50, 1937

No. 89 of 1936.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR ONTARIO.

IN THE MATTER of the Act 55 Vict. (Ont.) Chap. 96 and the Schedules thereto,

and

IN THE MATTER of an Arbitration thereunder.

BETWEEN

INTERNATIONAL RAILWAY COMPANY - *Appellant*

AND

THE NIAGARA PARKS COMMISSION - *Respondent.*

Case for the Respondent.

RECORD.

1. This is an Appeal from the Judgment of the Court of Appeal of Ontario (Mulock, C.J.O. Masten, Middleton, Fisher and Henderson, JJ.A.) dated the 31st of December 1935 which unanimously confirmed with a variation the award of the Arbitrators appointed pursuant to an agreement of 4th December, 1891, between the parties and dismissed the Respondent's cross-appeal against such award. No question now arises upon such cross-appeal. p. 51, l. 30, et seq. p. 287.

2. The matter in dispute upon such arbitration was the amount to be paid by the Respondent (the Park) to the Appellant (the Railway Company) in respect of the voluntary surrender to the Park of a certain Electric Railway operated by the Appellant under the terms of the above-mentioned agreement and the main question for decision in this Appeal is whether the Appellant is entitled to recover from the Respondent, in respect of such voluntary surrender, the cost of reconstruction of the undertaking less depreciation or as the Respondent submits and as the Arbitrators and Court of Appeal adjudged, the full actual value of the undertaking at the time of the surrender.

p. 23, ll. 14-17. p. 14, ll. 12-15. 3. The railway at the time it was so surrendered had no value for operation as a railway " to the Railway Company or the Parks Commission or to anyone else " and was closed down by the Respondent eleven days after its surrender to them.

p. 287, et seq. p. 277, et seq. 4. The proceedings in this case began by an arbitration held under agreement made between the predecessors in title of the parties which was confirmed by an Act of the Ontario Legislature in 1892 being Chapter 96 of the Statutes of Ontario, 55 Victoria. By the agreement certain promoters from whom the Appellant traces its rights agreed to construct an Electric Railway running from Queenston to Chippawa in the Province of Ontario along the west bank of the Niagara River and operate it for a period of forty years from 1st September, 1892. The Commissioners for Queen Victoria Niagara Falls Park, being the predecessors in title of the Respondents, gave them an exclusive franchise for the forty years with a right of renewal for a further period of twenty years, later increased to forty years. The Niagara Falls Park and River Railway Company was incorporated by the special Act of 1892 which confirmed the agreement and took over the project from the promoters and subsequently transferred it to the Appellant. The enterprise was carried on for the forty year period as agreed until 31st August, 1932, when the Appellant being unwilling to renew its franchise exercised its right to abandon the venture and all the railway, equipment, machinery and other works of the Appellant vested in the Respondent which became obligated under the agreement duly to compensate the Railway Company for such property.

p. 289, ll. 25-31. p. 292, ll. 23-32. p. 287, ll. 1 & 2. p. 292, ll. 23-32. p. 278, ll. 4-9.

5. The main question in this appeal is one of law and requires the interpretation of the words " duly compensate " in paragraph 26 of the agreement, the pertinent parts of which read as follows :—

p. 295, ll. 14-23.

> " If, at the end of the said period of forty years, the Company are unwilling to renew, or at the end of the further period of twenty years, if the Company continue to hold for such further period, the Company shall be duly compensated by the Commissioners for their railways, equipment, machinery and other works including . . . the high level railway from Chippawa to Queenston, and including also their works in Chippawa and Queenston, but not in respect of any franchise for holding or operating the same . . ."

p. 14, ll. 35-40. p. 15, ll. 3-22. 6. The Appellant contends that under paragraph 26, it is entitled to be paid what it would cost to reconstruct the railway new as of 1st September, 1932, with the items of property that comprised the railway as of that date, less an amount for the depreciation and obsolescence existing in the property as of 1st September, 1932. The Appellant relies on a series

of English and Canadian cases having reference to compulsory acquisitions for support of this artificial basis of valuation which the Respondent contends have no application to the facts of this case, namely, the voluntary abandonment of an unprofitable and indeed hopeless undertaking to an unwilling party.

