review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary, and without the necessity of any counter reclaiming note; and after a reclaiming note has been presented, the reclaimer shall not be at liberty to withdraw it without the consent of the other parties as aforesaid; and if he shall not insist therein, any other party in the cause may do so, in the same way as if it had been presented at his own instance."

This enables the reclaimer to bring under review the interlocutor of July 8, 1868, as well as the subsequent one.

The respondents argued, that under § 28 of the same Act, the interlocutor of July 8, 1868 could not be brought under review, because it had become "final." The section is as follows:—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section, except under sub-division (1), shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily; and when the reclaiming note is advised, the Division shall dispose of the expenses of the reclaiming note, and of the discussion, and shall remit the cause to the Lord Ordinary to proceed as accords: Provided always that it shall be lawful to either party within the said period, without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired: Provided also that nothing herein contained shall be held to prevent the Lord Ordinary or the Court from dismissing the action at any stage upon any ground upon which such action might at present be dismissed according to the existing law and practice."

Authorities quoted—*Bannatyne's Trs.* 7 Macph. 813; *Scheniman*, June 25, 1828, 10 S. 1019; *Forbes*, 10 S. 374; *Matthew*, 6 D. 718.

The Court, before disposing of the question raised, appointed Counsel to be heard on the merits.

Counsel for Reclaimer—Balfour. Agent—A. Morison, S.S.C.

Counsel for Respondent—Rutherford. Agents—Murray, Beith, & Murray, W.S.

Friday, February 21.

FIRST DIVISION.

[Lord Gifford, Ordinary.

BLACK AND OTHERS *v.* EDINBURGH TRAMWAYS COMPANY.

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* (*diss.* Lord President) that the former must prevail, notwithstanding that the relative Parliamentary plans referred to in the Special Act appeared to sanction the variation.

This was 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 Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 24th July* 1872.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, statutes, and plans founded on, and whole process, Finds that, according to the sound construction of the statute incorporating the respondents, being 'The Edinburgh Tramways Act, 1871,' and the statutes and agreements incorporated in the said Act, the respondents had, and have, no right to lay down or construct their Tramway upon that portion of North Bridge Street extending from the High Street of Edinburgh to the open part of said North Bridge, so 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; and this in respect that 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, have timeously objected thereto.: Finds that, if within the portion of North Bridge Street above mentioned, the respondents' tramways are so constructed that, for a distance of 30 feet or upwards, a less space than 9 feet and 6 inches intervenes between the outside of the footpath and nearest rail of the tramway, the suspenders are entitled to have the same lifted and removed; and with these findings, Appoints the cause to be enrolled, reserving in the meantime all questions of expenses.

"*Note.*—When this case was argued before the present Lord Ordinary in the Bill Chamber in April last, on the question of interim interdict, the only documents produced to the Lord Ordinary, besides the Statutes founded on. were a copy or tracing from the Parliamentary plan, No. 17 of process, and a copy of the Parliamentary notice that the Act was applied for, the copy notice being No. 19 of process.

"The copy of the Parliamentary notice of the intention to apply for the Bill was founded on by the respondents, but the Lord Ordinary was of opinion that it formed no part of the Statute, and could not be referred to as explaining or controlling the words of the Act.

"Immediately before the closing of the record, there was produced a copy of the complete Parliamentary plans, prefixed to which, and numbered as a sheet of which, is a sheet of letterpress, containing a description of the position of the centre line of each tramway. This was seen by the Lord Ordinary for the first time at the debate on the closed record, and it certainly is a very important part of the respondents' case, and meets to some extent the considerations which, in the Bill Chamber, induced the Lord Ordinary to grant interim interdict.

"As the case now presents itself to the Lord Ordinary, he thinks it is attended with very great difficulty. Indeed, the case is nearly one of contradiction or incompatibility between different parts of the respondents' statute, and the question is, which portion shall be construed as overruling or controlling the other? This is always a nice and difficult question, but the peculiarities of the present case are such as greatly to enhance the delicacy of reaching the true construction of the statute as a whole.

"After much consideration, aided by the very able argument with which he was favoured on both sides, the Lord Ordinary, though with much hesitation, adheres substantially to the view which he expressed in his note in the Bill Chamber, of date 13th April last. Although much shaken in his opinion by the production of the Parliamentary plan and relative letterpress, he has not been displaced, and he has not been able to come to the opposite conclusion from that at which he arrived in the Bill Chamber. The Lord Ordinary respectfully refers to his note of 13th April last, and without repeating the views therein expressed, he will merely indicate the reasons which have led him, notwithstanding the Parliamentary plans and letterpress, to adhere to the results then arrived at.

"1. Beyond all doubt, the agreement between the Lord Provost, Magistrates and Council and the Tramway Company, dated 29th March 1871, and subsequent dates, forms part of the respondents' Act. It is expressly embodied therein, 'made part of the Act, and to be carried into effect accordingly.' It forms schedule No. 1 of the Act.

"Now, the first head of this agreement expressly provides that the whole provisions of the General Tramways Act, 1870, shall apply to the respondents' Special Act then passing through Parliament, 'as fully in every respect as if the same were a provisional order obtained under the Tramways Act, 1870.'

"It is plain some effect must be given to this enactment if at all possible. It must be held to mean something, and the most natural meaning which can be given is, that the respondents, although they were getting a Special Act, should be held to be in no different or more favourable position than if they had obtained a provisional order confirmed by Act of Parliament. The respondents did not want this; they wanted something better than a confirmed provisional order, and accordingly they only proposed to embody in their Act parts 2 and 3 of the general statute, leaving out part 1, where the clause now founded on appears. But they were defeated, and compelled by the Parliamentary agreement to take the whole of the General Act, part 1, as well as parts 2 and 3, and in particular, section 9 of the General Act, which is contained in part 1 thereof; and, as if to make sure that section 9 should not fail, it was stipulated that the whole of the General Act should apply to the respondents' Special Act, 'as fully in every respect as if the same were a 'provisional order.'

"3. It is thought that, in virtue of this provision, the respondents' Special Act, with all its relative plans, and their embodied letterpress, must be read as if it were a provisional order enacted by Parliament, and this may afford a rule of interpretation to be applied if apparent contradictions appear. The Special Act of 1871, though obtained as an Act, is to be read as if it had been obtained in the form of a provisional order.

"The respondents argue that part 1 of the General Act has no application at all, for it only regulates the mode of obtaining provisional orders. But this is a mistake, for besides providing rules for obtaining provisional orders, it declares (section 9) what powers provisional orders shall confer, and prescribes a time (section 18) when such powers shall expire.

"The difficulty which the respondents have to meet is, that unless these clauses apply, the first head of the agreement which is made part of the Act is absolutely meaningless. The provisions as to the method of obtaining a provisional order did not, and could not possibly, apply to the Act which the respondents were carrying through Parliament, and if the incorporation of part first meant nothing else, it would have no effect at all. But in reading the statute and agreement, a conclusion like this is to be avoided, if another possible and reasonable interpretation presents itself. The Lord Ordinary feels himself compelled to adopt the view, that the Special Act must be read and interpreted as if it had been a confirmed provisional order.

