LORD COWAN concurred.

Counsel for the Prosecution—Lancaster, A.-D., Moncrieff, A.-D.

Counsel for Panel—Trayner and Jameson. Agents—Messrs M'Ewen & Carment, W.S.

Monday, July 8.

HOUSE OF LORDS.

EDINBURGH STREET TRAMWAYS COMPANY *v.* BLACK AND OTHERS.

(See *ante*, p. 275.)

General Tramways Act, 1870—*Special Act*, 1871—*Inconsistency—Relative Plans.*

Where the provisions of a Special Act of Parliament conflicted with those of a General Act incorporated with it—*Held* (reversing the judgment of the Court of Session) that the latter must prevail, and that the deposited plans and sections had by reference been made part of the Special Act, to which it was too late to object.

This was an appeal from a judgment of the First Division in an action of suspension and interdict, raised by Messrs Black and others, owners and occupiers in North Bridge Street, against the Edinburgh Tramways Company, and its object was to compel the Company to remove their rails at certain points *ex adverso* of the suspenders' property, on the ground that the statutory distance of 9 feet 6 inches had not been left between the outer rails of the tramway and the curb-stone.

The First Division, adhering to the interlocutor of the Lord Ordinary (Gifford), gave judgment for the suspenders.

The Tramways Company appealed.

At giving judgment—

LORD CHELMSFORD—My Lords, the question in this case is whether the Edinburgh Street Tramways Company can be restrained by interdict from constructing a tramway on the portion of North Bridge Street, extending from the south end of the North Bridge to the High Street of Edinburgh, at a distance of less than 9 feet 6 inches from the nearest rail to the outside of the footpath.

The question depends upon the effect of an article in an agreement contained in the schedule to the Edinburgh Street Tramways Act, which, by the 44th section of the Act, is made part of the Act. By the 5th section of the Act the Company are to "make, form, lay down, and maintain, the tramways hereinafter described, in the lines and according to the levels shown on the deposited plans and sections, and in all respects in accordance with those plans and sections."

We had occasion a short time ago to consider the question as to the effect of plans and sections deposited and referred to in this manner, and we found that, in the case of the *North British Railway Company* v. *Tod*, which is reported in 12 Clark & Finelly, it was laid down, that where there is such a reference as this to the plans and sections in an Act of Parliament, they are incorporated into the Act. The provision here is most express, that the tramways are to be constructed in all respects in accordance with the deposited plans and sections. Now, according to the description of the plans and sections, the Company are to make a double line of tramway, in which the space between the outer line of rails and the footway on each side of North Bridge Street must be less than 9 feet 6 inches. By the agreement which was entered into, and which is made a part of the Act, the Company bind and oblige themselves "to construct and work the tramways described in the said bill and shown on the Parliamentary plans." Therefore the Company, under the Act and the agreement, which is made a part of it, are bound to make the tramways in accordance with the plans and sections.

But it is said that by the agreement one-third of the owners of houses abutting upon North Bridge Street have a right to object to the tramway being brought within 9 feet 6 inches of the footway. The first clause of the agreement says—"The parties hereto of the first part, as the local authority foresaid, shall have the whole rights, powers, and privileges which 'The Tramways Act, 1870,' or any other general Act relating to tramways now in force, or which may hereafter pass during this or any future session of Parliament, confer, or may hereafter confer, upon the local authority of any district, and the whole provisions of the said Acts shall apply to the Act of Parliament which the said second party is now promoting, or to any Act of Parliament which they or the Company may hereafter obtain, as fully in every respect as if the same were a Provisional Order obtained under 'The Tramways Act, 1870.'" The ninth section of the General Tramways Act provides that "every tramway in a town which is hereafter authorised by Provisional Order shall be constructed and maintained as nearly as may be in the middle of the road, and no tramway shall be authorised by any Provisional Order to be so laid that for a distance of 30 feet or upwards a less space than 9 feet and 6 inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners or one-third of the occupiers of the houses, shops, or warehouses abutting upon the part of the road where such less space shall intervene as aforesaid shall, in the prescribed manner and at the prescribed time, express their dissent from any tramway being so laid."

