

For these reasons I am of opinion that the interlocutors appealed from ought to be affirmed with costs.

My noble and learned friend Lord Shand, who heard the argument in this appeal, is unable to be present to-day, but his Lordship has requested me to state that the opinions which I have expressed have been carefully considered by him, and have his entire concurrence.

LORD MORRIS—My Lords, I have had an opportunity of reading the reasons which have been assigned by my noble and friend Lord Watson for his judgment, and I desire to express my entire concurrence.

The House affirmed the decision of the First Division and dismissed the appeal with costs.

Counsel for the Appellant—Lord Advocate (J. B. Balfour, Q.C.)—Salvesen. Agents—Adam Burn & Son, for H. & H. Tod, W.S.

Counsel for the Respondent—Asher, Q.C.—J. J. Cook—Mark Napier. Agents—Andrew, Wood, & Company, for Pringle, Dallas, & Company, W.S.

Monday, July 30.

(Before the Lord Chancellor (Herschell), and Lords Watson, Shand, and Ashbourne.)

EDINBURGH STREET TRAMWAYS COMPANY v. LORD PROVOST AND MAGISTRATES OF EDINBURGH.

[Heard and decided along with *The London Street Tramways Co. v. The London County Council.*]

(*Ante*, p. 598, and 21 R. 688).

*Tramway—Sale to Local Authority—Terms of Purchase—Valuation of Tramway—Tramways Act 1870 (33 and 34 Vict. cap. 78), sec. 43—Edinburgh Street Tramways Act (34 and 35 Vict. cap. 78), sec. 43.*

By the 43rd section of the Tramways Act 1870 it is provided that where the promoters of a tramway in a district are not the local authority, the local authority may, after the expiry of twenty-one years from the time when such promoters were empowered to construct such tramway, require the promoters to sell to them their undertaking, or so much of the same as is within such district, "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district," such value in the case of difference to be determined by a referee nominated by the Board of Trade.

The Edinburgh Local Authority gave notice under the foregoing section to purchase the Edinburgh Street Tramways undertaking.

*Held (aff. the decision of the First Division—Lord Ashbourne diss.)* that the then value of the "tramway" meant the then value of the "tramway lines;" that in valuing the tramway lines the referee was not entitled to take into account the present profits or rental value of the undertaking; and that the proper value to be put upon the tramway lines was the cost of construction at the date of the sale less depreciation, the referee being entitled, in estimating such cost, to take into account the fact that the tramways were successfully constructed and in complete working order.

This case is reported *ante*, p. 598, and 21 R. 688.

The Edinburgh Street Tramways Company appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL)—My Lords, the appellant company was formed under the provisions of a private Act of Parliament in the year 1871. This Act incorporated part 2 and part 3 of the Tramways Act 1870. Section 43 of that Act entitled the respondents, within six months after the expiration of a period of 21 years from the time when the appellants were empowered to construct the tramway, by notice in writing to require the appellants to sell their undertaking. They accordingly, on 12th August 1892, gave notice to the appellants that, in exercise of their rights under that section, they would purchase the appellants' undertaking within the city of Edinburgh. The appellants and respondents having differed as to the price to be paid, the Board of Trade appointed Mr Henry Tennant, of York, as referee, to fix what the price should be. In the narrative of the award or decree-arbitral which he made, Mr Tennant stated that in his opinion, after careful consideration of the terms of section 43 of the Tramways Act 1870, in valuing the tramways he was not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the tramways to be determined by him, according to his construction of the statute, was such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation for their present condition, and that in estimating such cost he was entitled to take into account the fact that the tramways were then successfully constructed and in complete working condition.

The present conjoined actions were thereupon raised by the appellants against the respondents for the purpose of reducing Mr Tennant's award or decree-arbitral, upon the ground that his view of section 43 of the Tramways Act 1870 was erroneous, and for declarator that he ought, under that section, to have fixed the value to be paid by the respondents for the tramways

upon the rental basis, and for an order on him to proceed with the reference, and to find and declare the value of the tramway lines according to their rental value.

Both the Lord Ordinary and the First Division of the Inner House have held Mr Tennant's award to be good, and have assozied the respondents.

The question on this appeal is whether these decisions were correct. The question turns on the construction to be put upon the language employed in section 43 of the Tramways Act 1870, which prescribes the terms upon which the promoters of a tramway (in this case the appellants) are to sell their undertaking to the local authority. The words are as follows—"Upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking."

It is contended on behalf of the appellants that the value of the tramway must be ascertained by taking into consideration what rental could be obtained for it if let with all the statutory rights of using it possessed by the promoters, and then allowing whatever may be thought the proper number of years' purchase of the rental which could thus be obtained. The sum so arrived at, it was argued, would represent the then value of the tramway within the meaning of the section.

