the new bridge; 2d, the defenders, if bound to remove the portions of the bridge still standing, are entitled to do so at any time before 18th July 1886 that may be most suitable for them. (7) The defenders' whole actings being in accordance with their legal rights, and particularly their rights under the said Act of 1881, they should be assolizied.”

It was admitted that since the passing of the Act the defenders had been making use of the piers and permanent way of the old bridge which had been left standing in their operations for the erection of the new one. This had been done with the approval of the Board of Trade, and without objection from the Corporation of Perth.

The Lord Ordinary (ADAM) pronounced this interlocutor:—“Finds, decerns, and declares in terms of the first conclusion of the summons, and decerns and ordains the defenders forthwith to remove the ruins and debris of the bridge and railway over the river or Firth of Tay at or near the town of Dundee, commencing in the parish of Forgan, in the county of Fife, and terminating in the parish and royal burgh of Dundee, in the county of Forfar, erected and made by them in virtue of the powers conferred upon them by the Act 33 and 34 Vict. cap. 135, with all the piers, cylinders, cut-waters, and other portions thereof, and all obstructions to the free and uninterrupted navigation of the said river, caused by the said bridge, to the satisfaction of the Board of Trade: Finds the pursuers entitled to expenses, and *quoad ultra* continues the cause: Further, on the motion of the defenders, allows them to reclaim against this interlocutor.”

“*Opinion*—In this case it appears that a bridge was erected by the defenders across the Firth of Tay under powers contained in an Act passed in 1870. It further appears that that bridge was opened for public traffic in June 1878, and it stood until 28th December 1879, when, unfortunately, as we all know, part of it was blown down. It also appears that, in 1881, the defenders obtained authority from Parliament for the erection of another bridge across the river, apparently higher up the river than the old bridge but still near its site. That Act was passed on 18th July 1881.

“The state of matters at the passing of that new Act is set forth in condescendences 7 and 8, and is substantially admitted. There is no dispute about the real facts of the case—[*His Lordship here quoted condescendences 7 and 8, ut supra*]. Now, this is a correct description—for the facts are not disputed—of the bridge, of the size of the piers, and of the situation of the bridge. I do not mean to say that the fact is admitted that the ruins cause obstruction, but as regards the physical features of the bridge, &c., there is no dispute about the facts stated on record. Now, it is clear that if there was no provision for the removal of the old bridge, and the new bridge were erected as proposed, the result would be that in place of the one bridge as formerly there would be two bridges across the river at this place, and it is difficult to say that that would not cause more obstruction to the navigation than if there was only one bridge as formerly; because it is very obvious that a sailing or other ship will have, or would have, double the length of an obstruction to pass through if there were two bridges instead of one. It stands to reason that that must be a

greater obstruction than if there was only one bridge there.

“That, then, was the state of matters at the passing of the Act, and apparently to make provision for that state of matters the 21st section of the Act was inserted:—‘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.’ That is the clause which is founded on, and it is to have that clause enforced that the present action has been brought by the pursuers.

“Now, it appears to me, in the first place, on the construction of that clause, that that is an absolute obligation on the part of the railway company to remove the ruins and debris of the old bridge. It is not, according to my view, as is set forth in the record and as was argued to me, that it was a matter referred to the Board of Trade whether the ruins and debris shall be allowed to stand or be removed. I think the reference simply points to the duty on the Board of Trade to see that the ruins are sufficiently removed,—that is, removed to their satisfaction. In that sense it appears to me that this obligation is an absolute obligation upon the railway company to remove the ruins and debris of the bridge.

“But it is said that the pursuers have no title to enforce this obligation. I cannot think there is any force in that objection, for it cannot be disputed that the pursuers are the conservators of the river above this bridge. If I remember rightly they are called conservators in the immediately preceding section of the Act. Assuming, as I think we must assume, that this old bridge does impede the navigation of the river, the pursuers have for these reasons a clear right and interest to insist on the removal of the old bridge,—a perfectly sufficient title to see that the navigation is kept clear. That is the first objection stated by the defenders. The next objection stated by them will be found in the 4th article (page 12)—‘By the said Act of 1881 the Board of Trade alone are entitled to require any part of the old bridge to be removed. The ruins and debris of the old bridge, and all obstruction to the navigation caused by the old bridge, have, in accordance with the instructions of the Board of Trade, been removed by the defenders to the satisfaction of the said Board.’ That looks, at first sight, like an objection in point of fact, viz., that in point of fact the ruins and debris of the bridge have been removed. But if you look at the record, that is not the meaning of this statement. It raises a question on the construction of the Act,—the meaning being that, according to the view of the construction of the Act there set forth, the ruins and debris do not mean the whole of the ruins and debris of the bridge, but only apparently the ruins and debris of the part of the old bridge destroyed. That, I think, is clearly the meaning, because in the next article they describe how the parts of the old bridge and of the railway connected therewith still standing are in good repair and in excellent condition. They also go on to describe how they are to use them, and they maintain a right to use them for the construction of the new bridge. Therefore