7. The Respondent contends that under paragraph 26 of the agreement it is to pay to the Appellant the full value of its property as of 1st September, 1932. This value is not to be determined by any artificial or fanciful basis of valuation but should be the fair value—that is the real value—of the undertaking if it had any value or of the property comprised in the undertaking if the railway as such was, as is the fact, without value.

8. At the arbitration, the Majority Arbitrators awarded the Appellant the sum of $179,104.00 applying various considerations to various component parts of the property. As the matter was largely one of law, however, in order to save expense to the parties, the Majority Arbitrators stated an amount of $967,592.00 as representing the reproduction cost new as of 1st September, 1932, less depreciation and physical obsolescence of the property. p. 4, l. 19. p. 23, l. 18. p. 25, l. 25.

9. The third Arbitrator dissented from the basis of valuation adopted by the Majority Arbitrators. He was aware, however, of the details making up the amount of the majority award and nowhere did he dissent from the amount allowed in the majority award assuming that the basis of valuation adopted by the majority was correct nor did he suggest any alternative amount on that basis. p. 27, l. 31.

10. The third Arbitrator would have valued the property at the reproduction cost new less depreciation and obsolescence. He agreed with the Majority Arbitrators on the figure of $967,592.00 as the proper amount on this basis to be paid to the Appellant subject to an increase to $1,069,652.00 as an additional allowance for certain items of property which the Majority Arbitrators rejected. p. 32, ll. 8 & 9.

11. If the basis of valuation adopted by the Majority Arbitrators is the proper basis, the three Arbitrators are not in disagreement that $179,104.00 is the proper amount to be paid to the Railway Company as due compensation subject, of course, to an additional small amount in respect of the few items of property in dispute which the third Arbitrator thought should be added. If reproduction cost new less depreciation and obsolescence is the proper basis of valuation then all three Arbitrators are in complete accord that $967,592.00 is the proper amount to be paid to the Railway Company subject to the same addition for the disputed items of property. The Court of Appeal for Ontario adopted the figure p. 52, l. 10.

of $179,104.00 as the proper amount to be paid to the Appellant, subject to minor variations. The argument on this appeal, therefore, resolves itself largely into a determination of which of the two bases of valuation is proper.

12. In his reasons for judgment Mr. Justice Masten, with whose judgment the other members of the Court concurred, came to the conclusion that " Compensation must be based on the actual financial value to the Respondent of that which passed and not on any artificial value such as the Appellants seek to establish." He further found that there were " no grounds to warrant interference with the finding (of the Majority Arbitrators) that " the railway at the time it was handed to the Parks Commission was of no value for operation as a railway " and that the real basis of compensation was analogous to that which is applied as between landlord and tenant when buildings are erected by the tenant and at the conclusion of the tenancy are taken on by the landlord, i.e., at their value to the landlord."

p. 42, ll. 15-17.

p. 45, ll. 21-24.

13. The minor question involved in the appeal relates to certain items of property which the Majority Arbitrators excluded from their award and which the third Arbitrator thought should be included. In the Court of Appeal the exclusion of these items by the Majority Arbitrators was not disturbed except in regard to three small pieces of property which the Court of Appeal held should be included in the amount of compensation. In dollar figures the Court of Appeal reduced the award of $179,104.00 by $11,440.00, which latter amount both parties agreed had been added to the award in error, and then increased it to $168,764.00 by an addition of $1,100.00 for one of the items of property to be included and directed a reference back to the Arbitrators in regard to the other two small items on the failure of the Appellant to accept a proposed figure of an additional $1,000.00 suggested by the Court.

p. 52, l. 15.

p. 52, l. 33, to p. 53, l. 2.

History of the Railway.

14. The property of the Appellant which became vested in the Respondent on the Appellant being unwilling to renew its franchise consisted of the railway structure including ballast, ties, rails, track equipment, poles, cross-arms, feeders, trolley wires and other appurtenances of an electric railway and also a number of buildings, a number of parcels of real estate, chattel property of various kinds ordinarily used in connection with an Electric Railway, power house equipment used in the furnishing of electric power for the operation of the Railway, an incline railway situate near the whirlpool in the Niagara River and an incline railway known as the Clifton Incline Railway. The latter railway included and the whirlpool railway excluded the machinery necessary for its operation.

p. 14, ll. 16-27.

