

Friday, June 23.

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

GILMOUR v. NORTH BRITISH RAIL-
WAY COMPANY.

(Ante, vol. xxx. p. 450, 20 R. 409.)

Railway—Question whether Statutory Obligation to Stop all Ordinary Trains at a Certain Station was Temporary or Permanent—Title to Sue.

A railway company were taken bound by a clause in their Act in 1855 to "erect and maintain a temporary goods and passenger station" at a point to be agreed on on an estate which was to be intersected by their line of railway, on the narrative that the then proprietors of the estate had laid out a portion of it for feuing. The clause proceeded thus—"At the said station all ordinary trains shall stop for the purpose of traffic;" then came a proviso that if on the expiry of five years the traffic proved unremunerative the company should no longer be bound to maintain the said station, and that the question of the maintenance or abandonment of the station should be determined by arbitration.

A station was erected in accordance with the above enactment, and no proposal to abandon it was ever made.

In 1858 the same parties arrived at an agreement, which proceeded on a recital of the above clause, and provided that in consideration of certain prestations in favour of the railway company they should complete the station as a permanent station, and should thereafter maintain it in all time coming at their own expense.

Subsequently the estate was sold. In 1892 the then proprietor brought an action against the railway company to have it declared that they were bound to stop all ordinary trains, and in particular certain specified trains, at the said station on his estate.

Held (rev. judgment of First Division) that all ordinary trains must stop at the station.

This case is reported *ante*, vol. xxx. p. 450, and 20 R. 409.

Mr John Gilmour appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is an appeal from a judgment of the Inner House reversing a decision of the Lord Ordinary. The question turns mainly upon the construction of a clause in the East of Fife Railway Act 1855. The clause has relation to the erecting and maintaining of a station upon the line which was to be constructed under the Act upon a part of the estate of the Standard Life Assurance Company, who then owned the estate of Lundin; and the matter to be determined is whether

there is an obligation created by that clause under which the railway company are at the present time bound to stop all ordinary trains at a station constructed on that line for the purposes of the traffic, or whether that obligation has in the events which have happened come to an end.

The clause begins by reciting that "the owners of the estate of Lundin, in the parish of Largo, have laid out a portion of the said estate on the proposed line of railway to be let in lots of feus for building," and then it enacts "that the company shall erect and maintain a temporary goods and passenger station at or near to Sunnybraes, or at any other point on the said estate which may be agreed upon by and between the company and the owners of the said estate for the time; and at the said station all ordinary trains shall stop for the purpose of traffic." The question really to be determined is, what is the meaning of the words "the said station?" The contention on behalf of the respondents which found favour with the Court below is this, that "the said station" means "a temporary goods and passenger station" and that if the station, though on the line and at the place, ceases to be a temporary station and is one which is to remain there permanently the obligation to stop ceases, because it is not within the description "the said station."

Now, my Lords, that of course depends upon what is included in the words of reference "the said station." I cannot admit that it is a proposition universally true that where you find a substantive with several adjectives qualifying it, and you find a reference back to the substantive, preceded by the words "the said" the reference necessarily includes the substantive qualified by all the adjectives which precede it in the previous part of the clause. That is a question to be determined really by looking at the agreement as a whole. It can hardly be contended, for example, that if instead of the word "temporary" upon which so much stress has been laid the word "wooden" had been substituted, or the word "covered" or "uncovered" the obligation to stop the trains would have ceased if, for example, an uncovered station were turned into a covered one, or a wooden station into a stone building. It would have been impossible, I should think, for anyone to contend then that it ceased to be "the said station" although upon the same line of railway because one adjective of the description was no longer applicable.