"4. But even then, the difficulty remains raised by the terms of the Parliamentary plan, and the sheet of letterpress, that this is a provisional order which gives power to the respondents to make the tramway nearer the curb of the North Bridge than the prescribed limits, and yet at the same time enacts (section 9) that 'no tramway shall be authorised by any provisional order,' (and the present Act shall be held as a 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 occupants object.' The question is, How are these apparently conflicting provisions to be interpreted or reconciled?

"5. Now, the Lord Ordinary feels himself compelled to give effect to section 9 of the General Act, even although it in one view overrules and contradicts the Parliamentary plan, taken in connection with its sheet of letterpress. He has come to this conclusion, because the words of section 9 are express, whereas it is only by implication that the Parliamentary plan and its letterpress authorise the tramway to be laid nearer the curb-stone than the prescribed distance.

"There is no ambiguity in the provision of section 9,—there is no possibility of misunderstanding it; and if it applies to the respondents' Act (and the Lord Ordinary thinks it does), then it is an express enactment applicable to every narrow street like the North Bridge at the parts embraced in the present suspension.

"Now, it is no answer to an express enactment that there is an implied power the other way—and the power given by the plans is merely an implied power. The plans do not show that less space will be left outside the tramway than 9 feet 6 inches. Even the letterpress does not mention this. All it mentions is, that the tramways are to be a certain distance from an imaginary centre line, and it is only by a careful measurement on the ground of the street itself that any one could possibly discover that the space outside the tramway would, at certain points, be less than the specified breadth. If it be true that mere implication must always yield to express enactment, then the express enactment of section 9 must overrule the implication deducible by the aid of actual mensuration from the plans and letterpress.

"If it had been intended to overrule section 9 in the case of the North Bridge, there should have been an express exception. For example, if it had been enacted that section 9 shall not apply to the North Bridge, or if it had been said in so many words that the space outside the rails at the North Bridge shall only be 6 or 7 feet, instead of being 9 feet 6 inches, then section 9 would have been overruled by an express enactment. As the Act stands section 9 is the leading enactment. The position of the rails deducible from the plans must be held as subordinate thereto.

"6. It was admitted by both parties that if section 9 applied, then the present suspension was timeous notice by the objecting owners and occupiers, for the rules of the Board of Trade were only issued 9th May 1871, so that notice in terms thereof could not possibly be given either by the promoters on the one hand, or by the objectors on the other.

"Under the minute No. 20 of process, the tramway has been provisionally formed, subject to removal, if the suspenders' pleas are well founded. Instead of ordering removal, the Lord Ordinary has thought it best to fix the rights of parties by findings: and if these findings be affirmed on review (and it was intimated that one or other of the parties would certainly take the case to review), removal can be then ordered, and the case exhausted. This avoids further question as to interim possession. For the same reason, the Lord Ordinary has reserved the question of expenses, but if the Lord Ordinary's views are right, the suspenders are entitled to expenses."

The Tramways Company reclaimed.

Argued for them that § 9 of the General Tramways Act does not apply, and that if it did it would not bear the conclusion which the complainers sought to draw from it,—it has reference solely to certain preliminaries required of parties applying for a provisional order, and does not therefore apply here in the case of an Act of Parliament. The line as laid down and worked is in strict conformity with the Parliamentary plan, and the Company have no power to lay down the line in any other way than they have done, even if it were physically possible, which it is not. In any view, the objection of the complainers comes too late.

Wauchope v. *Dalkeith Railway Company*, Dec. 14, 1837, 1 Bell's App. 252.

Argued for the complainers that the Special Act is only passed subject to the control and regulation of the General Act, and if there is any inconsistency between the two the Special Act must give way. The plans are only incorporated so far as to settle the directions and levels, and certainly cannot be held to override an express enactment. If the respondents found that they were unable to comply with the terms of § 9, they ought to have obtained express special powers dispensing with them.

At advising—

Lord Deas—The complainers are occupiers of more than one-third of the houses, shops, and warehouses in that portion of North Bridge Street of Edinburgh which extends from the open arches of the Bridge to the High Street, and in that character they claim right, which they say the Edinburgh Tramways Act, 1871, confers on them, to object to what admittedly has been done *ex adverso* of their premises,—viz., the laying of the nearest tramway rail, for a space of 30 feet or upwards, within less than 9 feet 6 inches of the outside of the footpath on the sides of the street.

The complainers in the record suggest a distinction between the rights conferred on the Tramway Company by their Act over the portion of North Bridge Street which is *ex adverso* of the complainers' premises, and that portion of the same street which extends from Princes Street to the south end of the open arches of the Bridge. But I agree with the respondents that there is no such distinction. The respondents say, in their answer to article 3d of the record,—"The terms 'North Bridge' and 'North Bridge Street' are used indiscriminately, and the former expression is well known to refer to and include the street extending from Princes Street on the north, to the South Bridge or South Bridge Street on the south, and thus refers to and includes the portions of street at the north end of the North Bridge, and also at the south end of the said bridge, and extending to the High Street, as well as the bridge itself."

All your Lordships know this is correct and consistent with the everyday language of the city. We cannot read that portion of the statute which occurs under the head of "Edinburgh General Post Office to Newington," and doubt that it describes the tramway from Princes Street to High Street, and southward past the front of the College, &c., as one continuous line, including the roadway across the open arches of both bridges, as well as those portions of the roadway which are lined with buildings.

It is quite true, therefore, as the respondents say, that the question is a serious one for the interests of the Company. Although the complainers have chosen to limit their application for interdict to that portion of the tramway which is *ex adverso* of the premises occupied by them, the result of their success must necessarily be the discontinuance of the double line of rails accross the open arches of the North Bridge, where the roadway is very much narrower than it is *ex adverso* of the complainers' premises, and consequently, the continuity of the double line of rails, from Princes Street southward, must be interrupted. That, however, will not relieve us from the duty of enforcing the Act if the complainers' objection be well founded.

That is a question of construction of the Act, and in deciding it we must keep in mind that the Act bears to proceed upon, and incorporates with it, three agreements, to which the parties on the first part were respectively the Magistrates and Council of Edinburgh, the Road Trustees, and the Magistrates and Council of Leith; and the parties on the second part were the promoters of the Edinburgh Tramway Bill, then before Parliament, in whose place the respondents, the Tramway Company, now come. The Act is thus nothing more nor less than a Parliamentary agreement, and, like every other agreement, it is to be construed according to its fair meaning, and in consistency with the probable intentions and good faith of the parties to it.

The three agreements are scheduled and referred to in the Act as parts and portions of it. Section 44 bears—"the agreements which are respectively set forth in three schedules to this Act, are hereby respectively confirmed and made part of this Act, and the same shall be carried into effect accordingly." The first head of these agreements

is the only one we have here directly to deal with, and as it is the same in each of the three, it will be sufficient to quote it from the first agreement, in which the Magistrates and Council of Edinburgh are designated as the parties of the first part. It is in these words:—"First, 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.'"

It is important to observe in the outset that this first head consists exclusively of stipulations by and in favour of the Local Authority. Two things are stipulated for, viz.—*first*, that the Local Authority shall have all the powers, &c., which the existing or any future general Tramways Act had conferred or might confer on any Local Authority. *Second*, That the whole provisions of these general Acts should apply to the Act which the second party was then promoting in Parliament, that is, to the Edinburgh Tramways Act, 1871, which has since passed, or to any Act which the Company might thereafter obtain, "as fully in every respect as if the same were a Provisional Order obtained under the 'Tramways Act, 1870.'"

