[HEARD 14*th July*—JUDGMENT 23*rd July*, 1846.]

The NORTH BRITISH RAILWAY COMPANY, *Appellants.*

JOHN TOD, ESQ., of Kirkhill, *Respondent.*

Statutes.—Local Railway Acts.—In construing the powers given by a local statute, plans exhibited, or notices given, prior to the passing of the statute, are to be disregarded, except in so far as they may have been incorporated into or made part of the Act. Terms of clause held not to amount to such incorporation.

Ibid.—In construing local Acts, with reference to plans deposited under the Standing Orders of either House of Parliament, these orders must be put wholly out of the question.

Railway Act, 8th and 9th Victoria, cap. 33.—If a proposed deviation of the level of a railway be within five feet of the original level, calculated with reference to the *datum* line in the plans deposited under the Standing Orders of either House of Parliament, the deviation will be within the power of deviation allowed by this statute, although it should exceed five feet calculated with reference to the *surface*-level shown upon the plans.

IN the month of December 1844, the appellants, in compliance with the Standing Orders of the House of Lords, served a notice upon the respondent, that an application would be made by them in the ensuing session of Parliament for power to make a railway from the Edinburgh and Dalkeith Railway to the town of Hawick, and that the property mentioned in the schedule annexed to the notice, being the property of the respondent, would be required for the railway, "according to "the line thereof as at present laid out, or under the usual "powers of deviation to the extent of 100 yards on either side "of the line, and will be passed through in manner mentioned "in such schedule;" and that a plan and section of the rail-

way had been deposited with the parish authorities. In the schedule annexed to this notice, and in a column of it, entitled, "Description of the section of the line deposited, and of the "greatest height of embankment and depth of cutting," were inserted these words, "Cutting, 15 feet 4 inches. Bridge."

This notice was given in compliance with the Standing Order, in these terms: "That, on or before the 31st day of "December, immediately preceding the application for a bill, "by which any lands or houses are intended to be taken, or an "extension of the time granted by any former Act for that pur- "pose is sought for, application in writing, (and in cases of bills "included in the second class, in the form, as near as may be, "set forth in the Appendix marked A.,) be made to the owners "or reputed owners, lessees or reputed lessees, and occupiers, "either by delivering the same personally, or by leaving the "same at their usual place of abode, or, in their absence from "the United Kingdom, with their agents respectively, of which "application the production of a written acknowledgment by "the party applied to shall, in the absence of other proof, be "sufficient evidence; and that separate lists be made of such "owners, lessees, and occupiers, distinguishing which of them "have assented, dissented, or are neuter in respect thereto."

And the plan and section referred to in the notice were deposited in compliance with two other Standing Orders, Nos. 223–3 and 223–5, in these terms: "223–3. That a plan, and also a "duplicate of such plan, on a scale of not less than 4 inches "to a mile, be deposited for public inspection at the office of "the clerk of the peace for every county, riding, or division, in "England or Ireland, or in the office of the principal sheriff- "clerk of every county in Scotland, in or through which the "work is proposed to be made, maintained, varied, extended, "or enlarged, on or before the 30th day of November immedi- "ately preceding the session of Parliament in which applica- "tion for the bill shall be made; which plans shall describe

"the line or situation of the whole of the work, and the lands "in or through which it is to be made, maintained, varied, "extended, or enlarged, or through which every communica- "tion to or from the work shall be made, together with a book "of reference, containing the names of the owners or reputed "owners, lessees or reputed lessees, and occupiers, of such "lands respectively; and in the case of bills relating to turn- "pike roads, cuts, canals, reservoirs, aqueducts, and railways, "a section and duplicate thereof, as hereinafter described, shall "likewise be deposited with each plan and duplicate."

"223–5. That the section shall be drawn to the same hori- "zontal scale as the plan, and to a vertical scale of not less "than 1 inch to every 100 feet, and shall show the surface of "the ground marked on the plan, and the intended level of "the proposed work, and a datum horizontal line, which shall "be the same throughout the whole length of the work, or any "branch thereof respectively, and shall be referred to some "fixed point, (stated in writing on the section,) near either of "the termini."

By the plan deposited with the parish authorities, it appeared that the railway would cross the approach to the respondent's house about 520 feet from the lodge at his gate on the turnpike road between the house and the lodge; that it would do so in a cutting of 15 feet 4 inches deep from the level of the ground at that particular point; and that the approach to the respondent's house would be carried over the railway by a bridge which would raise its level two feet. By the corresponding section, also deposited with the authorities, it appeared that the approach to the respondent's house would have an inclination of one foot in twenty for a short distance from the summit level of the bridge over the railway.

As the house of the respondent was situated at a surface level considerably lower than that of the point at which the plan represented the railway would cut his approach, the proposed

works of the appellants did not seem to him calculated to occasion anything offensive or obstructive to the view from his house, and in consequence he did not offer any opposition in Parliament to the bill proposed to be obtained by the appellants.