The first clause of the agreement provides that the General Act shall apply "as fully in every respect as if the same (that is, the Private Act) were a Provisional Order." A great deal of controversy has taken place as to the exact meaning of those words, but I apprehend that the ordinary sense and understanding of the language would be that it must refer to a Provisional Order obtained—that is, completed and confirmed—by Act of Parliament. Now, supposing, instead of being an Act of Parliament, this had been such a Provisional Order, it would have been one, of course, as I have already said, confirmed by Act of Parliament. How could there be a veto by the owners under those circumstances? Taking the case of a Provisional Order, they could only have interposed while it was in progress—that is to say, after notice had been given of the intention to apply for a Provisional Order. They might then have given notice of their objection. But, under those circumstances, supposing there was no dissent at all, a Provisional Order, of course, might be made which

allowed a tramway to be constructed with an intervening space between the footway and the outer rail of less than 9 feet 6 inches. Such a Provisional Order, of course, would be utterly incapable of being resisted afterwards; and how, under these words, putting the Act of Parliament upon the same footing as a Provisional Order, could the owners possibly, when the Act of Parliament was passed, have any veto whatever? And how can it possibly be understood that this reference to the first part of the General Tramways Act with regard to Provisional Orders can have any application to a case of this description? The local authority having for the protection of the public bound the company to make their tramways according to the plans which the Act of Parliament authorised, can it be believed that, by a general reference to rights, which these persons would have to prove, as well as that the Provisional Orders were being made to their prejudice, they intended to prevent the Act of Parliament being carried out? The argument upon which the respondents insist is, according to their construction of it, utterly inconsistent. One part compels the Company to do the works which are authorised by the Act, the other, according to the argument of the respondents, allows the owners to say that what the Act sanctions and the agreement compels shall not be done. Even putting it upon the lowest possible ground, the part of the Act as to the execution of the works is clear and distinct, and the obligation to execute the tramways as prescribed by the Act is express. The qualification is hard to be understood, and it is capable of a construction which renders it wholly inoperative.

My Lords, I should not have entertained the slightest doubt upon this case if it had not been for the respect which I feel for the judgment of the four learned judges who have expressed a contrary opinion; but it appears to me that the owners have no right whatever to the interdict which has been granted to them, and therefore I submit to your Lordships that the interlocutor ought to be reversed.

Lord Colonsay—My Lords, with every respect for the opinions of the majority of the learned judges in the Court below, I cannot come to any different conclusion from that which has been arrived at by my noble and learned friend. It appears to me that the only contention that could be maintained with plausibility here is that which is founded on the notion that the 9th section of the General Act was somehow imported into this statute, and formed a condition which overrode the other provisions of the Act. But I think that is a strained construction of the agreement, and that it is founded on not only straining the construction of the agreement, but also straining the objects and purposes of the 9th section itself. I therefore cannot adopt the conclusion which has been come to in the Court below.

It appears to me that the respondents in this case have been rather negligent of their own interests in this matter with regard to what would be the result of this tramway passing through their street. Either they had not measured the street and ascertained what was to be the effect of the construction of the tramway according to the plans, or they relied upon some protection from the local authority, which would supply the want of their being themselves parties to an agreement which would have protected their interests. However, looking to the agreement as it stands, and considering what the purposes of that 9th section of the General Act are, I cannot concur with the views taken in the Court below. I can arrive at no other conclusion than that which has been suggested by my noble and learned friend.

As to the form of judgment to be pronounced here; in the first place, I apprehend that the interlocutor of the Court below must be reversed; then, I presume, there will be a remit to the Court to recal the interdict and repel the reasons of suspension.

Lord Cairns—My Lords, the learned judges in the Court below who granted the interdict in this case appeared to have been very much influenced in their views by a consideration of the great danger which would arise to the public unless the fullest care was taken as to the mode in which license was granted for making tramways of this description.

In those considerations I entirely concur; but it appears to me that the time has passed in this case for giving weight to them, and that all that the Court below had to do, and all that this House have now to do, is to ascertain what is the extent and limit of the Parliamentary authority which has been granted to the appellants in this case.