this defence raises a question on the construction of the Act itself. Does the expression ‘ruins and debris of the old bridge and all obstructions interfering therewith and with the navigation’ merely mean that part of the bridge, or those parts called openings of the bridge, which actually fell? I do not think that is the meaning of it at all. I think ‘ruins and debris’ of the old bridge means the whole ruins of the whole bridge. The whole bridge is ruined. The whole bridge from shore to shore must come down. I do not think the meaning is that the defenders are only to remove the shattered parts where the bridge was blown down. The whole bridge, I repeat, is a ruined one from end to end—just as when a part of an old house falls down it is all ruined, and the ruins of it have to be removed. So that I think the meaning of the Act is that the ruins and debris of the bridge are the remains of the old bridge throughout its length.

“The defenders next go on to say in article 5—‘The Parliamentary plans and estimates for the new bridge were prepared, estimated, and formed on the basis that these parts of the old bridge would be used in connection with the construction of the new bridge, and the contract for the new bridge was entered into on that footing. The Board of Trade, in virtue of the powers vested in them by the said Act of 1881, approved of the plans for the new bridge, and have sanctioned and acquiesced in the construction thereof being proceeded with, all in the full knowledge that the said parts of the old bridge still standing were to remain and to be used in connection with the construction of the new bridge.’ Even if that were true in point of fact, I do not think it relevant, because for reasons I have stated I do not think the leaving of these things standing or not depends on the approval or disapproval of the Board of Trade. But there is no use arguing that matter because of what I see in the letter of 16th January 1882 from Mr Walker, general manager of the railway company, sending plans and so on to the Board of Trade for approval. ‘They are sent to be approved on the footing there indicated—‘As the requirements indicated by the Board of Trade have now been satisfied, may I express the hope that the approval of the plans will be forthwith given, always, of course, without prejudice to the provisions of the 21st section of the Act of 1881.’ And they were approved of subject to that provision. Thus it is quite clear that nothing that the Board of Trade has done, or could do, has prejudiced the right of the pursuers to have the ruins and debris removed, supposing them to have a right.

“These are all the special defences set forth. But the principal difficulty of the case still remains, and it is this, that in the 21st section of the Act no time is specified within which the ruins and debris of the old bridge shall be removed. And the question accordingly comes to be, whether or not the fulfilment of that obligation can now be demanded by the pursuers, or whether they are premature in their action. The defenders say in article 8 that if the defenders are bound by the Act to remove the old bridge they would not be bound to do so before 1886. ‘The Act of 1881 allows the defenders five years for the completion of the railway therein mentioned. Even if the defenders were bound by said Act to remove the whole of the

said old bridge, they would not be bound to do so before the expiry of five years from the passing of the said Act of 1881, viz., 18th July 1881.' Upon this point the defenders refer to the 14th section of the Act 'If the railways by this Act authorised and described on the deposited plans are not completed within five years from the passing of this Act, then on the expiration of that period the powers by this Act granted to the company for making and completing the said railways or otherwise in relation thereto shall cease to be exercised, except as to so much thereof as is then completed.'

"They also refer to section 12, which enforces penalties against the railway company if within the five years they do not have the works finished. But I cannot see how these clauses have any reference to the removal of the bridge. They only refer to the making of railways and the construction of the new bridge. They make no reference whatever to the matter of removing the old bridge. And therefore I cannot see that the period of five years is the period within which the defenders can say that under their Act they are to have time to remove the bridge.