But it is said that the word "temporary" points to the station as lasting for a time only, and that therefore the words "the said station" in the latter part of the clause point to a station which is to last for a time only, and as soon as it ceases to be a station which is to last for a time only, and becomes a station that is to last in perpetuity, it ceases to be "the said station." Now, my Lords, the fallacy, as I respectfully venture to think, of the judgment which the respondents here seek to support lies in this, that the first part of this clause is treated as if it only provided for a station which was to last for a time. As I read the

agreement as a whole, the word "temporary" cannot have been used in that sense. This never was a station which was to last only for a time. If the words which I have read had stood alone, without anything following them, it would have been difficult to say what was meant by the word "temporary," how long it was to last or in what sense that word was employed. But the words which I have read are followed by a proviso which commences with "but providing always." Now, I do not lay too much stress upon those words, but, nevertheless, I think it must be admitted that, ordinarily speaking, where you find such words they introduce a qualification of the obligation which without them would have been created by the words which precede. The proviso is, "that if upon the expiration of five years from the opening of the line of railway the traffic done at such station shall not be of sufficient extent to remunerate the company for the maintenance of the said station, the obligation to maintain the said station shall be no longer binding on the company."

Now, what is the effect of that? It is only this, that in a certain event to be determined by a question of fact, namely, the station paying or not paying (to put it shortly), in the event of the station not paying, the obligation which is treated as created by the earlier part of the clause is to be no longer binding. It, of course, assumes that an obligation has been created by the earlier part of the clause which lasts beyond the five years; otherwise it would be nonsense to speak of the obligation being no longer binding after the five years have elapsed, when the obligation had been only created for five years. Therefore it necessarily implies that the obligation created by the earlier part of the clause is an obligation lasting beyond the five years, but which in a certain event is to cease to be binding. Therefore it appears to me, with all deference to the learned Judges in the Court below, that the earlier part of the clause cannot be construed, giving full effect to the word "temporary," as creating an obligation which lasts only for a time. The obligation at the outset is an obligation permanent save in a certain event, and therefore when you find the words "temporary station" the word "temporary" must be construed in the same sense, and in this part of the clause which I have just been reading, the words "the said station" cannot refer back to that quality of temporariness, if I may so term it, because this is speaking of a time when the five years have elapsed and it speaks of the obligation to maintain the said station being no longer binding. "The said station" there can only mean this station at Sunnybraes, without reference to that quality of temporariness which it is suggested was imposed by the earlier part of the clause. I do not think that it would be according to the ordinary principles of construction to treat the words "the said station" in that part of the clause as referring to the station after the five years, and to treat the same words "the

said station" occurring almost immediately before as qualified and restricted and limited to the term of five years.

My Lords, it appears to me that the word "temporary" there means no more than this—to "maintain a goods and passenger station subject to the provision as to time hereinafter contained." If it had been so worded, nobody, I think, could have contended that if in a particular event that station was to be permanent the words "the said station" only referred to it whilst it was doubtful whether it was to be temporary or permanent. That, my Lords, seems to me to be the strongest reason showing that the construction which the respondents have sought to maintain here really cannot be maintained.

It is said that it was natural that the parties should contract that all the trains should stop during the five years, inasmuch as it was right that there should be a full test of the question whether the station could be made to pay or not. No doubt that would be a very good reason for having provided, if the parties had so provided, that there should be that obligation for five years and no longer. Certainly in that case I should have expected to find the provision in the proviso, and in immediate connection with that part of the proviso which states that the obligation was not to be binding if the traffic did not pay for the five years—it would have been natural to find in connection with that the provision that during those five years all trains should stop. But this provision is not found in that part of the clause. It seems to me to be as much a quality of the station as that it should be a goods station or a passenger station. Of course one might speculate that the parties might have had such an intention as has been suggested, but it appears to me to be impossible to deduce such an intention from the words used in the place in which those words are found, and it would be violating all the ordinary principles of construction if one were to treat the words "the said station" as having the very limited effect given to them by the counsel for the respondents and by the learned Judges in the Court below, when in truth you cannot give that limited interpretation to precisely the same words when they are found in the other part of the clause.

My Lords, for these reasons I think that the judgment appealed from must be reversed so far as it depends upon the construction of the 36th section.

But then it was contended that the parties having entered into an agreement in October 1858, about three years after the passing of the Act, have by that agreement put an end as between themselves to the stipulation upon which so much argument has been addressed to your Lordships. No doubt it was competent for them to do so, but they have not done so in terms. They agreed that the station from the outset should be completed as a permanent station. The agreement contained various other stipu-

lations, but it did not provide, as one would have expected it to provide if that had been the intention, that the obligation to stop all trains should cease as soon as it had been completed as a permanent station. There is no such actual provision to be found, and I do not think it arises by necessary implication from the terms of the agreement. Upon this point I find myself in accord with the learned Judges of the Court below in the Inner House, who all came to the conclusion that if the obligation existed not qualified by the word "temporary" in the sense given to it under the 36th clause, it had not been abrogated by the agreement of September or October 1858.

