general agreement, apparently of thought and opinion, during so long a course of time as that to which I have referred, was founded in right and in title.

But as it happens in this case, (and we owe the demonstration of it in a great degree to the extreme attention which has been devoted to the case by my noble and learned friend who first addressed the House,) there really is not the thinnest interstice in which there can be interposed a presumed arrangement or a presumed agreement which would justify the claims set up by the appellant to treat this particular parcel of land as having been valued in the valuation of 1629, for we have, with a degree of distinctness and completeness which could scarcely be expected in a title derived from so remote an antiquity, a clear deduction of title, which has been made much more clear, I admit, to my own mind, by the statement of the noble and learned Lord who first expounded the deduction of titles. We have a clear and continuous stream of documents of title which evince the course in which the land now in question, namely, the land of "Knock," came down from the parson of the parish in 1629, and we have another exactly similar stream of clear and continuous titles with reference to the land belonging to M'Lean of Lochbuy, which comprehended another parcel which the appellant in this present case wished to represent as including the land of Knock. It is impossible, as was demonstrated by the deductions of title traced by my noble and learned friend, so to include "Knock" in the lands which came from M'Lean of Lochbuy. Having these two clear and distinct streams of title, beginning from a period considerably antecedent to the valuation, beginning from 1620 (nine years before the valuation) in the one case, and from a period still more remote in the other case, we find these two streams at last in confluence in the title of Cameron of Glendessary, and we find nothing from that time forwards which can leave room for a presumption of an arrangement to be interposed at any time by which your Lordships can now say, that the land of Knock was comprised in the valuation of the Lochbuy land under another title, namely, Cowlkeylis. It appears to me to be clearly made out, that the "Knock" in question is the Knock which belonged to the parson at the time when the valuation was made, and it appears to be equally clear, that it is not named or included in that valuation.

Under these circumstances, and being anxious to say these few words in order to shew, that I am not unmindful of the duty which is incumbent upon every Court to presume all that can be presumed in favour of what have been believed for a long course of time to be respective rights and titles of the parties, I think it is impossible in this case to make a presumption which will exclude the positive and clear matters of fact which have been placed before our minds, and therefore I find myself compelled to join with my noble and learned friends in the conclusion at which they have arrived.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellant's Agents, Andrew Webster, S.S.C.; Connell and Hope, Westminster.—*Respondent's Agents*, John Martin, W.S.; Willoughby and Cox, Clifford's Inn, Westminster.

JULY 28, 1873.

THE EDINBURGH STREET TRAMWAYS CO., *Appellants*, *v.* A. and C. BLACK and Others, *Respondents*.

Statute—Tramways Act, 1870—Special Act—Agreement incorporated in Special Act—*The Edinburgh Tramway Company, on applying for a Special Act of Parliament, agreed with certain frontagers on their line, that the Tramway Act*, 1870, *should apply to their Special Act "as if the same were a provisional order." This agreement was made part of the Special Act which passed in* 1871, *and the Special Act authorized part of the line to be made differently from the Tramways Act*, 1870.

HELD (reversing judgment), *That the Tramways Act*, 1870, *did not override the later Act, and the provisional order referred to by the agreement meant a confirmed provisional order.*[1]

The "General Tramways Act" 1870, 33 and 34 Vict. cap. 78, provides in part I. (provisional orders authorizing the construction of tramways), § 9—"Every tramway in a town which is hereby authorized by provisional order, shall be constructed and maintained as nearly as may

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[1] See previous report 11 Macph. 418; 45 Sc. Jur. 291. S. C. L. R. 2 Sc. Ap. 336; 11 Macph. H. L. 57; 45 Sc. Jur. 582.

be in the middle of the road ; and no tramway shall be authorized 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."

In 1871 the Edinburgh Tramways Company obtained a Special Act of Parliament for the construction of tramways in Edinburgh, which provided in § 2 that part II. (construction of tramways) and part III. (general provisions) of the "General Act" and certain other Statutes there specified "are incorporated with, and form part of this Act, save where the same are expressly varied or excepted by this Act."

Section 5 of this Special Act was as follows :—"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 level 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, and described in the deposited book of reference to those plans respectively as may be required for that purpose," etc.

Section 44 is in the following terms :—"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."

And by section 47 it is enacted—"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."

The agreements referred to in § 44 above quoted were three agreements entered into between the Local Authority of the City of Edinburgh, the Road Trustees of the City, and the Local Authority of Leith, each of the first part, and the promoters of the Tramway Company's Bill, (in whose place the Company now came,) of the second part, in each agreement. Each agreement contained as its first article—"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.'"

In the second article of the agreement with the Local Authority of the City of Edinburgh it was provided—"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 shewn on the Parliamentary plans, from Haymarket to Leith, and from the Edinburgh General Post Office to Newington," etc.

The Tramway Company, under the powers conferred upon them in their Special Act, were about to lay down that part of the line of tramways, Nos. 6 and 6A, which was to pass along that portion of North Bridge Street which extends south from the open arches of the North Bridge to the High Street, when, in April 1872, Messrs. A. and C. Black and others, more than one-third of the occupiers of houses, shops, and warehouses in that portion of the street, presented a note of suspension and interdict against them. In the statement of facts annexed to the note they averred (1.) that the Tramway Company had no power to lay their lines on this portion of North Bridge Street, as it was not enumerated in their special Act—(see enumeration given above.) They also stated (2.) that the distance between the curbstone on the west side and the curbstone on the east side of the North Bridge Street, measured only from 31 feet 10 inches at the top to 32 feet 6 inches at the bottom of the street ; and if a double line of rails were laid down in that 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, would be less than 9 feet and 6 inches, which was prohibited by the 9th section of the "General Tramways Act" (above quoted), if one-third of the occupiers objected. They also made averments (3.) that the want of a free space of 9 feet 6 inches extent between the pavement and the tramway would be attended with great inconvenience and damage to the complainers and other occupiers of premises in North Bridge Street, as, in addition to the large and increasing traffic between Edinburgh and the south, heavy goods were frequently, during every day, taken from and brought to shops and warehouses in North Bridge Street ; and the carts conveying these goods as well as the carriages of customers, were frequently standing at the doors of these shops, and for these purposes a free space of 9 feet 6 inches is required.