This at once raises the question—What would have been the provisions of the Edinburgh Tramways Act, 1871, so far as regards the matter now under consideration, if that Act had been a Provisional Order?

To solve this question, we have only to turn to sect. 9 of the General Act of 1870, which, together with the other provisions of that Act, is declared part of the special Act, and there we find that "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."

If, therefore, the Act had been a Provisional Order, the complainers would clearly have been entitled to object to the tramway rail coming so near to the footpath or foot pavement as it does *ex adverso* of their premises. A condition is no doubt added, in section 9, that the objectors "shall, in the prescribed manner and at the prescribed time, express their dissent from any tramway being so laid." And, by sect. 7, it is enacted that, in considering an application for a Provisional Order, the Board of Trade "shall consider any objection thereto that may be lodged with them on or before such day as they from time to time appoint, and shall determine whether or not the promoters may proceed with the application." But the Board of Trade appointed no time for objecting to Provisional Orders till 9th May 1871, when the regulations issued were such as the promoters themselves could not, and did not attempt to comply with, by giving the notices on the one hand, which were to be met by objections on the other. Besides, as the respondents themselves plead (Ans. to Stat. 5), these rules as to notices and time for objections have no application, as no Provisional Order ever was applied for. It is not surprising, therefore, that, as the Lord Ordinary states in his note—"It was admitted by both parties that if section 9 applied, then the present suspension was timeous notice by the objecting owners and occupiers," as the rules issued by the Board of Trade on 9th May 1871 could not possibly apply either to the one party or the other.

It was not contended before us that any error had been committed in making this admission, and I can see none. The question is not one of time, but of substance. There is nothing about time in the first head of the agreement which forms part of the local Act of 1870. It is there substantially agreed that section 9 of the General Act shall apply to the local Act as fully as if the local Act had been a Provisional Order. If the Act had been a Provisional Order, the complainers would have had an opportunity of objecting to what was proposed to be done in front of their premises; and the question is, whether, according to the fair meaning and good faith of the agreement embodied in the Act, this portion of the agreement, or, in other words, this clause of the Act, can be held, as the respondents contended to us, and as the Lord Ordinary says they contended to him, to be "absolutely meaningless?" The Act, sect. 44, already quoted, incorporating the agreements with the Act, says—"and the same" (that is, the agreements) "shall be carried into effect accordingly." But the contention now is, that this part of the agreement shall have no effect at all—which is not, I think, a construction to be put upon any agreement, if by any reasonable reading such a result can be avoided.

I agree with the Lord Ordinary in the Note to his last interlocutor, correcting, so far, the view taken in the note to his previous interlocutor, that, taking the local Act in connection with the Parliamentary plan and relative letterpress, it must be held the respondents are authorised, and indeed taken bound, by their Act, to lay a double line of tramway from Princes Street southward along the whole of North Bridge Street. But this does not create, in my mind, the same difficulty which it appears to have done in the mind of the Lord Ordinary, because the authority and obligation, as I read the statute, are not absolute but conditional—the condition in both cases being that no objection shall be made by one-third either of the owners or occupiers of premises abutting upon that part of the roadway where the nearest rail comes within the prescribed distance of 9 feet 6 inches of the footpath. There is thus nothing contradictory between the authority and the obligation on the one hand, and the right to object on the other. It was quite consistent with the agreement that statutory authority should be given to make the line, because otherwise the line could not have been made, even if the whole owners and occupiers had been desirous that it should be so, in place of being opposed to it. But, if I construe the Act rightly, this authority was given subject to the proviso that if one-third of the owners or oc-

cupiers objected, no rail should be actually laid within the prescribed distance of the footpath.

The complainers, whatever notices had been given to them, could not have opposed the passing of the Act. The answer to them would have been that the Act embodied and gave effect to the very agreement on which they founded,—that they would have the option stipulated for of objecting to any rail being laid within the prescribed distance of the footpath *ex adverso* of their premises, and that they had no ground, therefore, for opposing the Act.

So soon, however, as the respondents proposed to construct the tramway in the manner now complained of, it was intimated, on the part of the complainers, as is admitted in the record (Ans. to Stat. 12), that they objected to this being done, and the present application for interdict was then presented, and interim interdict obtained. This interim interdict was sometime thereafter recalled, by arrangement of parties,—the respondents being willing to take the responsibility of forming the tramway in the meantime, subject to removal if so ordered by the Court, and the complainers not being willing to take the risk of a claim of damages if the interim interdict should not be confirmed. Consequently, as the Lord Ordinary states in his Note,—"Under the minute, No. 20 of process, the tramway has been provisionally formed, subject to removal if the suspenders' pleas are well founded."

My opinion is that the complainers' 2d and 3d pleas, taking them, not separately, but together, are substantially well founded, and if this view required confirmation, which I think it does not, from the probabilities of the case, that confirmation would be amply afforded by examination of the plans and other productions, showing the position and the measurements at different points of the street called North Bridge Street now in question, and the consequent danger to the public from a double line of rails being laid down there, when reference is had to the purposes notoriously served by that street, which neither have been nor could be disputed by the respondents.

As I have already observed, North Bridge Street, or, as it is familiarly called, "The North Bridge," extends, as the respondents correctly state in the record, from Princes Street to High Street, and the effect of adhering to the Lord Ordinary's judgment will necessarily be to prevent a double line of rails in any part of that street. But this, I think, is just what the *proviso* was intended to enable the owners or occupiers of premises in that street to enforce, if they wished to do so. It is, I admit, surprising that a matter so important to the public generally should have been left to the option of these private complainers. The foot pavement on each side of the street, where it crosses the open arches of the bridge, is barely broad enough to admit of three persons walking abreast. The tramway rails at each side come within some 13 inches or thereby of the foot pavement. The tramway cars project some 6 inches or thereby beyond the rails. The consequence necessarily is, that if the street is crowded, or if a storm of wind and rain, with or without the protection of umbrellas, causes those of the pedestrians who are next the outside of the pavement to swerve from the perpendicular in that exposed position, or if men's cloaks or greatcoats, or ladies' dresses, flaunt in the wind, the danger is imminent of their being caught by the passing car; and if any of the blind men who pass there habitually from and to the Blind Asylum, happen to be met with, there must either be a collision which may throw both parties in the way of the car, or the passenger who has his eyesight must step partially off the foot pavement to let the blind passenger pass, at the risk of being cruelly killed upon the spot, as happened to a highly respectable citizen, known to us all, since this case was last debated, although he was a man in vigorous health and in full possession of all his faculties. Then, as regards the space between the two lines of tramway, it is barely sufficient to hold a single carriage, so long as that carriage keeps precisely in the centre of it. If two tramway cars, going opposite ways, happen to come parallel to each other and to the carriage which is in that position, the deviation of little more than a few inches to either side, from the restiveness of the horse or agitation of the driver, may, at any moment, cause a collision fatal alike to the carriage and its occupants. These are results which no ordinary care could avoid. Once in the centre space, where one carriage cannot pass another without going upon the rails, the occupants of two carriages, be these carriages of what sort or construction they may, must await the fate which Providence and the Tramway Company have in store for them; and I need not tell your Lordships that all this refers to a street which forms the only great and properly available highway between what are, in local position, two great and growing cities, although now united by a common name, viz., the old and new towns of Edinburgh, there being only two other possible ways of crossing the great valley which lies between, and both of these ways being unfitted, by their windings and gradients, to accommodate the bulk of the traffic which consequently passes along the streets in question.