For these reasons, my Lords, I move your Lordships that the judgment appealed from be reversed, and the interlocutor of the Lord Ordinary restored.

LORD WATSON—My Lords, the main question for our decision is, whether the agreement of 1858 wholly supersedes or merely qualifies the contract embodied in section 36 of the Act of 1855? The answer depends in my opinion upon the construction of that clause. It imposes an obligation upon the company to erect and maintain a temporary goods and passenger station at or near to Sunnybraes, or at any other point upon the estate of Lundin which may be agreed upon between the company and the owner of the estate for the time being. The obligation is immediately followed by the enactment that all ordinary trains shall stop for the purposes of traffic "at the said station."

What, then, is the station at which trains are to be stopped? Is it the station to be erected at Sunnybraes or elsewhere upon the estate of Lundin so long as such station exists and the company are bound to maintain it; or is it a station which is to be maintained by the company for five years only or until it becomes permanent? The Lord Ordinary selected the first of these alternatives and decided in favour of the appellants. Their Lordships of the First Division (with the exception perhaps of Lord M'Laren) preferred the second, and gave judgment for the respondents. Either of these conflicting decisions is, in my opinion, the logical result of the construction upon which it is founded.

The terms of the proviso which follows the obligations to erect and maintain a station and to stop trains appear to me to be conclusive in favour of the construction adopted by the Lord Ordinary. The proviso is framed on the assumption that an obligation had already been created, which unless qualified by the proviso would be of permanent force. It implies that the antecedent obligation to maintain was meant to include the station after as well as before it ceased to be temporary. For these and other considerations which have been suggested by the Lord Chancellor, I think it is clear that the word "temporary" as it occurs in the clause relating to the erection and maintenance of the station, was not used in any sense which could

restrict the obligation of maintenance in point of time, and that the reference back implied in the words "said station," as these occur both in the clause relating to stoppage of trains and in the proviso, is to the station to be erected on the estate of Lundin, whether it should prove to be temporary or permanent.

In that view of the statutory contract of 1855 it does not appear to me to be doubtful that the agreement of 1858 does no more than discharge the proviso, and leaves untouched the obligation to stop trains.

LORD ASHBOURNE—My Lords, I concur.

LORD MORRIS—My Lords, I concur in the judgment which has been moved.

I think the enacting part of the clause provided for a station which might not be permanent, and which the company were not to be bound to permanently keep up, but as long as it was kept up and lasted, all ordinary trains were to stop at it. What time the word "temporary" would cover was left indefinite. A proviso was added which in my opinion amounts to this—that it should last for at least five years, because it is provided that if then found unremunerative it was not to be kept up. If no trial took place at the end of the five years, or if it was found that it was remunerative, then matters reverted to the enacting part of the clause—that is to say, an incident was attached to it that it was not binding upon the company to keep it up permanently, but that as long as it was kept up the trains should all stop there.

This view is, in my opinion, fortified by the subsequent agreement, because, as an indefinite time might attach after the expiration of five years, the agreement of the 29th September 1858 was entered into by which for considerable consideration from the assurance company in the shape of contribution to the building of the station, the building of houses, the making of roads, &c., they agreed that the temporary character of the station was to be altered into a permanent one, with the necessary incident that all ordinary trains should stop there.

LORD SHAND—My Lords, I have felt this to be a question attended with some difficulty. It is apparent that it is by no means absolutely clear, when we look at the division of opinion amongst the learned Judges in the Courts below, and at the reasons they have variously assigned for their opinions. But I have come to the conclusion, without doubt, that the view which your Lordships take is sound, and that the decision of the Court of Session ought to be reversed.

There has been much argument upon the meaning of the word "temporary" as it occurs in the opening part of this enactment, and I confess that if there had not been the proviso in the second part of the enactment I should have been very clearly of opinion that there was no lasting obligation upon the company to have a station there at all, and certainly none to have a

station at which every train should stop. There might have been an obligation which they could not summarily bring to a close, but it would have been a temporary obligation in the ordinary sense of the term, and not an obligation which could have been made lasting against the company.