Now, if the agreements between the appellants and the different local bodies are put aside for a moment, it is perfectly clear that under the Act of Parliament the Company were making, when they were interfered with by the interdict, or had made, a tramway along North Bridge Street in exactly the way that was authorised by the Act of Parliament, and that, in point of fact, the Act of Parliament would not have authorised them to make it in any other way than the way in which they had made it. If there were nothing more in this case, there would be nothing more for argument.

But the authority given by the Act of Parliament is attempted to be controlled by the 1st section of the agreements which were entered into by the local bodies. Now I own that it is not very easy to give a clear and distinct interpretation to that first section of those agreements. I doubt very much whether the parties had themselves in their own minds any very clear and intelligent apprehension of what that first section meant; but if it is not possible to give a very clear and distinct meaning to the section, certainly that section cannot be made available for the purpose of curtailing and restraining the clear and distinct power entrusted by the Act of Parliament to the appellants.

As it appears to me, the utmost that the first section of the agreement does is this:—It provides that the provisions of the general Acts should apply to the Act of Parliament which was then being solicited by the Company, or to any other Private Act of Parliament which the appellants might afterwards have obtained, as fully in every respect as if the same, that is, as if the Private Act, were a Provisional Order obtained under the Tramways Act, 1870.

Now what advantage that would give to the parties, or was supposed to be likely to give to the parties, I am not quite sure; but I see clearly that the words they have used hypothetically are these

"as if the Act of Parliament were a Provisional Order obtained under the Tramways Act, 1870." But if the Provisional Order were obtained under the Tramways Act of 1870, the time for objection had passed, the time for exercising a veto was gone, the Provisional Order was in existence, and whether that were an order which had passed through its stages properly or improperly is quite immaterial.

The Act of Parliament, coming over the Order and upon the top of the Order, did away with all consideration of the foundation of the Provisional Order, and took the place of the Provisional Order as an Act of the Legislature. It appears to me that it is only with that Act of the Legislature that we have now to do, and that there is no power in any Court to restrain the appellants so long as they follow the provisions of the Act of the Legislature, which it is not pretended they are not doing. Therefore, my Lords, I agree that in this case the interdict should be recalled.

LORD HATHERLEY—My Lords, I also concur in the opinion in which your Lordships have arrived, that the interdict should be recalled, and that relief should be given to the appellants, and I will very shortly state my reasons for coming to that conclusion. If your Lordships look at the General Act of 1870 you find that it is divided into three parts, the first part relating to the mode of proceeding to obtain a Provisional Order, the second and third parts being of a more permanent character, the one relating to the construction of the tramway, and the other to certain provisions usually introduced into other Acts giving power for making tramways of this description. The second and third parts are introduced into this Private Act which we are considering. The first part, being in its nature temporary, is not so introduced, but it happens that in that first part there is the 9th section upon which so much discussion has arisen, by which section a power is given to one-third of the frontagers, or persons living in front of the line of tramway about to be constructed, to put an absolute veto upon the making of any Provisional Order empowering the construction of such a tramway unless a certain distance be kept between the extreme edge of the tramway and the kerb at the outside of the footpath.

Now, my Lords, there is no possibility of arguing this case with success as the respondents have argued it, if that Act had expressly said no Provisional Order can be made at all which will bring the edge of the tramway within that distance of the footpath, irrespective of there being consent on the part of the frontagers or not, for the introduction of the question of the consent of the frontagers makes it clear that such an order is not in itself an invalid order.

It is an order which has the full force of an Act of Parliament unless that dissent has been interposed before the order is made. Therefore, it is not upon the face of the order a bad order. The order is perfectly good, although it gives a more limited space,—it may be much more limited space—between the tramway and the footpath, because when the order is once made and there has been no opposition on the part of the frontagers, it will be assumed that it is a proper order. The order is full and complete.