But, while it must thus be admitted to be surprising that the Local Authority should ever have agreed to a double line of tramway rails being authorised to be laid along such a street as North Bridge Street, with so uncertain a security against that authority being acted on as was afforded by the option entrusted to a few private individuals to object to it in the form of an expensive lawsuit, it would have been still more surprising if no means whatever of objecting to or preventing a result so incompatible with the safety of the public had been stipulated for by the Local Authority, to whom it belonged to protect the public interests. For the credit of the Local Authority it was necessary to stipulate something with that view; and while I think it should not have been left to a limited number of private individuals to prevent a result which ought never to have been allowed to be possible, I think, at the same time, that it is impossible to construe the stipulation as meaning nothing at all, and that it luckily proves, in the result, to be legally sufficient for its purpose, which must be presumed to have been not merely the protection of private interests, but the prevention of imminent danger to human life.

LORD ARDMILLAN—An important and interesting question has been here raised. The facts out of which the question has arisen are few and simple. The difficulty of the case is in the construction of the statutes, and the relative agreement under which the tramways in Edinburgh have been formed.

The Tramway Company hold an Act of Parlia-

ment, passed in 1871, empowering them to form and lay down tramways in different parts of the city of Edinburgh; and one of these tramways is described as "a Tramway from the Edinburgh General Post Office to Newington, passing along North Bridge Street, the roadway of the North Bridge, South Bridge Street, &c.," to Newington.

I agree with the Lord Ordinary in disregarding an objection taken by the complainers to the terms of the statutory description of this line. I think that the tramway must be continuous, that the line is sufficiently described, and that the statutory authority and provisions must be held as applying to the whole line. On this point I have nothing to add to what Lord Deas has so clearly explained.

By the 47th clause of the Act of 1871 it is enacted "That nothing herein contained shall be deemed or constructed to exempt the Tramways from the provisions of any General Act relating to Tramways now in force, or which may hereafter pass," &c. If there be in any General Act relating to tramways a clause providing for the public security, then it is the law of this statute that such clause in the General Act shall affect the tramways constructed under this Act.

But the public safety and welfare was not left by its appropriate guardians without still further protection. An agreement relative to this Act of 1871 was entered into between the Lord Provost, Magistrates, and Town Council of Edinburgh on the one part, and the promoters of the Bill for the Edinburgh Tramways on the other part. By the 44th clause of the Act of 1871 it is enacted that "the agreements which respectively are set forth in three schedules to this Act, are hereby respectively confirmed and made part of this Act, and the same shall be carried into effect accordingly."

By the agreement which is thus made part of the Act of 1871, being set forth in the first schedule above mentioned, it is provided that "the whole provisions of the said Acts (meaning the Tramways Act 1870, and any other General Act relating to tramways), shall apply to the Act of Parliament which the said second party is now promoting, or 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."

A similar provision is contained in the agreement No. 2, between the City of Edinburgh Road Trust and the Promoters, set forth in the second schedule of the Act; and another between the Magistrates of Leith and the Promoters, set forth in the third schedule of the Act, and these are also made part of the Act.

It thus appears,—1st. That the tramways constructed under the Act of 1871 are not exempt from the provisions of the General Tramways Act of 1870; 2d. That the agreement set forth in the first schedule is part of the Act of 1871, and has the force of statute; and 3d. That the whole provisions of the Act of 1870 are, by force of that agreement, and of the statute incorporating it, made applicable to the Act of 1871, and to the tramways constructed under that Act. If there be a clause in the Act of 1870 affecting the public safety and welfare, it is manifest that the question whether, to the present system of Tramways in Edinburgh that clause is now applicable and effectual, is one of great importance.

The 9th clause of the Act of 1870, called the General Tramways Act, is in the following terms:—"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 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 word "prescribed" at the end of this clause is explained by the statute to mean prescribed by any rules made by the Board of Trade under the Act. No rules have been prescribed which exclude these objections. It is clear beyond dispute that, if this ninth clause of the General Act is applicable to the tramway now complained of, then the complaint is well founded. The complainers have undoubtedly the interest which the statute recognises; their number exceeds that which the statute requires, and no good objection has been urged against the manner or the time of their expression of their dissent.

The real question, and indeed, I think, the only question here, is, Whether the complainers can found on the 9th clause of the Act of 1870?

The first part of the Act of 1870, viz., from the 4th to the 21st clauses, relates to procedure by Provisional Order by the Board of Trade, afterwards confirmed by Parliament. According to the agreement, "the whole provisions" of this General Act, no exception being made, are declared to apply to the Act of 1871; and among these whole provisions, I cannot help including the provisions in the 9th clause, more especially as these whole provisions are in the agreement declared to be applicable, "as fully, in every respect, as if the same were a Provisional Order obtained under the Tramways Act, 1870."

We are called on by the Company to construe this agreement in such a manner as to hold the Tramway Company free from the force and obligation of the 9th clause of the General Tramways Act. Of the meaning of the 9th clause there is no doubt. It is said that the promoters have escaped from it; but it cannot be easily that promoters can escape from a clause of this nature. The promoters did not proceed by Provisional Order, but by Act of Parliament, and therefore it is said that the 9th clause does not apply. The Lord Provost and Magistrates, charged with protecting the interests, and especially the safety, of the inhabitants of Edinburgh, were not content to leave the reference to the General Act as it stood under the 47th clause of the local Act. They, by the agreement with the promoters, brought the local Act within the reach and scope of the whole provisions of the General Act, *inter alia*, within the provisions of this 9th clause.

In the view which I take of the 9th clause, as affecting not only the interest of the owners of houses on the street, but the interest of the public, I think that this is the construction of the agreement which is to be presumed as being most in accordance with the duty and the presumable intentions of the parties to the agreement.

It has been contended that the words "Provi-

sional Order obtained," mean obtained as a confirmed Provisional Order, having the force of statute, and if so, it is argued that the 9th clause is not applicable, because its effect would be to prevent confirmation by Parliament, and the result of confirmation would be to exclude the previous provisions. I think that, in order to deal with this argument, it is important to ascertain the meaning of the word "obtain," as used in the Act, with reference to a Provisional Order. I am of opinion that the word "obtain" is used in the Act of 1870 in reference to an unconfirmed Provisional Order, or a Provisional Order in the course of procedure prior to confirmation, and therefore that there is no ground for contending that, in respect of the use of the word "obtain" in the agreement, the provisions in regard to the prior procedure are shut out. This would be to defeat the true meaning of the Act by a very narrow technical objection. I may mention that the word "obtain" is so used with reference to unconfirmed orders in the 4th clause, and so also in the 20th and 21st clauses. Still more important are the provisions of the 12th clause, which enacts that a Provisional Order being then unconfirmed, shall be delivered by the Board of Trade to the promoters; then, by the 13th clause, the Order so delivered shall be published; and by the 14th clause, on proof of the publication of the order thus delivered, the Board of Trade obtain confirmation thereof from Parliament; after that the Order has the force of statute. Now, I think that when this delivery for publication with a view to confirmation is made, the Provisional Order may be truly said to be "obtained" by the promoters to whom the delivery is made, the counterpart of the delivery being the acceptation or obtaining of the order.