The appellants obtained their proposed Act, which, by its 1st section, declared, that "The Lands' Clauses Consolidation Act "(Scotland), 1845, and the Railway Clauses Consolidation Act, "1845, shall be incorporated with, and form part of, this Act, "save as to any provisions thereof respectively which may be "modified by, or be inconsistent with, the provisions of this "Act."

The only clauses of the Railway Clauses Consolidation Act, declared to be incorporated with the appellants' Act, which it is necessary to notice, are the 11th and 15th.

The 11th section of that Act was in these terms: "In "making the railway, it shall not be lawful for the company to "deviate from the levels of the railway, as referred to the com-"mon datum line described in the section approved of by Par-"liament, and as marked on the same, to any extent exceeding "in any place 5 feet; or, in passing through a town, village, "street, or land continuously built upon, 2 feet, without the "previous consent in writing, of the owners and occupiers of "the land in which such deviation is intended to be made; or, "in case any street or public highway shall be affected by such "deviation, then the same shall not be made without the con-"sent of the trustees or commissioners having the control of "such street or public highway, or, if there be no such trustees "or commissioners, without the consent of the sheriff, or with-"out the consent of the trustees or commissioners for any "public sewers, or the proprietors of any canal, navigation, gas-"works, or water-works, affected by such deviation: Provided "always, That it shall be lawful for the company to deviate "from the said levels to a further extent without such consent

" as aforesaid, by lowering solid embankments or viaducts, pro-
" vided that the requisite height of headway, as prescribed by
" Act of Parliament, be left for roads, streets, or canals passing
" under the same: provided also, that notice of every applica-
" tion to the sheriff, for the purpose of considering the matter,
" shall, fourteen days previous to such application, be given in
" some newspaper circulating in the county, and also be affixed
" upon the door of the parish church, in which such deviation or
" alteration is intended to be made; or, if there be no church,
" some other place to which notices are usually affixed."

And the 15th section: " It shall be lawful for the company
" to deviate from the line delineated on the plans so deposited,
" provided that no such deviation shall extend to a greater
" distance than the limits of deviation delineated upon the said
" plans, nor to a greater extent, in passing through a town, than
" 10 yards, or elsewhere to a greater extent than 100 yards from
" the said line, and that the railway, by means of such deviation,
" be not made to extend into the lands of any person, whether
" owner, lessee, or occupier, whose name is not mentioned in
" the books of reference, without the previous consent, in writ-
" ing, of such person, unless the name of such person shall have
" been omitted by mistake, and the fact that such omission pro-
" ceeded from mistake shall have been certified in manner herein
" or in the special Act provided for in cases of unintentional
" errors in the said book of reference."

The sixteenth section of the Act obtained by the appellants was in these terms: " And whereas plans and sections of the " railway, showing the line and levels thereof, and also books " of reference, containing the names of the owners, lessees, and " occupiers, or reputed owners, and lessees, and occupiers of the " lands through which the same is intended to pass, have been " deposited with the sheriff-clerks of the counties of Edinburgh, " Selkirk, and Roxburgh: Be it Enacted, That, subject to the " provisions in this and the said recited Acts contained, it shall

" be lawful for the said company to make and maintain the said " railway and works, in the line, and upon the lands, delineated " on the said plans, and described in the said books of reference, " and to enter upon, take, and use such of the said lands as shall " be necessary for such purpose."

The appellants obtained their Act in the month of July, 1845. In December following they served a notice and a relative plan upon the respondent, showing that they intended to make a deviation of the railway at its intersection with the approach to his house, by making the line 66 feet nearer his house, in a cutting 2 feet 10 inches deep, and that they intended carrying his carriage-road over the line by a bridge about 17 feet above the existing level of the ground, with a corresponding descent on either side.

Upon receiving this notice, the respondent presented a note of suspension and interdict to the Court of Session, which, as subsequently altered with the leave of the Court, prayed the Court to interdict the appellants " from constructing or carrying " the said railway through the said approach or avenue to the " complainer's house, except at a depth of 15 feet 4 inches from " the present surface-level of the said avenue, at the point of " original intersection, and under a bridge not higher than 2 feet " from the said point to the metalled surface of the roadway " along such bridge, with a gradient or descent of not more " than 1 in every 20 feet, from the summit-level of the roadway on " said bridge towards Kirkhill House; or, in the event of the " said company exercising their powers of deviation, at a depth " not less than 10 feet 4 inches below the level of the said " point, and under a bridge not higher than seven feet from the " level of the said point to the metalled surface of the roadway " along said bridge, with a gradient or descent of like inclina- " tion, from the summit-level of the roadway on the bridge " towards Kirkhill House; and thereafter, on the discussion of " the suspension and interdict, to declare the interdict per-

" petual; or to do otherwise in the premises, as to your lord-
" ships shall seem proper."

The Lord Ordinary, (*Robertson*,) remitted to an engineer to report, whether the plan served upon the respondent was within the line of deviation as delineated in the parliamentary plan; 2nd, whether it differed from that plan, and in what particulars; 3rd, whether the plan of the proposed works deviated from the levels of the railway, as referred to the common datum line described in the section approved of by Parliament, and as marked on the same to any extent, and if so, to what extent.