"If that be so, and no time is specified, what is the result? It appears to me that as soon as this bill passed into an Act, the obligation in the 21st section became immediately prestable; the obligation ran from that date as against the defenders. I do not see any other time from which to fix it. Here is an Act of Parliament passed containing an obligation on the railway company to remove this bridge. Was the obligation not prestable from the passing of the Act? If the obligation was prestable immediately on the passing of the Act, then the fulfilling of it ought to have been immediately set about. I do not mean to say it was immediately prestable in the sense that they were not to be allowed a reasonable time to make arrangements for removing the bridge. I do not say they should have begun to remove the bridge next day. It must be a work of great labour and expense, and they must be allowed a reasonable time in which to accomplish it. Still the obligation began to run from the passing of the Act. What are the facts on that part of the question? The Act was passed in July 1881, and, according to their own statement on the record, they commenced the building of the new bridge in June 1882, eighteen months ago. The question appears to me to be whether it is not reasonable that the defenders should by this time have been proceeding with the removal of the ruins and debris of the old bridge. I cannot say that I think it unreasonable for the pursuers to say that the time is now come when the defenders must take steps to remove the bridge. The defenders say—and I have no doubt there is a great deal of force in that—that the use they are making of the remaining part of the bridge causes less obstruction to the navigation than if the ruins were removed and they had to set to work to construct the new bridge by means of lighters, and so on. There is a great deal of force in that, but I do not think we can have regard to that, and for the simple reason that I think the bridge is ordered to be removed on account of its being an obstruction. I cannot regard it otherwise than as an obstruction, and in that view it is not unreasonable that these pursuers, who have, as I think, a title to look

after the removal of obstructions in the river, should now insist, two and a-half years after the passing of the Act and eighteen months after the parties have been proceeding with the erection of the new bridge, that the time has come when they must take steps for the removal of the bridge.

"There was another view of the case suggested by myself, namely, that the time as well as the manner and completeness of the removal of the ruins and debris was left to the Board of Trade. On consideration, however, I do not think there is anything in that.

"Upon those grounds I am of opinion that the pursuers are entitled to decree of declarator in terms of the first conclusion of the summons. Nothing was said with reference to the particular terms of the conclusion, but there are some considerations which naturally suggest themselves. I can see that in carrying out the removal of the ruins it might be of interest to neither party that those parts of the piers which have been sunk below the bed of the river should be removed. But that must be matter of arrangement, because according to the view I take, the pursuers are entitled to have the ruins and debris of the old bridge removed entirely. But it does occur to me that it should be considered by both parties whether the bed of the river should be turned into holes by the removal of the piers in so far as they are below the bed of the river. As I say, that is for the parties to consider.

"The pursuers further ask that the defenders should be ordained 'to remove the piers, cylinders, cut-waters, and all other portions of the said bridge and railway situated in the channel of the river or Firth of Tay, and the whole ruins and debris connected therewith, and all obstructions interfering with the navigation of the said river, caused by the said bridge,' and 'to remove the said ruins and debris of the said bridge and railway, with all piers, cylinders, cut-waters, and other portions thereof, and all obstructions to the free and uninterrupted navigation of the said river caused by the said bridge, and that within such period as our said Lords shall appoint, and at the sight and to the satisfaction of the Board of Trade.' Now, I do not know that there is any authority in the Act of Parliament for that being done at the sight of the Board of Trade. After the bridge has been removed, if the pursuers are not satisfied that it has been sufficiently removed they can go to the Board of Trade and ask them whether they are satisfied—'Ay or No.' But there is no provision in the Act of Parliament that the work of removal is to be carried on at the sight of the Board of Trade.

"I am therefore not prepared to say that this work is to be carried on at the sight of the Board of Trade. The Act of Parliament does not say so, and if I give decree under this conclusion I propose to omit these words.

"In the next place, the pursuers ask it to be done 'within such period as our said Lords shall appoint.' At this stage of the cause I am not disposed to appoint a period. I would rather ordain the defenders forthwith to remove the ruins and debris of the bridge, and if there is any undue delay, then the pursuers may come to the Court again, and a period can then be fixed. But in a case of this kind, where the work may take years or months, and when nothing was said

to the Court about fixing a time, it is not necessary to fix a period. Therefore I propose to give declarator in terms of the first conclusion, and to ordain the defenders forthwith to remove the ruins and debris of the bridge, omitting the words I have referred to in the course of my opinion."

The defenders reclaimed, and argued—(1) There was no absolute obligation incumbent on them to remove debris which in point of fact could not be called ruins, and which were useful to assist in erecting the new bridge. (2) The pursuers had no title to enforce such an obligation. On a sound interpretation of the 21st section of the Act, the Board of Trade were the parties on whom alone a right of interference was conferred. (3) The action was premature. They had five years in which to take away the debris to the satisfaction of the Board of Trade.