Other instances might be given of the use of the word "obtain," but it is unnecessary. In my humble opinion, the whole provisions of the Act of 1870 are applicable to the Act of 1871. The construction proposed to us, by which the words of the agreement are so read as to disengage the local Act from the provisions of the 9th clause of the General Act, is far too narrow and critical to be sound or safe.

In construing together the agreement of 1871, the local Act of 1871, and the General Act of 1870, I think we must keep in view that the great end and aim of the Legislature, in regard to the construction of tramways in the streets of a great city, must be, and doubtless was, the securing the public safety, and we must read this agreement bearing this in mind. If there be a doubt or difficulty in construction, we must read the agreements and the Acts so as to abate, if possible, the hazard to human life. The 9th clause affords important protection to the public. It is on no light grounds that we can hold the clause of the Act of Parliament excluded by force of construction of an agreement such as this. If the Company had proceeded by Provisional Order they could not, against the will of these complainers, have laid down this tramway where it is and as it is. In its present state and position, the tramway complained of is unquestionably in violation of the 9th clause of the General Act; and it is complained of by parties entitled to complain. It is equally clear that the tramway, as now laid along the North Bridge, forming a continuous line with the portion specially complained of, is not laid in a manner consistent with the public safety. The space left between the rail and the footpath is generally too small, and in some places dangerously small. Of this fact we had recent painful experience.

I by no means leave out of view the pleas founded on the Parliamentary plan and the relative letterpress, which are certainly important, and which were forcibly and ably urged in the judicious argument of Mr Mansfield. But I am not prepared to say, either that in respect to the Parliamentary authority given in relation to these plans and relative letterpress and notices, the 9th clause is repealed, or that the Company became entitled to set aside the provisions of the 9th clause, and indeed to set them at defiance, or that the objections of the complainers are now excluded as too late. The argument was ingenious, but not to my mind conclusive.

Unless the 9th clause of the General Act was intended to be continued as a protection to the public, and unless it was imported into the local Act, I cannot see why the first head of the first agreement was made part of the local Act at all, or why the first part of the General Act, and not only the second and third parts, should be made applicable to the local Act. I observe that the Lord Ordinary asks this question—a very natural question I think, and I have heard no satisfactory reply.

I cannot admit that the parties meant to introduce into the agreement words without meaning.

On the whole matter, I cannot suppose that the Legislature intended in 1871 to reject as inapplicable the important provision made in the 9th clause of the General Act of 1870. Nor can I suppose that the Lord Provost and Magistrates of Edinburgh, charged with the duty of protecting the public interests, and guarding the public safety, in a matter necessarily calling for anxious and cautious provision, agree to liberate the Company from this most important statutory limitation of their powers.

The extent of free space on the street along the line of tramway is, in my opinion, a matter of the deepest importance, not only to the interest of those complainers, but to the safety of the public. The effect of enforcing the 9th clause of the General Act is to prevent the construction of a double line of Tramways in this narrow thoroughfare, contrary to the expressed dissent of these complainers; a single line would leave the necessary free space. The authority or provisions of the subsequent Local Act, must, I think, be viewed as given under the condition that the persons interested as these complainers are do not dissent.

Taking that into consideration, and fairly construing the statutes and agreement, I concur in the judgment which the Lord Ordinary has pronounced.

Lord Jerviswoode—I may state that on all the points which appear essential to the determination of the question here raised, I concur in the judgment pronounced by your Lordships.

Lord President—As I have the misfortune to differ not only from the Lord Ordinary, but from all your Lordships, I think it my duty to state the grounds of my opinion at some length. The Complainers here are occupiers of houses, shops, or warehouses in or abutting upon the portion of North Bridge Street which extends to the south end of the North Bridge. They consist, as they

say, of more than one-half of the whole occupiers of the houses in that section of the street. Their complaint, and the remedy which they seek, is confined entirely to that portion of the street. I am not therefore inclined, nor do I consider myself entitled, to offer any opinion as to the rights of the Tramway Company in that part of the North Bridge which is not between the houses, but is open; for no such question can by any possibility, be raised by this record, and, accordingly, the prayer of the note of suspension and interdict distinctly limits their evidence to that portion of the street which extends from the south end of the North Bridge to the High Street of Edinburgh. Now, the ground of the complaint is that the tramways, in traversing that portion of the street, approached nearer than 9 feet 6 inches to the curb-stone of the pavement for a space of more than 30 feet in length, and the complainers maintain that that is illegal under the Act of Parliament which the Tramways Company projected. If I were entitled to consider this as a question of expediency, I would be inclined to agree with a great deal of what has been said by your Lordships, for I consider that nothing could be more undesirable than the construction of such a tramway as now exists upon the North Bridge of this city; but it appears to me that such considerations are entirely irrelevant in this question, which depends entirely upon the construction of an Act of Parliament. The 5th section of the Special Act provides that "subject to the provisions of this Act, and the Acts and parts of Acts incorporated herewith, the Company may make, form, lay down, and maintain the tramways hereinafter described, in the lines and according to the levels shewn on the deposited plans and sections, and in all respects in accordance with those plans and sections, the tramways hereinafter described, with all proper rails, plates, works, and conveniences connected therewith, and may enter upon, take, and use such of the lands delineated on the said plans respectively, as may be required for that purpose."

Now, in order to understand precisely what is the power thus given to the Tramways Company, it is, of course, indispensable to look at that part of the plan, for the purpose of seeing what are the lines and levels according to which the tramways are to be laid down. The first thing that we observe, upon looking to the Parliamentary plan, is that throughout the whole course of the North Bridge, including both portions of North Bridge Street—both that at the north end and that at the south end, —there is laid down upon the plan a double line of tramways. There is therefore power given to lay down a double line of tramways along the whole way, and the Parliamentary plan contains not only drawings, but also certain printed descriptions, which are of the highest possible importance. Upon that sheet of drawings we have this note—"For description and position of centre line in each tramway, see sheet No. 1." That is, to see sheet No. 1 of the volume entitled "Parliamentary Plan." Now, when we come to sheet No. 1 of that volume, which is thus made part of the statute, for the purpose of affording an accurate description of the works to be executed, we find this statement—That there are to be several lines of tramways connecting the different parts of the city, and the sixth of these lines is a line which runs from the Edinburgh General Post Office to Newington. The tramways along that line are called in this part of the Parliamentary plan, and are also called in the body of the statute itself, No. 6 and No. 6A. No. 6 is the eastern line of the double line of tramways along the North Bridge; No. 6A is the western line of the line of tramways along the North Bridge—here again shewing how completely and how very distinctly the Company are authorised to make not one line, but two lines of tramways along the whole of the North Bridge. The description proceeds to show how, after passing the North Bridge, the double line of tramways is continued along the South Bridge, Nicolson Street, and various other streets, until it reaches Newington, and then there occurs this passage, which appears to me to be of vital importance in this question—"The centre line of tramway No. 6 will be throughout at the distance of 4 feet 6 inches from and on the left-hand side proceeding from the commencement to the termination of the tramways of the imaginary centre line of each of the streets and roads through which it is intended to pass, excepting that from a point one chain north of the north end of the bridge, along the street or road called the North Bridge, over the North British Railway, the centre line of the tramway will greatly diverge from the said imaginary centre line, until at the south end of the said bridge it attains a distance of 8 feet 6 inches from and on the left-hand side (proceeding as aforesaid) of the imaginary centre line of the roadway of the bridge, and thence to the south end of the said bridge at a point immediately over the south of Low Market Street, it will continue at the last-mentioned distance from and on the left-hand side (proceeding as aforesaid) from the imaginary centre line of the said roadway, and then will again gradually approach and until in the length of one chain, which is a distance of 4 feet 6 inches, from and on the left-hand side of the imaginary centre line of the street." And then there is a corresponding description of the western tramway upon the same ground, which is called Tramway No. 6A. This is a very minute description, and it is, perhaps, clothed in rather too many words. It might be comprised in a very small number of words, for it amounts to no more than this, that each of the two tramways passing along the North Bridge and North Bridge Street is to be at its centre 4 feet 6 inches from the centre of the street, except that in the open part of the bridge it is to be a great deal further from the centre. At this open point it is to be 8 feet 6 inches from the centre.