The report of the engineer disclosed this state of matters. As the *surface*-level of the ground, at the point of intersection of the respondent's road to which the appellants proposed to remove their line, was much lower than the surface-level of the ground at the point of intersection originally projected, the necessary consequence of the deviation would be to make the railway cross the respondent's road nearer to the surface of the ground; and upon the assumption that the levels in the parliamentary plan and section of the *surface*, and of the *railway* with reference both to the surface and to the datum line, were correctly stated, and that the level of the railway, with reference to the datum line, had not been raised in the plan of the proposed deviation, the depth of the cutting at the new point of intersection should be 13 feet 5 inches; the difference between the *surface*-level at the original point of intersection, and at the new point of intersection, being only 1 foot 11 inches; whereas it was shown on the plan of the deviation, that the cutting at the new point of intersection would be only 2 feet 10 inches deep, which left 10 feet 7 inches of the 13 feet 5 inches to be accounted for on the only possible supposition that the level of the railway itself, as referred to the datum line, must have been raised to that extent. But upon taking the actual levels, it appeared that although the cutting at the new point of intersection would be only 2 feet 10 inches deep, the level of the

railway would deviate from the levels in the parliamentary plan, as referred to the *datum* line, only 3 feet 2 inches. The necessary inference, therefore, as stated by the engineer, was, that the parliamentary plan had given an erroneous level of the *surface* of the ground at the point of intersection originally proposed, and that this error was to the extent of the 10 feet 7 inches which have been noticed as unaccounted for.

It thus appeared that the proposed deviation, according to the *actual* levels as referred to the *datum* line, was *laterally* 66 feet, being 34 feet within the 100 feet of lateral deviation allowed by the Railway Clauses Consolidation Act, and *vertically*, as referred to the datum line, 3 feet 2 inches, being 1 foot 10 inches within the five feet of vertical deviation allowed by the same statute. But that while this was the case, if the level of the *surface*, as represented upon the parliamentary plan and section, had been correct, the respondent had a right to expect that the cutting for the railway at the new point of intersection, calculated with reference to that surface-level, should be 8 feet 5 inches, if the level of the railway was raised 5 feet, the sum of vertical deviation allowed by the public Act, or 10 feet 3 inches, if that level were raised only 3 feet 2 inches, the amount to which the engineer represented it would actually be raised by the proposed plan of deviation; whereas, according to that plan, the depth of the cutting would actually be only 2 feet 10 inches, as already stated.

The Court, on the 11th March, 1846, passed the note of suspension, and granted interdict in the terms prayed by it.

The appeal was against this interlocutor.

Mr. Stuart and *Mr. Bethel* for the Appellants.—All that the private Act obtained by the appellants requires, is that the railway be "in the line and upon the lands" delineated upon the parliamentary plan. These words are to be construed with reference to the Railway Clauses Consolidation Act, which

is declared to be part of the appellants' Act. By that statute a deviation of the line from that delineated on the plan, is allowed to the extent of 100 yards laterally, and 5 feet vertically. It is admitted that the deviation proposed by the appellants, is within the *lateral* limit, and no question is or can be raised upon that point; but it is said the deviation proposed is not within the *vertical* limit, because the 16th section of the appellants' Act recites, that plans and sections, "showing the line "and *levels*" of the railway had been deposited; and, therefore, it is said, the levels upon that plan must regulate the appellants' operations, and if that were done, and if the level of the railway with reference to the level of the surface of the ground, as shown upon that plan, were observed, the railway would cross the respondent's road at a greater depth from that surface than is proposed.—The answer to that is threefold.

1st. The plans and sections deposited with the authorities prior to the introduction of the respondent's bill into Parliament, were so deposited in compliance with the Standing Orders of this House. These orders, in requiring the deposit, have a view solely to the protection and convenience of the public, by giving them early intimation of what is about to be asked of Parliament; but they neither are intended to have, nor could they, without the authority of the other branches of the legislature, by possibility have, any effect in themselves upon the enactments of any statute involving the matter contained in them. The only way in which these plans and sections could affect the construction of the statute, would be by the statute having in terms adopted them. If it be silent in regard to them, they cannot enter into the question. This would be conclusive upon the ordinary principles of legislation and statutory construction, but any consideration of them is excluded upon another ground. The acts obtained by private bodies, such as the appellants, for the execution of any given project, are contracts between them and the public. That has been repeat-

edly held in the Courts of this country, Blaikmore *v.* Glamorganshire Canal, 1 *My. & K.* 162; and upon the rules of construction applicable to these parliamentary contracts, as to all contracts, whatever may have been done prior to the execution of the contract, is to be excluded from consideration in ascertaining the construction of the contract, unless it is to be found within the four corners of the contract itself.