15. The admissions of the Appellant's own witnesses disclosed a picture of very heavy losses from the operation of the Railway over the forty year period of its existence and particularly heavy losses during the last twelve and three-quarter years of its operation. Exhibit 68 put in by the Appellant shows a loss of $571,400.76 for the forty years' operations of the Railway. It also shows a loss of $971,805.88 for the last twelve and three-quarter years' operation. On cross-examination, J. F. Schmunk, the Appellant Company's Chief Accountant, admitted that to give a true and complete picture of the financial plight of the Railway, a sum of $510,000.00 should be added to the losses for the last twelve and three-quarter years as loss on invested capital making the total losses for the last twelve and three-quarter years the huge sum of $1,481,805.87. A perusal of Exhibit 68 shows annual losses ranging from $25,980.42 in 1921 to $112,303.72 in 1931 and $78,305.34 for the last eight months of its operations to 1st September, 1932. With one exception, during the last eleven years of its operation, the annual earnings fell short of paying even operating expenses, apart from overheads and depreciation.

p. 244. p. 81, l. 40. p. 82, l. 43. p. 244.

16. The witnesses called by the Respondent at the Arbitration made it clear that the virtual bankruptcy of the Railway Company on the Canadian side was due to the changed mode of transportation by means of private automobiles, busses and trucks which on the provision of good roads had superseded the Railway. The construction of good roads had diverted traffic across country from Fort Erie to Hamilton away from the Falls and had enabled visitors to the Falls to use their own private automobiles or buses. A splendid road runs parallel to the line of the Railway and enabled visitors to view the wonders of the whirlpool and the Falls from their seats in their automobiles. Chartered buses as well bring visitors to the vicinity and these more modern forms of transportation have competed with and superseded the Railway.

p. 113, ll. 1-7. p. 113, ll. 22-40. p. 113, l. 46, to p. 114, l. 8. p. 139, l. 23 to p. 140, l. 36. p. 144, l. 25 to p. 145, l. 6. p. 152, l. 12 to p. 154, l. 8. p. 161, l. 35 to p. 162, l. 18. p. 107, l. 35 to p. 108, l. 33. p. 24, l. 15-20. p. 113, ll. 10-13. p. 167, ll. 10-20.

17. The extent to which the public had forsaken the Railway is indicated by the decline of passengers carried (Exhibit 101). From a peak year in 1923 when 1,950,629 passengers were carried, the number declined steadily year by year until in 1931 only 485,556 passengers were carried and a further decline to 230,429 passengers had taken place for the first eight months of 1932. In marked contrast with such decline is the rise in revenue of the Clifton and Whirlpool Incline Railways with their concession privileges, which indicates the increased patronage of the Park by visitors while at the same time the Railway was being abandoned by the public. The rentals received from the Clifton Incline Railway, which were based on a percentage of the total business transacted, rose from $1,872.52 in 1920 to $15,799.53 in 1929 and the rentals received from the whirlpool incline rose from $3,959.01 in 1920 to $14,179.00 in 1929. This increased revenue of the inclines during the years when the number of passengers and

p. 249. p. 256, l. 35 to p. 257, l. 10.

the revenue of the Railway was sinking rapidly is significant and indicates that while visitors were coming to the Falls in increased numbers, the Railway was being forsaken by them.

p. 141, ll. 22-28. 18. The evidence of a number of expert witnesses of great experience showed that the same changed mode of transportation that caused the downfall of the Railway was operative throughout Ontario and had been responsible for the abandonment of many other inter-urban electric railways. The heyday of this type of transportation facility had passed and was now superseded by more modern and satisfactory modes of conveyance.

p. 145, ll. 12-22. p. 119, ll. 29-33.

19. Although no surer evidence that this Railway could not be operated at a profit in the future was required than the admission of the fact by the refusal of the Appellant to renew its franchise and continue the operation of the Railway even at a reduced rental (which was offered to them), the Respondent called five expert witnesses at the Arbitration who, from a vast experience in railway matters, stated that this Railway could never operate at anything except a tremendous loss in the future. There was no denial of this evidence by the Appellant. There was no hope of conditions improving for the Railway and it would just be a " sink hole " for money. As an additional safeguard, however, the Respondent, on learning that the Appellant was unwilling to renew its franchise, advertised extensively in papers that circulated throughout Canada and the United States for either the sale or rental of the Railway but without results. Thus the evidence showed that the Railway in 1932 could neither be sold or rented as an operating enterprise and that its activities could be carried on only at a great loss in the future. Its continuance as a railway was commercially impossible and it was at once closed down.

p. 262, ll. 5-11. p. 112, ll. 32-37. p. 140, l. 43 to p. 141, l. 8. p. 155, ll. 10-37. p. 162, l. 35 to p. 163, l. 39. p. 24, ll. 15-20. p. 40, ll. 12-15. p. 155, ll. 28-41. p. 165, l. 12 to p. 167, l. 9.