I have already said that it is needless to deal with that portion of the bridge which is unenclosed by houses, because it is not within this case in any form whatever, and therefore the important point here is, that the centre line of No. 6, and equally the centre line of No. 6A, in passing along North Bridge Street, must be 4 feet 6 inches, neither more nor less, from the centre line of the street. Now, that being matter of positive enactment, from which the Tramway Company cannot escape, let us see what the necessary consequence of this is. In the record it is stated, in the ninth article of the condescendence, that "the distance between the curb-stone on the west side and the curb-stone on the east side of the North Bridge measures only 31 feet 10 inches at the top to 32 feet 6 inches at the bottom of the said street; and if a double line of rails is laid down in said street, with the usual distance between the two inner rails, the space intervening between the outside of the footpath on

either side of the road and the nearest rail of the tramway will be less than 9 feet and 6 inches." That is admitted. Parties therefore are agreed on that, but it is better not to leave a matter of such vital importance in the construction of this statute, even to the admission of parties, and I therefore proceed to show that it is certainly the case, and that it is physically impossible otherwise to construct the tramways. The total breadth between the footpath at the nearest part is 31 feet 10 inches, one-half of which is 15 feet 11 inches. One half of the street, therefore, on each side of the imaginary line of the centre, is 15 feet 11 inches from the curb-stone. The centre line of each tramway is 4 feet 6 inches from the centre line of the street, and must be, as a matter of statutory enactment. That leaves 11 feet 5 inches of breadth from the centre line of the tramway to the curb-stone. The breadth of the gauge of the tramway is fixed by section 25 of the General Act at 4 feet 8½ inches. Now, taking one-half of that space, viz., 2 feet 4¼ inches from the remaining breadth of 11 feet 5 inches, there remains only 9 feet and ¾ of an inch between the outer line of each tramway and the curb-stone. It seems to me therefore to be mathematically demonstrable, that it is impossible to construct the lines of tramways authorised by this Act of Parliament, in such a way as to escape from the result, that the space between the outer line of each tramway and the curb-stone shall be less than 9 feet 6 inches. If, again, you take the broad part of the street, where the total breadth is 32 feet 6 inches between the curb-stone, you will find a corresponding result. The distance then between the outer line of the tramway will not be so small as in the former case, but it will still be under 9 feet 6 inches. It seems to me demonstrable, then, that this Act of Parliament has authorised the Tramways Company to make a double line of tramway along the North Bridge, and to make it in such a way that in that part of North Bridge Street to which the present complaint refers, there must be, throughout the whole of it, a less space between the outer line of each tramway and the curb-stone than 9 feet 6 inches.

Now, it is quite possible that, notwithstanding this very distinct authority given to the Tramways Company by their statute, there may be other clauses in the Act of Parliament which prevent the Company from carrying it into execution, and certainly I understand that to be the opinion of your Lordships—that the line is authorised to be laid down as it has been laid down, but that, notwithstanding it being so authorised to be laid down, it is illegal. That appears to me to be a singular construction of an Act of Parliament; but still it may be so. Some Acts of Parliament are very extraordinary in their construction, and even very self-contradictory, and we must be quite sure we have not such an Act of Parliament to deal with here.

It is not immaterial to notice, in connection with the authorities so given to lay down tramways, without reference to the 9 feet 6 inches measurement, that there is a clause in this statute, section 8, which contemplates the construction of tramways within 9 feet 6 inches of the pavement, and provides a remedy, or at least, provides for the abatement of any inconvenience thence arising. The 8th section provides that,—"Where in any road in which a double line of tramway is laid, there shall be less width between the outside of the footpath on either side of the road and the nearest rail of the tramway than 9 feet 6 inches, the Company shall and they are hereby required to construct a passing-place or places, connecting the one tramway with the other, and by means of such passing-place or places the traffic shall, when necessary, be diverted from one tramway to the other." Now, surely, if there is in this statute, either by incorporation or in any other way, a provision that there shall be no tramway within 9 feet 6 inches of the pavement, this was a very unnecessary clause. But it was a very necessary clause if that authority which I have shown had been given to the Company stands in full force, and is not derogated by any other part of the statute. It is not said that there is anything in the clauses of the Special Act itself, or in any of the general statutes incorporated with the Special Act, that affects this question at all, or could be construed so as to derogate from the authority given by the leading section of the Special Act—the fifth section—with the relative Parliamentary plan. But it is said that there are three agreements, which are incorporated with the statute, and which have the effect of introducing into the statute a provision that no line of tramways shall be constructed in the way complained of in this suspension and interdict. It is needless, your Lordships have said, to refer to more than one of these agreements, for they are all substantially the same; but it is of some importance probably to observe that the present complainers are not parties to any of these agreements.

I do not mean to say that the complainers, more than any of the other inhabitants of Edinburgh, may not be very well entitled to avail themselves of stipulations made on behalf of the community by the Provost and Magistrates. But it must be kept in mind that they are not parties to this agreement, and at the same time that the Provost and Magistrates, as the Local Authority, are bound by these agreements just as much as the Tramways Company. Now there is one clause in the agreement specially founded on, that between the Tramways Company and the Magistrates of Edinburgh, which appears to me to be one of great importance. Under the statute all that was done was to empower the Tramways Company to make these lines of tramway. Whether they might be compelled to make them we are not considering, but so far as the language of the statute is concerned, they were only empowered and not bound to make the lines. But under the second head of this agreement they were bound to make the lines, and they are bound to make them precisely according to the description in the Parliamentary plan. Here is the section:—"The second party bind and oblige themselves and the said Company to proceed immediately after the said Bill shall become law, to lay down, construct, and work the tramways described in the said Bill, and shown on the Parliamentary plans, from Haymarket to Leith, and from the Edinburgh General Post Office to Newington," and some others are particularly mentioned. Now, here stands an agreement which the Lord Provost and Magistrates are entitled to enforce, and which, for all we know, they are prepared to enforce. We must assume that they are prepared to enforce it, and necessarily to compel the Tramways Company to lay down these lines upon the North Bridge and North Bridge Street, according to the Parliamentary plan. And is it to

be said that, under an Act of Parliament incorporating this agreement there is another party who is entitled to interfere, and say, "That shall not be done?" What is the Tramways Company to do in such circumstances? Are they to fulfil the express terms of their agreement to the Local Authority—the Provost and Magistrates,—or are they to comply with that construction of any clause of this agreement which the occupiers of houses in North Bridge Street are seeking to enforce against them, to prevent them from doing that which the Local Authority requires them to do?