The Tramway Company in their answers, stated, as regarded the complainers' averment, (1.) that the terms "North Bridge" and "North Bridge Street" were used indiscriminately, and the former expression was 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 referred to and included the portions of street at the north end of the North Bridge, and also at the south end of that bridge, and extending to the High Street, as well as to the bridge itself.

They also denied, in answer to averment (2.) that § 9 of the General Act founded on affected them, as that portion of the General Act was not incorporated in their Special Act. They denied the inconvenience alleged (3.), and referred to § 8 of their Special Act (see above), whereby provision was made for such a case as this. They also stated, that the lines of tramway here complained of were laid down clearly in their Parliamentary plan, and had been approved of by Parliament, so that they could not alter them, even were they desirous to do so.

The Court of Session held, that the provisions of the General Act overrode the enactment in the Special Act, and that the Company could not lay that part of the line of tramway in the manner authorized by their Special Act.

The Edinburgh Street Tramway Company now appealed to the House of Lords against the judgment.

The *Lord Advocate* (Young), *Clerk* Q.C., and *J. Mansfield*, for the appellants.—The judgment was wrong. By their Act of Parliament, 34 and 35 Vict. c. 89, § 5, coupled with the plans and sections which were in effect part of the Act, the appellants had power to lay down a double line of tramways on the portion of the street shewn by such plans, and with a less space between the outside edge of the footpath and the nearest line of tramway than 9 feet 6 inches. It was of no use to go back to the prior Act of 1870 (the Tramways Act), if there was any inconsistency between the two enactments, for, if necessary, the later Act impliedly repeals anything inconsistent in the prior Act. The agreement between the parties, that the whole provisions of the Tramways Act of 1870 shall apply to the local Act as fully as if the same were a provisional order obtained under the General Act, obviously meant a confirmed and not an unconfirmed provisional order, otherwise it was insensible. If it was a confirmed provisional order, then it is too late now to alter it, and the appellants were right in acting on their Special Act as they have done.

H. Lloyd Q.C., and *J. Maclaren*, for the respondents.—The judgment was right. The 9th section of the Tramways Act, 1870, was effectively incorporated in the Special Act of the appellants, and is equally applicable to the case of a tramway made by a Special Act as by a provisional order. The agreement between the parties was to the effect, that the Tramways Act of 1870 should apply to the appellants' line of tramways, and the appellants are barred from departing from that agreement, and the appellants are now in the same position as if a provisional order had been obtained by them, and the 9th section of the Act of 1870 had been part of such order.

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, 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 shewn 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. *Todd*, 12 Cl. & F. 722, 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 shewn 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 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 9th section of the General Tramways Act provides that—"Every tramway in a town which is hereafter authorized by provisional order, shall be constructed and maintained as nearly as may be in the middle of the road, and no tramway shall be authorized by any provisional order to be so laid, that, for a distance of thirty feet or upwards, a less space than 9 feet 6 inches shall intervene between the outside of the foot path 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 authorized, can it be believed, that by a general reference to rights which third persons would have to prevent provisional orders being made to their prejudice, they intended to prevent the Act of Parliament being carried out? The agreement 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 authorized 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 is capable of a construction which renders it wholly inoperative.

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 three 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 interlocutors 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 the judgment to be pronounced here, in the first place, I apprehend that the interlocutors of the Court below must be reversed. Then I presume there will be a remit to the Court to recall 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, appear 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 ambit 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, 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 authorized by the Act of Parliament, and that in point of fact the Act of Parliament would not have authorized them to make it in any other way than the way in which they had made it. If there were nothing more in the case there would be no room 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 1st 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 1st section meant, but if it is 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 1st 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 obtain, 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 of 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, I agree that in this case the interdict should be recalled.

LORD HATHERLEY.—My Lords, I also concur in the opinion at 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 relating 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 there is no possibility of arguing this case with success, as the respondents have argued it, as 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 a 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 this 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, the agreement simply 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 this, whenever you, the promoters of this tramway, are minded to have any tramway whatsoever in Edinburgh, you shall not have an 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 manner perfectly inconsistent with the contention of the respondents.

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 be no doubt owing to some defect on my own part, that I cannot see the force of the reasoning leading to the contrary conclusion.

The Lord Advocate.—Your Lordships will, of course, in pursuance of the ordinary custom, give the appellants their costs in the Court below.

LORD CAIRNS.—Was the case ripe for disposing of the costs in the Court below?

The Lord Advocate.—Yes, my Lord, the Court below did dispose of the costs, but it gave the costs to the respondents who succeeded there. Your Lordships are now reversing the judgment of the Court below, and you will therefore, I presume, give the appellants their costs in the Court below.

LORD COLONSAY.—I do not know whether that is always done, is it?

The Lord Advocate.—Yes, always; I never knew a case in which it was not done.

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

Appellants' Agents, Lindsay, Paterson, and Hall, W.S.; Ashurst, Morris, and Co., Westminster.—*Respondents' Agents*, Millar, Allardice, and Robson, W.S.; Simson, Wakeford, and Simson, Westminster.