The pursuers replied—(1) As the body entrusted with the conservancy of the river within certain bounds, they were the parties who were entitled to complain of obstructions within these bounds. All that the Act of 1881 provided with reference to the Board of Trade was that that body should give their approval to the operations when completed. It was absurd, then, to argue that they were the only parties entitled to sue here. (2) In point of fact, the debris of the bridge caused serious obstruction to the navigation. (3) There was an absolute obligation to remove the whole of it from end to end of the bridge.

At advising—

**LORD RUTHERFURD CLARK**—In my opinion there is an absolute obligation on the defenders to remove the ruins and debris of the old Tay bridge and all obstructions interfering with the navigation caused by that bridge. I agree with the Lord Ordinary in thinking that the obligation extends to all that remains of the bridge. As he says, "the whole bridge is ruined," and the whole from shore to shore must be removed. There is, in my view, no other possible construction of the statutory words. It has been said that the Board of Trade is the only authority who can enforce this obligation. I do not think so. The Board in my opinion cannot dispense with it or abridge it in any way. Their function simply is to see that the statutory obligation is properly and sufficiently performed.

It was not, I think, disputed that the pursuers had a sufficient title to enforce the obligation; unless the title be vested in the Board of Trade alone, in my opinion they are plainly entitled to require the defenders to perform their statutory obligation. So far all is, I think, clear. But in one respect I do not share the opinion of the Lord Ordinary. He has held that the defenders are bound to remove the foundations of the old bridge under the bed of the river. I do not think so. No interest whatever can be served by such removal. It is quite immaterial of what the bed of the river is composed.

There remains an important question, namely—When is the obligation to be performed? And it is to be taken in connection with the statement of the defenders that the remains of the old bridge, in so far as they carry a continuous railway, are of great value to them in the construction of the bridge which is now in course of erection. I do not think that we should deprive the defenders of this use of the old bridge. In

my judgment, the statute does not require us to do so. We may gather from the correspondence that the Board of Trade see no objection to the use which the defenders are making of the old bridge, and that they are satisfied—a matter which is I think sufficiently obvious—that the appliances which the defenders, if deprived of the use of the old bridge, must necessarily employ in the construction of the new bridge would more seriously interfere with the navigation. I propose therefore that the decree which we are to pronounce should in the meantime be limited to those parts of the old bridge which do not form part of a continuous railway from either shore. Of course, it will be open to the pursuers to move for a further decree whenever they think fit. This is the interlocutor I would propose—"Recal the interlocutor submitted to review: Find and declare that the defenders are bound to remove the ruins and debris of the bridge and railway on the river or Firth of Tay at or near the town of Dundee, commencing in the parish of Forgan in the county of Fife, and terminating in the parish and royal burgh of Dundee in the county of Forfar, erected and made in virtue of the powers conferred on them by the Act 33 and 34 Vict. c. 135, with all the piers, cylinders, cutwaters and other portions thereof, and all obstructions to the free and uninterrupted navigation of the river Tay caused by the said bridge, and that to the satisfaction of the Board of Trade: Decern and ordain the defenders forthwith to remove the piers and cylinders of the said bridge which are not connected by a continuous railway from either side of the said river or firth, and all the cutwaters and other works erected for the protection of or in connection with such piers or cylinders, and all the ruins and debris of the said bridge between the points at which the said railway proceeding continuously from either side of the said river or firth ends, and all obstructions to the free and uninterrupted navigation of the said river or firth between the said points, all to the satisfaction of the Board of Trade: *Quoad ultra* continue the cause: Find the defenders liable in expenses hitherto incurred."

**LORD CRAIGHILL**—I concur generally in the judgment of the Lord Ordinary and in the reasons set forth in the note to his interlocutor, in which the grounds of judgment are explained. The circumstances of the case are there so fully related that recapitulation here is unnecessary. Parties have differed as to the import of the 21st section of an Act to provide for the restoration of railway communication across the Tay near Dundee, passed on the 18th July 1881, and the first question for determination is, whether the import of that clause is to be determined by this Court or by the Board of Trade? I am of opinion that the view which has been taken by the Lord Ordinary is correct. The Board of Trade is not a judicial tribunal, and the interpretation of this provision of the statute in question, special powers for adjudication not having been conferred on the Board, rests with the legal tribunal of the country, and not with that branch of the public administration. The Board of Trade have duties, or, if you will, have rights under the clause in question, but these do not affect the obligation imposed on the defenders, if there be an obligation, but only touch the question, whether

in the performance of the obligation all has been done which is necessary for the removal of obstructions interfering with the navigation of the Tay?