It is a very singular position if that be the case, and it is about the last conclusion that I should willingly adopt,—that either the Act of Parliament or an agreement embodied in that Act of Parliament, should place the promoters of an undertaking in such a position that they must do one thing, and at the time not do the very thing contemplated in the Act of Parliament itself.

But the real question comes to be, whether that first head of agreement which has been referred to is really susceptible of the construction that has been put upon it? It consists, I think, of two parts; whether it is of any practical force or effect at all it is of some consequence to distinguish between these two parts. The first is this,—"The parties hereto of the first part, as the Local Authority aforesaid, 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." Does that mean anything, or does it really confer upon the Local Authority, the first party to this agreement, anything that they do not possess without it? They shall have all power which any Act of Parliament has given or may give. Is there any virtue in that? If there be, still it was unnecessary, for it is contained in one of the clauses of the statute, viz., the 47th, which provides,—"Nothing herein contained shall be deemed or construed to exempt the tramways from the provisions of any General Act relating to tramways now in force, or which may hereafter pass during this or any future session of Parliament." It is not very easy to see how people are to discover the operation of a subsequent Act of Parliament unless that Act of Parliament applies to them, and if the Act of Parliament applies to them the antecedent agreement is unnecessary, so that really the whole of this first half of the first head of agreement consists of words without meaning.

Now, we proceed to consider the second part,—"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." Now, I quite agree that before we can make anything of this second part of the agreement, we must distinctly understand what is meant by the word "obtained" under the Tramways Act, 1870. It is said, although that is rather a recent discovery in the agreement, that a Provisional Order maintained in this way means a Provisional Order obtained from the Board of Trade, but not confirmed by Parliament. The Lord Ordinary was of an opposite opinion to this, that it means a Provisional Order obtained and confirmed by Act of Parliament. And the counsel for the complainer, in stating the argument before us, adopted the same construction; but that was withdrawn, and cannot now be founded on.

But let us consider this question on its merits. If this special Act of Parliament is to be dealt with as a Provisional Order "obtained" from the Board of Trade, but not confirmed by Parliament, what is the consequence? The Tramways Company cannot lay down a rail, or use a spade or pick to raise a stone of the street. They have no authority whatever, because a Provisional Order until confirmed by Parliament is absolutely worthless. Now, to say that a Special Act of Parliament which has passed both Houses of Parliament, and received the Royal assent, is to be in the same position as a Provisional Order obtained from the Board of Trade and not confirmed by Parliament, is surely, to say the least of it, too monstrous a proposition to receive assent. If it is to be a Provisional Order still unconfirmed, it surely, at least, must have the right to procure the confirmation. Now, in what form is Parliament to confirm an Act which they have already passed? How is the House of Commons to entertain a bill for the purpose of confirming an Act of Parliament which has already obtained the Royal assent?

These are questions I cannot answer, and it is just because I cannot answer these questions that I am driven to the necessity of differing from the construction adopted by the Lord Ordinary,—that the Provisional Order obtained under the head of this agreement, means a Provisional Order not only obtained from the Board of Trade, but subsequently confirmed by Parliament. Well then, if this is to be dealt with as a Provisional Order obtained from the Board of Trade, and confirmed by Parliament, the next question comes to be, whether anything that is contained in that Provisional Order so confirmed can affect the promoters of the undertaking? The object of framing a Provisional Order by the Board of Trade is nothing more nor less than to save the time of Parliament. Instead of both Houses of Parliament appointing a committee to consider a bill, the whole thing is done by the Board of Trade putting the matter in the form of a Provisional Order; and it seems to me a convenient and handy arrangement for the purpose of expediting public business; but the Board of Trade has no more right to make an Act of Parliament, or to give the authority to make a tramway, than any private person. It merely prepares materials for Parliament; and when that Provisional Order is framed and adjusted, and delivered to the promoters, it has to be laid before Parliament, in order that it may be confirmed and converted into an Act of Parliament. But when it is converted into an Act of Parliament, it is to be read just like any other Act; and therefore, if this special Act is to be dealt with as a Provisional Order confirmed by Act of Parliament, I cannot see what benefit any person obtains from that greater than he would have in dealing with it as a Special Act. In short, in the result, a Provisional Order confirmed, and a Special Act, is one and the same thing.

But somehow or other it is said that a Provisional Order cannot have been obtained without having in it the provisions contained in the 9th section of the General Tramways Act. Now, that is a very unintelligible proposition, and I cannot see how it is arrived at. The first part of the General Tram-

ways Act provides almost exclusively for the way in which Provisional Orders are to be obtained and carried through, not for the way in which they are to be construed after they are carried through; not for the way in which tramways are to be constructed under them; and not for the way in which tramways are to be managed after they are constructed,—for the construction of a tramway, and the mode of management form the subject-matter exclusively of the second and third parts of the General Tramways Act; and, accordingly, the second and third parts of the General Tramways Act are incorporated by force of that General Act itself into every Special Act and every Provisional Order alike. There is, however, no mention of the incorporation of the first part either in the special Act or Provisional Order, for this very obvious reason, that the whole functions of the first part of the statute have come to an end, and when either a Provisional Order or a special Act has been obtained—that is to say, obtained in the sense of having passed through Parliament—the promoters of the undertaking, when they proceed to apply for a Special Act or Order, are obliged to give notice and deposit the document, very much in the same way as if they were applying for a Special Act. The Board of Trade is authorised by the seventh section to consider the application, to make various inquiries, and then, after this inquiry, they are authorised to make a Provisional Order. Then we are told what that Provisional Order is to contain. It is to contain all provisions necessary to regulate the form, construction, and use of the tramways. In other words, it is just to contain everything that would be contained in a Special Act, and then comes the ninth section:—"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." Now, this is plainly nothing more than a direction to the Board of Trade, just like a Standing Order in the House of Parliament. It would be just as easily expressed in a Standing Order "that any Committee of this House shall authorise," and so forth, and that Standing Order would be binding upon the House of Parliament that enacted it.