RESPONDENT'S SUBMISSIONS.

20. The submission of the Respondent is that " duly compensate " in paragraph 26 means " pay the value of " or give an equivalent in money for the property turned over by the Appellant. Section 18 of the special Act in the use of the word " value " in referring to " compensation " indicates that " compensation " means " value." It is to be borne in mind that even if the franchise were not worthless, nothing could be allowed as compensation for it, because paragraph 26 expressly excluded compensation in respect of " any franchise for holding or operating " the Railway. If the Respondent is right in its contention that " duly compensate " means " pay the value of " then it is apparent that since the Railway is valueless as an operating business enterprise and can never be operated at anything except great loss in the future, the only value of the Railway is what can be realised by a sale of its component parts. The true measure of the Railway's value is what could be realised in money as of 1st September, 1932, from a disposal of each item of property that comprised the entire railway.

21. It was not suggested at the Arbitration or in the Court of Appeal that the losses suffered by the Appellant were caused by the tariff of fares being too low. There was no evidence given that the public were not being charged all the traffic would bear or that higher fares would bring increased revenue. The Appellant gave no evidence in regard to applications to the Ontario Municipal Board for either increased or reduced fares and it must be assumed, in the absence of evidence to the contrary, that the Appellant was charging the public maximum rates and any attempt to raise the tariff would only have resulted in decreased revenue from a decrease in the number of passengers carried.

22. The Appellant contends that "duly compensate" in the agreement embraces any benefit the Park may receive from the property of the Appellant turned over to it. It is argued by the Appellant that the Railway is of value to the Park as a "feeder" to the concessions and restaurant facilities operated by the Respondent and that this should affect the amount of compensation to be paid to the Appellant. The submission of the Respondent is that such a consideration has nothing whatsoever to do with the meaning of the words "duly compensate" in paragraph 26 of the agreement. The Appellant is to be paid the value of the property it turns over to the Respondent and any other consideration is irrelevant and excluded by agreement of the parties. In addition, it was not even suggested by the Appellant that as a business proposition the Respondent should operate the Railway or that any added revenue to the concessions by reason of the Railway's operations could even approximately make good the large losses that such operation would inevitably entail. Finally it was demonstrated by the Respondent that the concessions were being patronised, largely, by persons who were being brought to the Park by facilities other than the Railway and while the number of passengers of the Railway were rapidly declining, the revenue of the concessions was rapidly increasing. Visitors coming by motor car and bus could with equal ease patronise the other Park concessions.

p. 24, ll. 21-30.

p. 249. p. 256. p. 24, ll. 25-32.

23. The Appellant contends that the construction of the Railway in 1891 and its operation for forty years was in the nature of a joint adventure between the parties which should entitle it to receive from the Respondent the reconstruction cost less depreciation and obsolescence of the Railway. It is argued that in 1891 the Respondent was very anxious to obtain added revenue for the support of its activities and that the promoters from philanthropic motives, undertook the project of constructing and operating the Railway at an annual rental of $10,000.00. It is further argued that the Respondent expected an increased number of visitors to increase the revenue to the Park from the Concessions, and that the Appellant's enterprise was an integral part of the Respondent's project and endeavour to make itself self-supporting.

p. 23, l. 41 to p. 42, l. 3.