That being so, we come to the second Act, and the agreement recited in it. I think it is of considerable importance for the purpose of coming to a just conclusion as to the intention of that Act of Parliament to observe that the Act pointedly introduces the second and third parts of the General Act, and does not introduce the first part. The only way in which the first part can be said to be introduced at all is, that the Act confirms by its 44th section an agreement made between the parties, that is to say, between the local board and the promoters of the tramway, and that agreement *inter se* provides that as between the parties it shall be as if the first part of the General Act had been introduced also. Still it does not introduce the first part at all, except by saying, as between you, the parties to the agreement, it shall be as if it were expressly enacted. The very fact of the Private Act saying that the second and third parts shall be considered to be incorporated in this Act, is an exclusion, as it appears to me, of the first part.

Upon the whole, my Lords, the agreement comes to this, as it appears to me, that the local bodies stipulate that as between themselves and the promoters, not only as to this Act, but as to all future Acts as well as to this, whenever you, the promoters of this tramway, are minded to have any tramway whatsoever in Edinburgh, you shall not have any advantage over us by proceeding by special Act instead of proceeding by way of Provisional Order; but it shall always be dealt with as between you and us, as if the powers you obtained were powers obtained by virtue of a Provisional Order, and therefore they shall be subject to all such rights and advantages as we might claim by virtue of that arrangement. Now, it is said it is very difficult to point out what the particular advantages would be of that arrangement. I quite agree that it is extremely difficult to point out what the particular advantages would be, but I am quite clear of one thing, and that is, that the local authorities had not the slightest idea that they had a right to object only at the proper time, that is to say, before the order was made, in consequence of the proper distance between the tramway and the footpath not being observed. In the present state of things the local authority might say to the Company—"This shall be treated as if a Provisional Order had been made, and we insist on your carrying out the article in our agreement—that you will execute the tramway in the manner you have undertaken to do, that is to say, according to your plans," which is a matter perfectly inconsistent with the contention of the respondents.

My Lords, I certainly feel that degree of diffidence which we ought always to feel in these cases, considering the great weight of authority in the Court below. I feel the weight of that authority, but I cannot bring my mind to any other conclusion than that which I have stated. It must no doubt be owing to some defect on my own part that I cannot see the force of the reasoning leading to the contrary conclusion.

Interlocutors reversed, with a remit recalling the interdict; the appellants to have their costs in the Court below.

Counsel for Appellants—The Lord Advocate, Mr (Clark), Q.C., and Mr Mansfield. Agents—Lindsay, Paterson, & Hall, W.S., and Ashurst, Morris, & Co., Westminster.

Counsel for Respondents—Mr Lloyd, Q.C., and Mr M'Laren. Agents—White-Millar, Allardice, & Robson, W.S., and Simson, Wakefield, & Simson, Westminster.

Thursday, July 10.

MRS CAMPBELL PATERSON *v.* REV. DR M'LEOD.

Teinds—Valuation—Prescription.

Held (affirming judgment of Court of Session) that it had not been proved that the teinds of certain lands were valued, and *observed* that no plea of precription could apply unless the identity of the lands were made clear.

The question to be determined under this appeal was whether the teinds of the lands of Knock and Gualachaolis or Gualachelish, in the parish of Morvern, and county of Argyll, belonging to the appellant, Mrs Campbell Paterson, were or were not valued.

The proceedings commenced with a summons of augmentation, modification, and locality in the Court of Teinds, at the instance of the respondent, the Rev. Dr John M'Leod, minister of the parish of Morvern, against the appellant and the other heritors of that parish, concluding for an augmentation of his stipend.

After certain preliminary procedure, the Court of Teinds, on 22d November 1865, modified a stipend of eighteen chalders of victual, half meal half barley, for Dr M'Leod, with £8, 6s. 8d. for furnishing communion elements, and remitted to the Lord Ordinary to prepare a locality, "but declaring that this modification and the settlement of any locality shall depend upon its being shown to the Lord Ordinary that there exists a fund for the purpose."

The Lord Ordinary (BARCAPLE), on Ist December 1865, appointed the heritors to produce their rights to teinds and valuations thereof, and thereafter allowed the minister to lodge, on 16th March 1866, a condescendence "regarding the teinds of the parish."