But when an Act is passed that has received the Royal assent, of what avail is a Standing Order? If this Special Act of Parliament had been a Provisional Order obtained from the Board of Trade, and subsequently confirmed by Parliament, and contained, as this Special Act does, authority to lay down these rails in an objectionable manner, this 9th section could have been of no avail. To show how completely this portion of the statute deals entirely with these preliminary proceedings, it may be worth while to show what follows this 9th section. The nature of the traffic has been specified in the Provisional Order; then the costs of the order are provided for, and then we come to the delivery of the Order by the Board of Trade to the promoters, and the provision for the publication of that Order before it can be confirmed by Parliament; and then the 14th section provides:—"On proof to the satisfaction of the Board of Trade of the completion of such publication as aforesaid, the Board of Trade shall, as soon as they conveniently can, after the expiration of seven days from the completion of such publication, procure a Bill to be introduced into either House of Parliament, in relation to any Provisional Order which shall have been published as aforesaid, not later than the 25th of April in any year, for an Act to confirm the Provisional Order, which shall be set out at length in the schedule to the Bill; and until confirmation with or without amendment by Act of Parliament, a Provisional Order under this Act shall not have any operation." Then it is provided that when a bill is introduced into Parliament it may be referred to a select committee, but when the bill is once passed, then the Act of Parliament confirming the Provisional Order under the Act shall be deemed a public general Act. And if this had been a Provisional Order in its original form and occupation, it would now be as much a public general Act of Parliament as a Special Act really is. I think, therefore, that this reference in the first head of the agreement referred to in the special Act of Parliament really gives no aid whatever to the complainers in their present contention. It cannot be held absolutely to annul and derogate the powers which the special Act contains. Unless it can do that, then it can be of no avail, for there are direct and express powers to make these two lines of tramway along North Bridge Street within a less distance than 9 feet 6 inches of the pavement of either side; and nothing but an express contradiction of that, or a repeal of that, can possibly take away that power.

I am therefore constrained, without consideration of these other matters that have been imported into the discussions, to come to this conclusion, that upon the construction of this Act of Parliament it inevitably follows that these lines of tramways could be constructed in no other manner than they have been constructed, and as they are authorised to be constructed; and that the Tramways Company by their Special Act, incorporating the agreement with the town of Edinburgh, are compellable so to construct these lines. They have no option. For these reasons I differ from the judgment pronounced by your Lordships.

The Court pronounced the following interlocutor:—

> "Adhere to the Lord Ordinary's interlocutor, and refuse the reclaiming note; and, on the motion of the complainers, decern and ordain the respondents to remove the tramways laid by them in and along the portion of North Bridge Street, Edinburgh, which extends from the south end of the North Bridge to the High Street; and decern and ordain the respondents to restore the carriage way of that portion of North Bridge Street to its former condition: Interdict, prohibit, and discharge the respondents from making or constructing any tramway along the said portion of North Bridge Street in such manner that for a distance of 30 feet or upwards a less space than 9 feet and 6 inches shall intervene between the curb-stone of the pavement on either side of the street and the nearest rail of the tramway, and decern; find the complainers entitled to the expenses of process; allow ac-

count thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Black and Others—Solicitor-General (Clark) and M'Laren. Agents—Millar, Allardice, & Robson, W.S.

Counsel for Tramways Company—Lord Advocate (Young) and Mansfield. Agents—Lindsay, Paterson, & Hall, W.S.

Wednesday, February 26.

FIRST DIVISION.

STEUART *v.* PADWICK.

(*Ante*, p. 197.)

Expenses—Consultation—Skilled Witnesses.

In a case which involved difficult and voluminous evidence, fees for consultation before hearing in the Inner House *allowed.*

Remuneration for skilled medical witnesses fixed at ten guineas a-day.

Circumstances in which medical witnesses who were called to speak to facts, but were also examined upon matters of scientific opinion, were allowed ten guineas a-day.

When the Auditor's report upon the account of expenses came before the Court in this case, certain objections were taken thereto. In the first place, the Auditor had disallowed the charge of fees to counsel for consultation before hearing in the Inner House. It was argued for the defender that this charge should be allowed on account (1) of the length of time (more than six months) between the hearing before the Lord Ordinary and before the Inner House; and (2) because on account of the unusual difficulty and delicacy of the evidence. It was argued for the pursuer that it was unusual to allow a fee for consultation before hearing in the Inner House.

Lord President—I think that we should allow the fee for consultation before hearing in the Inner House. Sometimes we have inconsistent arguments by counsel on the same side, which would have been avoided had there been a consultation. Of course there are many cases in which a consultation before hearing in the Inner House is not necessary; but in a case like this it is of the greatest consequence that counsel should arrange in what way they are to present the case to the Court, and for that purpose a consultation is necessary,

The other Judges concurred.

Another point which came up was in reference to the remuneration of the medical witnesses. Drs Grainger Stewart and Watson had been called as experts, and gave their opinions on the whole evidence led. The fees charged in account were £126 to each of these gentlemen. The Auditor disallowed this charge, and allowed a fee of ten guineas a-day for five days to each. The defenders maintained that such an allowance was quite insufficient remuneration for medical skilled witnesses.

Professor Spence and Dr Gillespie had also been examined. They had been examined as to their observations in a *post mortem* examination of the body of Sir W. D. Steuart, but their examination was not limited to matter of fact, but extended to scientific questions and matters of opinion. The Auditor treated these gentlemen as merely witnesses of fact, and limited their fee to the usual rate of two guineas per day. Objections to this finding were also submitted to the Court.

Lord President—Mr Grainger Stewart and Mr Watson were called merely as experts, and I do not think it safe to exceed the allowance fixed by the Auditor. There is no doubt that the highest class of evidence cannot be got at this rate, and in a case of such importance as this is, parties will have the best evidence; and it is desirable that it should be so. But is the winning party entitled to charge the whole of his expenses against the loser? It is against the spirit and practice of the Court that he should. If we exceed the sum paid by the Auditor, I do not see where we are to find a limit to such charges. The only safe course is to adhere to the rule of the Auditor.

As to Drs Spence and Gillespie, theirs is a very exceptional case. I do not remember a similar case. For they were called to speak to a matter of fact, but a matter entirely of medical fact, observed by themselves, and valuable chiefly on account of their skill as observers of such facts. They were also examined as experts. Now it is difficult to see any good ground for making a difference between the remuneration of these gentlemen and that allowed to Drs Grainger Stewart and Watson. No doubt they might have been compelled to attend as witnesses to fact; but the facts to which they were called to speak were their observations in the *post mortem* examination; and they went voluntarily to conduct this examination, and were sent to conduct it as being highly skilled men. So I am of opinion that they should be allowed the same remuneration as Drs Grainger Stewart and Watson—that is, ten guineas a-day.

The other Judges concurred.

Counsel for Pursuer—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Defender—Watson. Agents—Tods Murray, & Jamieson, W.S.

Wednesday, February 26.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.

EARL OF ZETLAND *v.* TENNENT'S TRUSTEES.

Salmon-fishing—Prescription—Medium filum.

Upon a title to "the salmon-fishings pertaining to lands" which were washed by a river: Exclusive possession for the prescriptive period exercised at stations or banks *ex adverso* of said lands, and beyond the *medium filum* of the stream, *held* to give right to the salmon-fishings at these stations.

The summons in this suit, at the instance of the Earl of Zetland against the trustees of the late Hugh Tennent, Esquire, of Errol, concludes that "it ought and should be found and declared that the pursuer has good and undoubted right to the salmon-fishings in the river Tay between Corbieden, on the east, and the Pow of Lindores, on the west, and that from the south shore as far as the middle line of the said river, and including the