II. The Act under which the appellants' operations are authorized, no way adopts by reference or otherwise, the levels in the parliamentary plans and sections. The 16th clause, in its preamble, undoubtedly refers to these plans and sections, as showing the line and levels; but the reference to the *levels* is dropped in the enacting part of the clause; there the terms are confined to "the line and the lands," and in no other part are the levels in the parliamentary plan and section referred to. But,

III. While the private Act of the respondent is silent in itself as to the level according to which the railway is to be constructed, the general and public Railway Clauses Consolidation Act, which is incorporated into and forms part of the private Act, speaks expressly upon the subject. It refers to the levels in the parliamentary plan and section, by declaring, that it shall not be lawful to deviate the levels of the railway, "*as referred to the common datum line*" described in the parliamentary section, more than five feet; but it is altogether silent in regard to the levels of the railway, as referred to the surface level of the ground. It is obvious, therefore, that the legislature intentionally dropped in the private Act, mention of the levels according to which the line was to be constructed, because that was already provided for by the clause of the general Act which has just been referred to; not only so, but it evidently was the intention of the legislature, that this course should be followed in the framing of every private Act. Were it otherwise, the very object of the general Act, which was to lay down

a general rule for every case, and supersede the necessity for legislation in each instance, would be defeated; moreover, the *datum* line in any given plan, is of necessity unchangeable throughout; whereas the *surface* line is continually changing. If, therefore, the private Act legislate as to the levels, and require, as the respondent says, the one now in question does, that the line be formed upon a level, having reference to the *surface* line, while the general Act requires the formation in every instance to be according to a level, having reference to the *datum* line, it is obvious that the construction of the two statutes together, would be altogether impracticable. It would require a very strong case indeed, to induce the House to adopt a construction of the private Act, which should so stultify the legislature. There is nothing, however, in the present instance, to call for such a construction, except the reference in the recital of the 16th clause, which, whatever doubt it may raise as to the object of that recital, is plainly insufficient for the purpose for which it is used.

The appellants' contention, therefore, is, that the express enactment of the general Act, and not doubtful inference from the recital in the private Act, must regulate the question between the parties. By the general Act, the appellants are allowed to make a deviation of the level as referred to the *datum* line described in the parliamentary section, so long as the deviation does not exceed five feet. By the report of the engineer, it has been shown, that the proposed deviation does not exceed three feet two inches; whereas the interlocutor of the Court below requires them to pass respondent's road, at a level which will make the deviation exceed the five feet considerably, and render it utterly impossible for the line to resume the level in passing through the adjoining lands on either side, which is required by the statute.

IV. It may be very true that the error in the parliamentary plan and section, in regard to the *surface* level, misled the respon-

dent; but, at the same time, he knew that a power of deviation would be taken, and that that power, if exercised, might necessarily occasion a vertical deviation. Admitting, therefore, that if the appellants had adhered to their original point of intersection, they would have been obliged to do so in a cutting of fifteen feet four inches, because of the representation in the parliamentary plan and section, making this part of the contract between them, it would not follow that at another point of intersection the same depth must be observed, because the power of lateral deviation was equally a part of the contract, and this, if exercised, would necessarily create a vertical deviation greater or lesser, even referring the line to the surface level. There was nothing in the parliamentary plan and section—even allowing them to form part of the contract—which made the appellants undertake that at whatever point within 100 yards of lateral deviation, they might cross the respondent's road, they would do so in a cutting of 15 feet 4 inches; the utmost that can be said even in that view, is, that they undertook to do so at the particular point indicated upon the plan. And excluding the plan and section from the contract, there is nothing in the conduct or representations of the appellants, which should vary their legal rights under the contract.

Mr. Kelly and *Mr. Rolt* for the Respondent.—I. Although the Standing Orders of this House, under which the parliamentary plan and section are deposited, have no legislative effect in themselves, this cannot be said of the plan and section. The legislature has by the 7 Will. IV., and 1 Vict. cap. 83, recognised them and the purpose for which they are required. The Railway Clauses Consolidation Act has adopted them as the rule of operations in each instance, and so has the local Act of the appellants, in the preamble of the sixteenth clause. The plan and section being thus adopted, the Standing Orders are of the utmost value in ascertaining their meaning and object; and it is

only for this purpose that reference is made to them, and to the notice served upon the respondent.

The Standing Orders are framed with a view to giving notice to the public, of how individual rights are proposed to be affected; and for this purpose the order 223–5 requires, that the plan deposited in compliance with order 223–3, shall show "the "surface of the ground marked on the plan; and the intended "level of the proposed work, and a datum horizontal line." The surface level, therefore, could no more be dispensed with in the plan, than could the datum line, and the exhibition of the one was no more a superfluity than was the exhibition of the other. Of the two, indeed, the surface level was of infinitely more importance to the public, than the datum line. All that the public had any interest in was, to see how the surface of each individual's land would be affected by the projected operations; once satisfied upon this subject, the datum line, although valuable as an unvarying and infallible check upon the projectors, is of comparatively little interest to the landholder, until a difference between the actual operations and those represented upon the plan, suggest to him the necessity of referring to this check. It is only for the purpose of such a check, that the datum line can have been required; for it cannot be supposed that anything so unreasonable would have been entertained, as that every landholder on the line of a projected railway, must be at the trouble and expense of having the level of the railway, with reference to the datum line, calculated and ascertained at the risk, if he fail to do so, of serious damage to his property; although from the representation given of the level of the railway with reference to the surface of his lands, he may not see any cause for apprehension.