In the second place, I am of opinion that there is an obligation on the defenders to remove the ruins and debris of the old bridge, and all other obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade. "They shall remove," are the words of the statute, and these imply obligation. What has been appointed has not been performed, and this action has I think been properly brought for the purpose of declaring the obligation of the defenders in the premises, and also for obtaining a decree by which the fulfilment of this obligation may be enforced.

In the third place, the pursuers have a title to sue. They are the conservators of the river Tay, so far as it is within the county of Perth, and this gives them a title to complain of anything by which the navigation of the river is obstructed, or to sue for implement of an obligation such as that imposed upon the defenders. The ruins of the old bridge are beyond the limits to which the conservancy of the pursuers extends, but if there are obstructions further down by which the navigation of their own water is obstructed they are entitled to complain. This indeed has hardly been disputed by the defenders, because when they say that the pursuers have no title to sue, all that is meant is that the Board of Trade, upon what they say is the true interpretation of the 21st clause, are the parties upon whom the right or duty to interfere has been conferred.

In the fourth place, as there is no time fixed by the statute within which the fulfilment of the obligation in question might be required, or must be performed, fulfilment was, I think, immediately prestable. The obligation is not a future but a present obligation according to its conception, but the pursuers, by the conclusions of their action, leave the matter of time to be fixed according to the discretion of the Court.

The considerations which Lord Rutherford Clark has suggested seem to me to be relevant and material to the determination of this question, and I therefore concur in thinking that the course which he has proposed may be pursued with advantage to the defenders and without prejudice to the pursuers, or to anyone interested in the navigation of the Tay.

LORD YOUNG—There is no question that the defenders are bound to "remove the ruins and debris of the old bridge and all obstructions interfering with the navigation caused by the old bridge." The obligation is expressly imposed in the interest of the navigation of the Tay, and the duty of seeing it duly performed is committed to the Board of Trade, which is a Committee of the Privy Council and the Government Department especially charged with the interests of navigation. The removal enjoined is to be "to the satisfaction of the Board of Trade." Lord Craighill expresses the view that there being no time appointed by the statute, or expressed by the statute, the obligation was immediately prestable, but subject to the powers and discretion of this Court. There is a discretion therefore in his Lordship's view to be exercised. I should have thought the character of the work was such

as to involve the exercise of judgment and discretion with respect to the time and manner of execution, and also the exact extent to which it was to be carried, and that by constituting the Board of Trade the authority at whose sight and to whose satisfaction the work is to be done, the Legislature contemplated the exercise of judgment and discretion. The Board of Trade have at their command all the means and aids needful to enable them to exercise a sound judgment and discretion, and I am not at liberty to suppose, and do not for a moment suppose, that they will fail to perform their duty or neglect the public interest in the navigation of the Tay which has been so expressly committed to them. Your Lordships, differing from the Lord Ordinary, propose to allow the piers and cylinders of the bridge which are still connected by a continuous railway from either side of the river to remain standing as being probably a less interference with the navigation than what would have to be substituted if they were removed. In my opinion this Court has no jurisdiction to judge of the matter, which is, I think, clearly committed to the Board of Trade. I make the same observation with respect to the removal of the foundations of the old bridge, about which likewise your Lordships differ from the Lord Ordinary, and may in the result very possibly differ from the Board of Trade also.

My opinion, in short, is that the Board of Trade is the statutory authority to be appealed to by the pursuers, or any others who may think that the railway company are unduly delaying the removal of the bridge in whole or in part, and that the navigation is consequently obstructed. I do not, of course, doubt that we have authority to enforce any order of the Board of Trade within the limits of their power, and that we should not hesitate to exercise it, or substitute a judgment for that of the Board, whatever we might have thought had the matter been committed to us.

I do not quite see how the judgment we are about to pronounce is to be made operative, for in both heads of it—I mean the declarator and operative decree—"the satisfaction of the Board of Trade" is referred to as the criterion or standard, so that if they declare themselves satisfied with what is being done, or in the end with what is done, there must necessarily be an end of the matter whether we are satisfied or not, unless, indeed, we are to review their judgment upon the question whether or not all "obstructions interfering with the navigation" have been removed, or are in course of being removed, with reasonable diligence—to say, in short, that although they may be satisfied we are not, and that our judgment must prevail. I cannot imagine that the Legislature meant to call in the Board of Trade only to see that the orders of this Court were duly executed.