24. The Respondent's answer to this contention is that the parties are governed by the provisions of the agreement and Act and that they exclude any such fanciful basis of valuation. The words used are " duly compensate " and if the parties had intended to adopt any such basis of valuation as is suggested by the Appellant, the word " reimburse " or some other like expression would have been used to indicate the amount of money the Appellant is to receive. The parties are governed by the provisions within the four corners of the agreement and the considerations upon which this argument of the Appellant is based, which are taken entirely from the reports of the Commissioners prior to the completion of the agreement are inadmissible for purposes of interpreting the provisions of the agreement. If such reports are admissible, however, they show conclusively that from a financial point of view in 1891 the construction of the Railway was a most attractive and promising enterprise. Any philanthropy of the promoters in constructing the Railway was tempered by a shrewd self interest and the evidence shows that not only were the promoters freed from all personal liability under the agreement upon the completion of the construction of the Railway but these alleged philanthropists sold out their entire interest to the Appellant after paying to themselves $120,000.00 in dividends—the only dividend paid by the Railway in its forty years' operation and immediately after the Railway had reached the peak of its operations due to revenue received from visitors attending the Pan American Exhibition of 1901. It must be assumed that the parties entered into a business agreement expecting mutual benefits and that they took their chances as to what the future would bring forth. Both the express provisions of the agreement and the surrounding circumstances indicate the fallacy of the Appellant's argument that based on such considerations, reproduction cost less depreciation is the proper basis of valuation.

p. 61, ll. 29-35.

p. 288, l. 37 to p. 289, l. 11.

p. 84, ll. 23-30.

p. 85, l. 42 to p. 86, l. 5.

25. Even assuming that the proper basis for valuing the Railway could be reproduction cost less depreciation and obsolescence, the evidence conclusively shows that the Railway as a whole was obsolete in the sense that by reason of the changed economic conditions it was incapable of earning the cost of operating it and competing satisfactorily with other modes of transportation. The result, therefore, flows from such a situation that even if such a basis of valuation is adopted as the proper one, the obsolescence to be deducted is so all-embracing and complete that it reduces the reproduction cost to the figure allowed by the Majority Arbitrators, namely, the value by appraising the various component parts of the property.

p. 26, ll. 20-28.

p. 111, ll. 2-8.

p. 26, ll. 5-7.

26. The Majority Arbitrators disallowed any compensation for an item known as the C.N.R. Turnout at Niagara Falls on the ground that it was not part of the Railway taken over by the Respondent. This was a spur laid down for the purpose of enabling the Railway to run up the middle of

Bridge Street in Niagara Falls, Ontario, to the former waiting room of the Niagara and St. Catharines Railway so as to make close and convenient communications with that Railway. This waiting room was long prior to 1932 moved to another part of Niagara Falls and this bit of track thereupon fell into disuse. The Court of Appeal confirmed the disallowance by the Majority Arbitrators on the ground that the spur was valueless and that the Appellant had not shown any right to tear up the street and remove the rails. It is submitted that the findings of fact of the Majority Arbitrators and the Court of Appeal in respect of this item are amply supported by the evidence and ought not to be disturbed.

p. 47, ll. 15-30.

27. In the alternative figures given by the Majority Arbitrators as the reproduction cost less depreciation and obsolescence they estimated the cost of Bridges Numbers one to seven and the power house as containing concrete in substitution for masonry which was used in the original construction. The Appellant contends that the reproduction cost as of 1st September, 1932, should be based on the use of masonry. The evidence showed beyond a doubt that in modern construction, concrete, which is cheaper, has replaced masonry and that it is generally used in construction work of this type. The Respondent submits that if reconstruction cost is applicable, the materials to be applied are those commonly used at the time of the fictional reconstruction. This item becomes of importance only if reproduction cost less depreciation and obsolescence is adopted as the proper basis of valuation. If the basis of valuation adopted by the Majority Arbitrators and the Court of Appeal is sound, the arguments in regard to this item are not material.

p. 25, ll. 34-36.

p. 121, l. 20 to. p. 122, l. 25.

p. 122, ll. 25-40.

28. The Majority Arbitrators disallowed any compensation for the item known as the Highway Bridge and this disallowance was upheld by the Court of Appeal. The evidence showed that the application to construct this bridge on lands owned by the Respondent was made not by the Appellant but by the Canadian Niagara Power Company and permission was granted only upon the express condition that it was to be constructed without cost to the Respondent. The abutments of the bridge were built by the Canadian Niagara Power Company. The Appellant was party to an agreement with the Respondent that there should be no recourse against the Commissioners in respect of the construction of the bridge. The Court of Appeal held that this item of property formed no part of the physical assets handed over to the Respondent. It is submitted that the concurrent findings of fact by the Majority Arbitrators and the Court of Appeal which is amply supported by the evidence should not be disturbed.

p. 105, ll. 30-40.

p. 228, ll. 1-3

29. The Majority Arbitrators disallowed any compensation for the item known as the Intake. This was a piece of work done by the Canadian Niagara Power Company on land owned by the Respondent to which the

p. 26, ll. 7-12.