[*Lord Cottenham.*—The Standing Orders cannot be referred to for the purpose of construction, though they may be of importance to show the dealing between the parties. The plans may be referred to, because they are referred to in the statute.]

NORTH BRITISH RAILWAY COMPANY *v.* TOD.—23rd July, 1846.

II. When the sixteenth clause of the appellants' Act recites that plans and sections of the railway, "showing the line and "levels thereof," had been deposited, as introductory to enacting that the railway might be formed, the only meaning which can with any reason be attached to such a recital, is, that the line is to be formed according to that line and to these levels; and by the use of the word "level" in the plural, the level with reference to the surface, as well the level with reference to the datum line, must have been embraced, for the Act does not point to the one more than the other as being shown on the plan, or being required to be shown, and both were shown upon it; and there were no other levels to which the use of that word in the clause in the plural could have reference. It is no doubt true, that in the enacting part of the clause, the word "levels" is dropped, but the words "and upon the lands," are introduced; so that it is not a repetition of the recital, dropping the word "levels," but a new independent sentence, in which it is obvious that the word "line" is used in a different and more general sense than in the recital, to express the line of the railway, both laterally and vertically; at all events, the clause is here silent as to levels, and refers to the plan upon which both the levels appear. The Act can as little, therefore, be said to dispense with the one level as with the other.

III. The general Act, in its eleventh section, makes it unlawful to deviate from the levels of the railway "as referred to the "common datum line described in the section approved of by "Parliament, and as marked on the same." The grammatical construction will not admit of reading these words, as if the levels meant were those referred to the datum line described on the section, and marked upon the section; neither will the state of the fact, for there are no levels marked upon the datum line. The words are not "as referred to and marked," but "*as* referred to and *as* marked." The levels in question, therefore, must be not only those referred to the datum line, but those

marked upon the section, and these will include the level with reference to the surface, as well as the level with reference to the datum line.

If the plan and section had been correctly drawn, this reading of the general Act could not lead to any difficulty or inconvenience, as suggested by the appellants. If the two levels had been correctly represented, a deviation from the one would necessarily infer a corresponding deviation from the other, to be corrected only by the variation of the surface; and inasmuch as the difference between the surface level at the original point of intersection, and the surface level at the new point of intersection, is only 1 foot 11 inches, that, deducted from 15 feet 4 inches, the depth of the original cutting from the surface, would leave 13 feet 5 inches as the depth of the new cutting; and allowing the 5 feet of vertical deviation permitted by the general Act, the cutting would still be at least 8 feet 5 inches. It is only by rejecting the plan and section as part of the Act, and of the contract between the parties, and taking the levels as they actually exist, instead of as they are referred to and marked upon the section, that the appellants can be enabled to do as they propose; but that is a course which has been refused in more cases than one, and upon the very ground that the plan and section are the rule by which to ascertain whether the Act has been complied with. Shand *v.* Henderson, 2 *Dow.* 519.

Even if it were impossible to read the private Act along with the general Act, so as to make them work consistently, the House will not strain the construction of the one, to make it accommodate to the other, where doing so will work an injury to the interest of the respondent, but will leave them to have the doubt resolved by the legislature. Webb *v.* Manchester and Leeds Railway Company, 4 *My.* & *Cr.* 120. Stowbridge Canal Company *v.* Wheeley, 2 *Bar.* & *Ad.* 793.

IV. Admitting that the appellants were entitled to have the construction put upon the statute which they contend for, and

that they have the legal right they insist upon, the Court below and this House have jurisdiction to restrain them from the exercise of this legal right, because of their conduct in the manner in which they obtained the right. The notice given by the appellants was worse than if they had given none at all. They intimated that the property of the respondent would be affected in a particular manner, which on inquiry, turns out to be erroneous. Had they not given any notice, the party could have inquired for himself. The effect of their notice, therefore, was to mislead, not to inform. And it cannot be said, that the respondent was bound to read the notice given to him qualified by the provisions of the general Act, for at the time he received the notice, the general Act had not been passed.

Mr. Stuart in reply. Though the Standing Orders required the depth of the cutting, with reference to the surface, to be stated, that was done away by the terms of the general and the private Act, which can alone be looked to for the present purpose; and the reason why it was done away with, was the great risk of inaccuracy from the constant variation in the surface level, whereas the datum line is necessarily invariable. This construction is not obstructed by the use of the word "*levels*" in the plural, for that is used not with reference to the levels at the point of intersection with the respondent's property, but with reference to the levels throughout the course of the railway, which must necessarily be different, one from the other, whether having regard to the datum line or to the surface level.

LORD CHANCELLOR.—My Lords, this is obviously a question of very great importance, as affecting the rights of the parties in the case.