I should even venture to assert as a general proposition, that when in a matter of national or public concern, as distinguished from private and patrimonial interest, the Legislature orders anything to be done to the satisfaction of a department of the Government, the Privy Council, or a Committee thereof, which the Board of Trade is, this Court has no jurisdiction or authority to interfere except to lend its aid and to enforce what the authority referred to may have duly

signified as necessary or proper in its judgment to be done.

**LORD JUSTICE-CLERK**—I entirely agree with the propositions of Lord Craighill and Lord Rutherford Clark. The Lord Ordinary has found under the statute that the North British Railway Company are bound to remove the debris of the old bridge across the Tay without any reservation and without any exception, and also all obstructions to the navigation.

It appears that since the Act of Parliament was passed considerable operations have been going on in regard to the construction of the new bridge, for which an Act of Parliament was obtained. Under that Act the promoters were bound in the way set forth in the clause that has been already quoted, that clause being—"That the company shall abandon or 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." The time during which or at which that operation is to be performed is not made specific in the statute. It must be done, of course, before the termination of the company's powers. But at what time it is to be done is not a matter directed by the statute. That the obligation is absolute, and that these things must be removed, is quite certain. Now, Lord Young seems to think that the Board of Trade are the only authority who can enforce that obligation, and that when it is said that the thing which is directed to be done is to be done to the satisfaction of the Board of Trade, that gives them jurisdiction to enforce the whole obligation, and excludes the jurisdiction of the ordinary Courts of law. I am of an entirely different opinion. This clause does not direct that the operations are to be conducted at the sight of the Board of Trade, which would have been a totally different matter, but that the operations when done must be approved of by the Board of Trade. This, as I have said, is a totally different thing. Where an operation is to be performed at the sight of an engineer, or at the sight of an architect, that does not mean that the architect or the engineer are to have the same jurisdiction in the matter of that obligation as a Court of law, but that his certificate is necessary before the obligation can be held to be fulfilled by a Court of law. That, I think, is the position of this matter as regards the Board of Trade; and so they seem to have thought themselves. The North British Company went to the Board of Trade wanting to have certain portions of the bridge removed and others to stand; the Board of Trade did not acquiesce in the view the company took, but substantially said "We have no authority in this matter; our function does not begin until you have, according to your own view, fulfilled the obligation; then the question will occur, has it or has it not been fulfilled to our satisfaction?" And such I take it is the proper view. I do not think the Board of Trade for a moment would admit that they or their officers were bound to superintend the work or control the parties in the course of it until it was settled judicially. That is my opinion. It would have been a great relief to us if the Board of Trade

had had the sole jurisdiction here. It is not a very convenient matter for the Court of Session to interfere with. That is very clear, but it is not unlike other obligations which we have to consider—whether the obligation has been fulfilled, and how it ought to be fulfilled? I concur with the general purport of the interlocutor proposed by Lord Rutherford Clark. There is no doubt a question, and it is not without difficulty, as to the mode in which this is to be carried out. I quite appreciate the demur which Lord Young has made on that point. The difficulty arises in this way—that pending the operations the North British Railway Company have found it convenient to use part of the old bridge for the purpose of carrying material and assisting in the construction of the new bridge. Undoubtedly that is not altogether consistent with the obligation contained in the statute; but it has been done, and it is in the course of being done, and the Board of Trade have not interfered to prevent it being done. On the contrary, they seem to agree that this use should be taken of the materials of the old bridge—the piers and permanent way of the old bridge—for the erection of the new one. That is beneficial to the company rather than otherwise; and one can quite see that the taking down of the bridge might have been a hindrance to navigation. But the use of the bridge to which I have referred has continued since the passing of the Act until now.

But although I take that view of the rights of parties, I do not think we are bound to disregard entirely the matter of convenience in the use of the ruins of the old bridge for the purpose I have mentioned. And indeed the community of Perth have not interfered until now, and if they have allowed these things to be done, and expenditure to be made, and arrangements to be concluded upon the faith of the company being entitled to use the material of the old bridge in that way, I think we are entitled to allow them to continue their use until the new bridge is completed. That may be a question no doubt, but I think it is an equitable interposition of our general jurisdiction.

On the whole matter I concur with Lord Rutherford Clark in the opinion he has delivered.

The Court pronounced the interlocutor proposed by Lord Rutherford Clark.

Counsel for Pursuers—J. P. B. Robertson—Young. Agents—Irons, Roberts, & Lewis, S.S.C.

Counsel for Defenders—Sol.-Gen. Asher, Q.C.—Dickson. Agents—Millar, Robson, & Innes, S.S.C.