Answers were lodged for the appellant, Mrs Campbell Paterson.

The Lord Ordinary on 22d January 1868 pronounced the following interlocutor:—

"The Lord Ordinary having heard counsel for the parties in the question between the minister, condescender, and Octavius Henry Smith, Esq., and others, heritors in the parish, respondents, and having considered the closed record, productions, and whole process—Finds that the objections stated by the minister to the decree of approbation and division in 1786 are excluded by the negative prescription: Finds that the teinds of the lands belonging to the several respondents, which are condescended upon by the minister as being unvalued, must be held to have been included in the valuation by the sub-commissioners in 1629, approved of by the Teind Court in 1785 and 1786; and appoints the cause to be enrolled, that parties may be heard upon the effect of this judgment, and on the question of expenses.

"*Note.*—The sub-valuation of the teinds in the old parishes of Kilcomkeill and Killentak, composing the united parish of Morvern, was carried through by the sub-commissioners for the presbytery of Argyll, at their own instance in 1629. From the terms of their report, which applies to all the parishes in the presbytery, the Lord Ordinary is of opinion that they must be held to have intended to value the whole teinds in each parish, and that they made and reported the valuation on that understanding. Processes of approbation of the valuations of the united parishes were brought by the Duke of Argyll in 1785, and by the whole other heritors in 1786. The last of these processes comprehended also a division of the valuation among the pursuers. It seems to be clear that the whole teinds of the parish have ever since been held to be valued until the present proceedings were taken by the minister. In particular, it appears that in the last locality, in 1804, the former minister stated that the whole teinds of the parish were valued, and on that ground got a judgment of the Court altering the original modification of his stipend, and modifying it to the whole teinds of the parish, except £80 Scots, then paid to the minister of Inverary. The present minister now undertakes to show that there are unvalued teinds on which his augmented stipend may be localled. For this purpose he condescends on the names of certain subjects as belonging to the several respondents, and appearing in the titles to their lands, some at an earlier, some at a later, date, which he maintains are not comprehended in the valuation. None of these names occur in the report of the sub-valuation, as it is set forth in the decrees of approbation, or in two documents in the Teind Office, each purporting to be a copy of it. But the respondents maintain that the subjects which may at any time have been so designated were valued along with the whole lands belonging to their predecessors, under the names in the sub-report.

"The respondent, Mr Smith, in regard to three of these subjects—Acharn, Correspein, and Mucherach, the names of which occur in his titles, and do not appear in the sub-valuation, maintains that the minister's contention is excluded by the terms of that part of the decree in the process of approbation and division in 1786 which divides the *cumulo* valuation among the heritors, who were pursuers of that process. And the respondent, Mrs Campbell Paterson, maintains the same plea in regard to the lands of Knock, which are not named in the sub-valuation. The decree, after approving of the report of the sub-commissioners in ordinary form, proceeds—'and in terms thereof, and of the scheme of division of the *cumulo* valuation after insert, have found and declared, and hereby find and declare, the just worth and constant yearly avail of the teinds, parsonage and vicarage, of the respective pursuer's lands libelled, to be now and in all time coming the particular quantities of victual and sums of money following, viz.:—The parsonage teinds of the lands of Auchagallin,' &c. . . . . '*Item*, the parsonage teinds of the lands of Auchnaha, Arneis, and Auchabeig, and Cowlchyllis, *now called Knock*, with the pertinents belonging to John Campbell of Ardsliganish,' &c. . . . . '*Item*, the parsonage teinds of the lands of Augorie, Darinamant, Anchengawin, Unibeg, Dariness, commonly called Airich Innes, *comprehending the pendicles called Correspein and Mucherach and Achiharn*, with the pertinents belonging to John Maclean of Inverscadale.' Cowlchyllis and Dariness are both contained by name in the report of the sub-commissioners, and the respondents maintain that the terms of the decree of the High Court above set forth conclusively determine that the subjects in dispute were valued under these names. The Lord Ordinary is of opinion that this is a well-founded contention, and that it is impos-