My Lords, the first question to be considered is, what is the rule in respect to applications for interdicts in Scotland, or for injunctions in England, as applicable to cases of this

kind; the case upon the part of the pursuer being, that a plan was exhibited to him and to the public, previous to the Act passing, under which the railway in question was intended to be made, which represented that the railway would pass over his land in a cutting of something more than 15 feet from the surface. The respondent alleges, that, giving faith to these representations, he had, as he naturally might, come to the conclusion as to what course he was to pursue with reference to the supposed state of circumstances as represented upon that plan; and that now, the railway company have not only deviated laterally, which they had a right to do by another line within the prescribed distance, which is a hundred yards, but they also propose to deviate beyond five feet vertically, which is the limit of the vertical deviation imposed by the Act of Parliament; that they propose to come nearer the surface by a space exceeding the five feet. The railway company say, that they do not dispute that they are actually coming nearer the surface to a much greater extent than the five feet, but they say they are still within the prescribed deviation from the datum line as laid down for the formation of the railway, the datum line being an imaginary line taking its commencement from some given point at a certain elevation, and then that line is supposed to run in a perfectly horizontal direction, and the inclination of the railway is measured with reference to that datum line. They say they are within the distance, that is, within the five feet of the line laid down upon those plans measured with reference to the datum line; and they contend, therefore, that they are within the provisions of the Act of Parliament, and that they are not deviating beyond what that Act authorizes.

Now, my Lords, as to the effect of plans exhibited previous to the contract made, or previous to the Act of Parliament being obtained, it does seem from cases which have occurred both in Scotland and in this country, that the rule of the Courts in the one country and in the other, is no longer a matter of any doubt

or dispute. If a contract or an Act of Parliament refers to a plan, to the extent that the Act refers to the plan, and for the purpose for which the Act or contract refers to the plan, undoubtedly it is part of the contract or part of the Act. About that there is no dispute. A contract or an Act of Parliament either does not refer to a plan at all, or it does refer to it for a particular purpose. It has been contended, both in Scotland and in England, that the defendants in the suit, or those who claim the benefit of the provisions of the Act of Parliament previous to the enactment being made, or the contract being concluded, had represented that the works were to be carried on in a particular mode, upon a plan shown previous to the powers being obtained under the Act, or the contract being concluded; and that the party obtaining the Act, or obtaining the contract, is bound by such representation.

My Lords, there was a case very much considered in Scotland—the case of the feoffees of Heriot's Hospital *v.* Gibson; and several cases have occurred in the courts of equity in this country. It was my fortune to have to consider the matter very minutely, in the case of Squire *v.* Campbell, in the first volume of *Mylne & Craig*, p. 459, in which I thought it my duty to review all the cases that had occurred in the one country and in the other, for the purpose, if possible, of establishing a rule which might be a guide on future occasions when similar cases should occur; and I found that, certainly, what had been very much the opinion of the profession in this country, namely, that the parties were bound by the exhibition of such plans, had met with a very wholesome correction by the doctrine laid down by Lord Eldon and by Lord Redesdale in the case of Heriot's Hospital—a case coming from the Court of Session, and afterwards decided by this House. Under the authority of that case, where the point was very distinctly raised and deliberately decided upon by those two very learned lords, I came to the conclusion that there was no ground for equitable interposition.

NORTH BRITISH RAILWAY COMPANY *v.* TOD.—23rd July, 1846.

Now, my Lords, not relying upon the authority of Squire *v.* Campbell, but relying, as we are bound to do, upon the case of the feoffees of Heriot's Hospital—that being a decision of this House—I consider that this is a rule to which the courts of this country, and the Court of Session in Scotland, and this House must hereafter adhere.

Now, my Lords, taking that, then, to be the rule in examining the facts of this case, and the Act of Parliament upon which the question turns, we are not to look at what was represented upon the plan, except so far as its representation is incorporated in and made part of the Act of Parliament; and the real question, therefore, turns upon this,—whether the Acts of Parliament do or do not make the datum line and line of railway with reference to that datum line, the subject matter of these enactments, and the rule by which the rights of the parties are to be regulated; or whether it also includes the surfaces which in this instance, accidentally no doubt, had been very much misrepresented upon the plan.

We are first of all, then, to refer to the Act of Parliament under which this railway is to be carried into effect, and the enactment is to be found in the sixteenth section. I may here observe, before I refer to that section, that everything which is out of the Act is to be found in the Standing Orders of the one House or of the other; and the plans which are required to be exhibited by those Standing Orders, except so far as they are made part of the Act, are, as I apprehend, entirely out of the question; because it may be very convenient that Standing Orders of this or of the other House should require plans to be exhibited, containing matters which are not binding between the parties. But still, when we are looking to what the rights of the parties are, we can only look to the Act of Parliament by which those rights are regulated. Plans or proceedings previous to the enactment can have no effect upon the enactments themselves.

NORTH BRITISH RAILWAY COMPANY *v.* TOD.—23rd July, 1846.