I think it equally clear, after all the discussion we have had about it, that the word "temporary" must be read in connection with the word "said" which we find in the second part of the clause; and it must be taken as if it had expressly said "the company shall erect and maintain a goods and passenger station temporarily in the sense hereinafter explained." Accordingly, going to the proviso, we see what is the meaning to be attached to the term. It is that there is an existing obligation to keep up the station, with the proviso that that obligation may ultimately turn out not to be permanent, for the clause is practically so expressed, "providing always that if after five years the traffic done at the station shall "not be sufficient to remunerate the company for the maintenance of it, the obligation to maintain the station shall be no longer binding upon the company." The result of that simply is, that the obligation which the company have undertaken in the earlier part of the clause may be determined in one event only—otherwise that obligation as originally expressed remains permanent in its character. My Lords, if the obligation remains permanent, it is the obligation as a whole in the terms in which it was originally expressed, If it turns out that the station is unremunerative, and the arbiter named gives a finding to that effect, the obligation as a whole flies off. But that obligation as a whole, as contained in the first part of that clause, appears to me either to remain permanently as an obligation as a whole, or the company are relieved of it as a whole. But the case is in the position that no such event occurred. The station has not been found to be remunerative, and therefore the obligation as originally contracted remains.

Now, what is that obligation? My Lords, it seems to me that there are four qualities or incidents of it. I do not care which expression is used, but when I use the expression I mean it to cover essential points with reference to which the company undertook the obligation. One of those refers to the place where the station is to be. It is to be at the point named or in some other position convenient to the parties on the estate of Lundin—the estate now possessed by the appellant. In the second place, it is to be a station for passenger traffic. In the third place, it is to be a station for goods traffic. In the fourth place, it is to be a station at which all the ordinary trains shall stop. My Lords, as I have said, I think the obligation applicable to all these points or incidents remains as a whole; and I think the company are no more entitled to get rid of the obligation to stop all their ordinary trains

there than they would be entitled to say, "this shall not be a passenger station" or "this shall not be a goods station."

Upon these grounds, my Lords, I concur with your Lordships, and I entirely agree in the views which have been already expressed by your Lordships who have preceded me.

The House reversed the decision of the Court of Session, and allowed the appeal with costs, holding that all ordinary trains must stop at the station in question.

Counsel for Appellant—Graham Murray, Q.C.—C. N. Johnston. Agents—Grahames, Currey, & Spens, for Macpherson & Mackay, W.S., and Wilkie, Youden, & Bruce, Leven.

Counsel for Respondents—Lord Advocate (Balfour, Q.C.)—Solicitor-General for Scotland (Asher, Q.C.) Agents—Loch & Co., or James Watson, S.S.C.

Monday, June 26.

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

THOMSON AND OTHERS v. CLYDESDALE BANK.

(*Ante*, vol. xxviii. p. 610, and 18 R. 751.)

Banker—Stockbroker—Overdrawn Account—Payment by Stockbroker into His Own Account of Proceeds of Sale of Shares belonging to Clients.

A stockbroker sold bank shares for certain clients for £2900, and received from the buying broker, in accordance with the usage of the Stock Exchange, a cheque for that amount in his favour. This cheque he lodged with his bankers, £2000 being put to his own account, which was at that time overdrawn to the extent of £6200, and a draft upon the bank's branch in London, where he had an account, being given him for £900. He shortly thereafter absconded.

Held (*aff.* judgment of the Second Division) that everything having been done in the ordinary course of business, the broker's clients had no claim against the bank for repayment of the sums contained in the cheque, which had properly been applied to reduce the broker's indebtedness.

This case is reported *ante*, vol. xxviii. p. 610, and 18 R. 751.

J. R. Thomson and others appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL) — My Lords, the appellants in this case are the trustees of the late Thomas Dunlop. They held fifty shares in the Commercial Bank of Scotland, which they resolved to sell with a view to another investment. They accordingly in February 1890 instructed Mr D. B. Thomson, a stockbroker in Edinburgh, to sell the shares and to deposit the