Appellant contributed $3,000.00. It consisted of the construction of a large Intake leading to the power houses of the Appellant and of the Town of Niagara Falls in replacement of two old wooden flumes and was necessitated by changes in the shore line of the Niagara River made by the Canadian Niagara Power Company. The Respondent subsequently bought out the Town's interest in the Intake. The Majority Arbitrators found as a fact that the work done was in excess of the value of the class of work prescribed by Section 18 of the Act and as no approval by the Commissioner of Public Works had been obtained as required under Section 21 of the Act, compensation was disallowed. The Respondent contends that as the work was done by the Canadian Niagara Power Company on the Respondent's lands and as all the property of the Canadian Niagara Power Company will vest in the Respondent at the end of 100 years without compensation that the disallowance by the Majority Arbitrators and the Court of Appeal should be upheld. In addition, the Court of Appeal found and the evidence so establishes that the value of the Intake is nil.

p. 240, ll. 40-45.

p. 26, ll. 7-12.

p. 213, ll. 29-34.

p. 48, ll. 1-19.

30. The present case is one covered by the Agreement of the parties inasmuch as by written contract the Respondent agreed to purchase and the Appellant agreed to sell the assets in question. The Appellant was given the right to exercise its discretion as to which of alternative dates it would select to turn over the property to the Respondent at a price to be determined by arbitration. There is therefore not only no element of compulsory taking by the Respondent from the Appellant but on the contrary in this case the Appellant having acquired the right by agreement so to do, itself named the date at which Respondent was compelled to take over and pay. The whole principle therefore involved in compulsory taking cases which proceed on the basis of the person who is to be compensated having something taken away from him which he wants to keep, is entirely absent here. The reverse is the fact,—that the Respondent was obliged to take over something for which it had no use and which it did not want, but which, by contract made long ago, it agreed it would take at an optional date to be selected by the Appellant. The following cases relied upon by the Appellant are all (except *the National Telephone Case*) distinguishable because they are compulsory taking cases. *The National Telephone Case*, though based on agreement, expressly provides in such agreement for a basis of compensation adopted in *the Edinburgh Case*, and as *the Edinburgh Case* was a compulsory taking case, the parties by agreement in *the National Telephone Case* contracted for that basis. In addition to this ground of distinction, the following cases are inapplicable and distinguishable from the present case upon the following additional other grounds :—

(A) *Stockton & Middlesbrough Water Board* vs. *the Kirkleatham Board* [1893] A.C. 444.

The undertaking in that case was capable of earning a profit. It was a case of *compulsory* taking.

(B) *Edinburgh Street Tramways Co.* vs. *The Lord Provost etc. of Edinburgh* [1894] A.C. 456 ; (1894) 63 L.J. 769.

The words governing compensation in that case were :—

" The then value (exclusive of any allowance for past or " future profits of the undertaking or any compensation for " compulsory sale or other consideration whatever) of the " tramway . . ."

The words " or other consideration whatever " exclude consideration of losses which affect value.

(C) *London Street Tramways Co.* vs. *The London County Council* [1894] A.C. 489.

This is the same kind of case as *the Edinburgh Case* (supra).

(D) *Lucas* vs. *Chesterfield* [1909] 1 K.B. 16.

This is an expropriation proceeding to acquire land, and the principles there laid down are inapplicable to the valuation of a railway.

(E) *Hamilton Gas Co. Ltd.* vs. *Mayor etc. of Hamilton* [1910] A.C. 300.

The basis of valuation included the value of a franchise which in the present case is excluded by agreement between the parties. In addition, it was a profitable undertaking as shown by an allowance for franchise.

(F) *Melbourne Tramways C[illegible]. Ltd.* vs. *The Tramway Board* [1919] A.C. 667.

Lord Dunedin at p. 676 says that this is a special case arising on the provisions of a statute specially expressed. The report in 1917 Victoria Law Reports 481 per Mr. Justice Cussen, shows that the railway was a highly profitable operation. See also Judgment in Privy Council of Lord Dunedin at p. 672 where the railway was valued as capable of earning a profit.