Now the sixteenth section of the Act of Parliament says: "And whereas plans and sections of the railway, showing the "line and levels thereof, and also books of reference containing "the names of the owners and lessees, and occupiers of the land "through which the same is intended to pass, have been depo- "sited with the sheriff-clerks of the counties of Edinburgh, "Selkirk, and Roxburgh: Be it enacted, that, subject to the "provisions in this and the said recited Acts contained, it shall "be lawful for the said company to make and maintain the said "railway and works in the line and upon the lands delineated "in the said plans, and described in the said books of reference, "and to enter upon, take, and use such of the said lands as "shall be necessary for such purpose." Here is a parliamentary authority, which of course cannot be disputed, that the parties are to be at liberty to make "the railway and works in the line "and upon the lands delineated on the said plans." We have, therefore, to look only to what is the meaning of the word "line" as used in this Act of Parliament. The reciting part of that section speaks of "lines" and "levels;" it is therefore necessary to look to other Acts, (the general Acts being required to be incorporated and made part of this Act,) to see what is the meaning of those terms used in this section, because this is a power under which the railway company are to act; and if they bring themselves within the meaning of that enactment, explained by provisions and sections to be found in other Acts of Parliament, beyond all doubt, they are then performing the powers which the legislature intended to vest in them.

My Lords, in the Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the making of railways in Scotland, we have several sections to which it appears to me to be necessary to refer. The seventh and eighth I only refer to for the purpose of observing that the plans which are there referred to are in cases where, after the original plans have been deposited, it has been found that they contain

certain errors; and then it defines the means by which the parties are to correct those errors and to make their plans correct. But the eleventh section contains this provision: "In making "the railway, it shall not be lawful for the company to deviate "from the levels of the railway as referred to the common "datum line described in the section approved of by Parliament, "and as marked on the same, to any extent exceeding in any "place five feet." It then provides for the case of passing through a town as to which other provisions are introduced. The description, therefore, of the levels, when it speaks of the levels of a railway, is in very distinct terms; it describes the level of the railway as referring to the common datum line described in the sections approved of by Parliament.

Then comes other clauses, to which I need not particularly refer. The fifteenth provides for a lateral deviation which is not in question in the present case. The power which is given by that section has been acted upon, and it is not contended that the lateral deviation does exceed those powers. Then comes the enactment of the sixteenth section of the appellants' Act: "That, subject to the provisions in this and the said "recited Acts contained, it shall be lawful for the said company "to make and maintain the said railway and works in the line "and upon the lands delineated in the said plans." And then it goes on to enumerate the works which the company is to be authorized to make.

Now, my Lords, taking these enactments—because I do not find that the other Acts contain any provisions which are very material to be attended to—taking these two enactments together, it appears to me to be quite plain, that the legislature intended, in speaking of lines and speaking of levels of the intended railway, to confine those provisions and to refer them to the datum line, and not to any other representation.

Although, my Lords, great convenience may arise from the plans and sections required by the Standing Orders to be exhi-

bited previous to the application to Parliament for powers to make railways, representing the surface as well as the datum line, and the intended line with reference to that datum line,—yet if any difficulty should arise as to the construction to be put upon these sections to which I have referred, we must recollect that Parliament must be supposed to have had before it, not only the line as explained in these sections, but also the other surface line which is exhibited in the plan. But the enactment totally disregards the surface line, and confines it in terms to the datum line—to the line of railway to be measured and ascertained with reference to its distance from that datum line.

I say then, my Lords, that a case does arise upon these provisions of the Acts in which the plan may be referred to, but referred to only to ascertain the line of the railway with reference to the datum line. It is not referred to with reference to any surface level; the plan, therefore, is entirely out of the enactment, and is not to be referred to for the purpose of construing the enactment as to any part of it, except so far as it is referred to and incorporated in the Act.

My Lords, arriving at that construction of the rule upon the provisions of the two Acts to which I have referred, and then applying to it the principle which has been established in Scotland, and by this House, in the case of the Feoffees of Heriot's Hospital, and acted upon in the Court of Chancery in the case of Squire and Campbell, we can have no difficulty in coming to the conclusion, that the application of that principle will necessarily lead to the construction of the clauses to which I have referred. The plan is binding to the extent of the datum line, and the line of railway measured with reference to that datum line; but it is not to be referred to for the purpose of surface levels, because the Act does not apply for that purpose, but cautiously confines the enactment to the other plans to which I have already referred.

My Lords, therefore acting upon the principle so established,

and with reference to the construction which I conceive to be the construction to be put upon these sections, although we cannot but greatly lament the hardship which, in all probability, these circumstances have imposed upon the pursuer, in having his land interfered with in a manner which he did not at all anticipate; yet, when we are called upon to consider whether the Court of Session are correct or not in suspending the further acts of the company, with reference to the mode in which they were to pass his land, we are bound to look what are the powers which these Acts vest in the company, and according to the opinion which I have formed, for the reason which I have already explained, I come to the conclusion that the company have not exceeded those powers, and do not propose to exceed those powers in the plans that they have formed, and therefore, that the Court of Session have been in error in granting their interdict against this company.

LORD CAMPBELL. I must admit, my Lords, that in this case I have felt very considerable doubts as the argument proceeded, and I acknowledge that I come to the conclusion at which I have arrived, with very great reluctance. It seems to me to be a case of very great hardship upon Mr. Tod. He, looking to the plans lodged under the Standing Orders of the House of Commons, and also of this House, had every reason to believe that there was no danger of the railway passing his avenue—his approach—in a manner that could seriously destroy the convenience or amenity of his place of residence, and he might very reasonably abstain from offering any opposition to the bill before Parliament upon that representation.

But, however, my Lords, when we come to consider what the law upon the subject is, I feel bound to concur in the opinion which has been expressed by my noble and learned friend, the Lord Chancellor.

The first question, as it seems to me, to be considered, is

this: what is the legal construction of the Act of Parliament? Do the company, or do they not, propose to exceed the powers which the Acts of Parliament confer upon them? Now, it is admitted that if the deviation is to be calculated from the datum line alone, that they have not; because, neither vertically nor laterally, do they exceed the powers of deviation which are conferred upon them by their Acts of Parliament.

Well, then, that raises the question, whether those powers of deviation are to be calculated from the datum line alone, or whether the surface line is to be taken into consideration; and my opinion is, (and I have no doubt at all about this—I never had much doubt about it,) that the Act of Parliament does refer everything to the datum line. I think it is evident that the eleventh section of the 8th and 9th Victoria, chapter 33, clearly makes the datum line alone that which is to be regarded.

My Lords, the word "levels" in the plural, really does not, in my opinion, at all include the surface levels. It refers to the levels on the datum line which point out the course the railway is to go. If that be so, the company do not propose to do anything that they are not authorized to do according to the letter of the Act of Parliament.

Now, there certainly was a representation made here on the part of the company, when they proposed to bring in an Act of Parliament, by which they intimated that at that time the intention was, that the railroad should be fifteen feet four inches below the surface of Mr. Tod's property at the point of intersection; and that the bridge by which his approach would pass the railway, would not be more than three feet. But then, my Lords, this was merely an intimation on the part of the company, that such was their intention. An Act of Parliament of this sort has, by Lord Eldon, and by all other judges who have considered the subject, been considered as a contract.

Well, then, this was a negotiation—it was a contract. We must disregard what took place previously; we must look to

see what the contract is. The contract, my Lords, is to be gathered from the words of the Act of Parliament, and that brings us back to the question that I first considered—what is the construction of the Act of Parliament? That Act of Parliament must be considered as over-ruling and doing away with everything that had taken place prior to the time when the Act of Parliament passed, and renders the representation or proposal of the company, pending the passing of the Act of Parliament, of no avail.

Now, many cases have occurred in the courts of common law, in which it has been held, that everything that takes place before a written contract, signed by the parties, is entirely to be disregarded in construing the contract by which they are bound.

Now, if Mr. Tod had been cautious, he would have done what I would strongly recommend all gentlemen hereafter to do under similar circumstances, which is to have a special clause introduced into the Act of Parliament, to protect his rights. I do not believe that there is any committee either in the House of Commons or in the House of Lords, who, if he had asked for a clause providing that the railroad at passing his approach should be fifteen feet four inches, (with a power of vertical deviation perhaps,)—that it should be of that depth in crossing his approach, and he should be able to pass it by a bridge not more than three feet—would not have acceded to the insertion of such a clause, as a matter of course. For it is only reasonable that his property should be protected in this manner, and that he should be saved from such a deformity being erected in the sight of his dwelling-house, which would for all time to come be a great nuisance, and might diminish its value. But he abstains from introducing any such clause, and therefore he must be considered as acceding to the company having all the powers which the Act of Parliament confers upon them. The Act of Parliament confers the powers upon them of deviating a hundred yards laterally, and I think five feet vertically, without

any qualification whatever. The company do not propose to deviate to a greater extent. They are, therefore, within the powers—they are not exceeding the powers which are conferred upon them; they are acting according to the contract that must be supposed to be entered into by them with Mr. Tod.

My Lords, I have read with very great attention the case of the Feoffees of Heriot's Hospital, and with very great attention, the most admirable judgment of the Lord Chancellor in Squire *v.* Campbell, in which all the cases upon this subject are reviewed; and these cases remove all doubt from my mind, and induce me now—I may say without hesitation, although I again repeat with very great reluctance—to come to the conclusion, that neither upon the construction of the Act of Parliament, nor upon the ground of the representation that was made, is there any sufficient reason why this interdict can be supported.

I therefore agree in the judgment which has been expressed by my noble and learned friend.

It is ordered and adjudged, That the said interlocutors, so far as they are complained of in the said appeal, be, and the same are, hereby reversed; and that the cause be remitted back to the Court of Session in Scotland, or, if the Court of Session shall not be sitting, to the Lord Ordinary officiating on the bills during the vacation, to do therein as shall be just, consistently with this judgment.