(G) *Oldham etc.* vs. *Ashton Corporation* [1921] 1 K.B. 267 per Rowlatt, J., confirmed in C.A. 3 K.B. 511.

The wording of the statute in this case was the same as in *the Edinburgh Case*, and the case is inapplicable.

(H) *Re City of Peterborough and Peterborough Electric Light & Power Company* (1922) 52 O.L.R. 9.

In this case the wording of the statute was that—

" nothing shall be taken into account or allowed for prospective profits or loss of profits."

This prohibited consideration from loss of profits as affecting value.

(I) *Toronto City Corporation* vs. *Toronto Railway Corporation* [1925] A.C. 177.

The compensation in this case depended upon the special wording of the Act under which the assets were turned over to the City. Among other special clauses affecting value is the following :—

"The revenue, profits and dividends being or likely to be derived from the enterprise are not to be taken into consideration."

(J) *Town of Berlin* vs. *The Berlin etc. Street Railway Co.* (1907–10) 42 S.C.R. 581.

The Railway in this case was being operated at a profit and was so valued. See Anglin, J., at p. 587 and see headnote in Judgment of Court of Appeal reported in (1909) 19 O.L.R. 57.

(K) *National Telephone Co. Ltd.* vs. *His Majesty's Postmaster-General* (1912–13) 29 T.L.R. 190.

The words governing the compensation were the same as in *the Edinburgh Case* (supra), and the same basis of valuation was adopted. The case is inapplicable for the same reason that *the Edinburgh Case* is inapplicable.

31. The following American text and cases are referred to only that the viewpoint for the reasoning they contain may be found useful as such :—

(A) *Whitton : Valuation of Public Service Corporations*, 2nd Edition, 1928, Vol. 1, p. 384, Section 220.

(B) *In re City of Eureka*, 19 Cal. G.R.C.R. 952, reported in Whitton at p. 489.

(C) *In re City of Groville*, C.U.R. 1922, p. 451, reported in Whitton at p. 490.

32. The Respondent therefore submits that the Judgment of the Court of Appeal for Ontario was right and should be upheld for the following amongst other

REASONS.

(1) BECAUSE the amount fixed is payable under the terms of and by reason of an agreement made between the parties and was properly ascertained.

(2) BECAUSE there was no compulsory taking by the Respondent but a voluntary surrender of the assets by the Appellant at a time chosen by the Appellant.

(3) BECAUSE the obligation to "duly compensate" the Appellant is fulfilled by paying the fair value of the assets purchased by and turned over to the Respondent as ascertained by the Arbitrators.

(4) BECAUSE the uncontradicted evidence discloses that the Railway, under capable management, has for twelve years past been operated at a huge loss and could only in the future be operated at a similar or greater loss.

(5) BECAUSE the agreement of the parties, as interpreted by the Arbitrators and in the light of surrounding circumstances, is fully carried out in its terms and its spirit by awarding to the Appellant the fair value of the assets.

(6) BECAUSE no conditions exist which would make it proper to enter upon an enquiry based on a fictitious method of reconstruction, less depreciation and obsolescence.

(7) BECAUSE even were it proper to adopt such fictitious method, the Railway as a whole was obsolete, so that the amount to be deducted for obsolescence is so embracing and complete that it reduces the reproduction cost to the amount allowed under the award.

(8) BECAUSE as to items omitted there were concurrent findings of fact by the Arbitrators and the Court of Appeal.

(9) BECAUSE the amount awarded by the Arbitrators, as varied by the Court of Appeal for Ontario, is supported by clear evidence and no evidence whatever was offered by the Appellant on which such amount could be disturbed, assuming that the basis adopted in fixing the same is correct.

(10) BECAUSE, the Railway having no value whatever as a commercial undertaking, valuation of the physical assets comprised in it alone afforded any basis for compensation.

(11) BECAUSE the sum awarded was the full market value of the Railway.

(12) For the reasons set out in the Majority Award and in the Judgment of the Court of Appeal.

ARTHUR G. SLAGHT.

WILFRID BARTON.

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GARD, LYELL & CO.,
47 Gresham Street, E.C.2,
Respondent's Solicitors.

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