My Lords, before discussing the language used by the Legislature, it is, I think, necessary to consider the nature of the rights and powers of the promoters which it is said are to be thus taken into account, and the manner in which they are conferred upon them.

The promoters obtained authority, in the first place, to interfere with public highways by laying down tramways upon them, and maintaining the tramways so laid down. But the most important power which they obtained was that contained in section 34 of the Tramways Act 1870, which authorised them to use upon the tramways so laid down carriages with flanged wheels, or wheels suitable only to run on the rail prescribed by their Act, and provided that, subject to the provisions of their special Act and of that Act, the promoters and their lessees should have the exclusive use of their tramways for carriages with flanged wheels or other wheels suitable only to run on the prescribed rail.

It will be seen that the power thus conferred is limited to the promoters and their lessees, the promoters being the persons or company authorised to construct the tramways. The right conferred is a personal one, and cannot be claimed by any persons who do not come within the designation of promoters or lessees of promoters. It is not conferred upon the promoters' assignees. A conveyance, therefore, by the promoters of their tramways or even of their undertaking would not carry with it the right to the statutory monopoly conferred upon the

promoters by the section to which I have referred.

My Lords, I proceed now to consider the words of the provision upon which the question at issue turns. It is to be observed that although the undertaking is described as the subject of the sale, it is to be sold, not upon terms of paying its then value, but upon terms of paying "the then value of the tramway and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking." It appears clear that the word "tramway" cannot be read as synonymous with "undertaking." The words which follow "tramway" are to my mind conclusive upon this point. What, then, does tramway mean as used in the section? I have examined every instance of its use in the statute, and it appears to me in every other case, at all events, to be used to describe the structure laid down on the highway, and nothing more, and I cannot see my way to give any other meaning to it in the section under consideration. The word "tramway" may, no doubt, without impropriety be held to include all proprietary rights attached to it; but I do not think that it can with propriety be held to comprise all the powers in relation to the tramway which are conferred by the statute upon the promoters.

I have already pointed out that the power exclusively to use the tramway was granted to the promoters as such, and is not capable of transfer by them. This is distinctly recognised by the enactment which immediately follows that under consideration. It is provided that when a sale has been made, all the rights, powers, and authorities of the promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if the tramway was constructed by such authority under the powers conferred upon them by a Provisional Order under the Act, and in reference to the same they shall be deemed to be the promoters. It is by virtue of this enactment, and of this alone, that the local authority become entitled to the exclusive use of the tramway which was previously vested in the promoters. It is the statute and not the company which originally constructed the tramways which confers upon the local authority this right.

It is also worthy of note that some, if not all of the rights, powers, and authorities of the promoters are treated as not included even in the term "undertaking" inasmuch as they are spoken of as the rights, powers, and authorities of the promoters "in respect of the undertaking sold."

My Lords, I have so far dealt with the language of the section without taking into consideration the words within the parenthesis, upon which so much of the argument turned; what was to be paid by the purchasers was the then value of the tramway "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever."

It was contended for the appellants that the presence of the parenthesis indicated that in the opinion of the Legislature the term "value of the tramway" would but for the words in the parenthesis have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution, to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure. There is, I think, a fallacy involved in considering the meaning of the words which follow the parenthesis by themselves, and then inquiring how far the meaning thus attributed to them is to be modified by reason of the words which precede. Each part of the provision throws light on the other. It is by reading it as a whole that the intention of the Legislature is to be ascertained. The words found within the parenthesis, to my mind, support the view that "tramway" is to be construed in the manner which I have indicated, and not in that contended for by the appellants. It is said that the words "exclusive of any allowance for past or future profits of the undertaking" were introduced for the purpose of preventing the arbitrator making any addition to the value otherwise arrived at in respect of such profit. I find it difficult to understand how it could ever be supposed that an arbitrator would make any addition to the value of the tramway in respect of the past profits of the undertaking, or how it could ever have been thought necessary to prohibit his doing so. It is, however, quite intelligible that it might be thought necessary to guard against his allowing for, or in other words, taking into account, past profits in arriving at the value of the tramways. But if the word "allowance" is used in this sense in relation to past profits its meaning must be the same in relation to future profits. I therefore construe the words as enacting that neither the profits made in the past nor to be anticipated in the future were to be taken into account in assessing the value.

It was argued that if the value of the tramway were arrived at by taking so many years' purchase of the rental which could have been obtained for it if let, no profits would be allowed for in the value so ascertained. I am unable to adopt this view. How would it be possible to determine the rental which could be obtained except by reference to the profits which had been or which might be made? The rent which a tenant would be prepared to give would obviously depend upon the profits to be anticipated.

It was further argued that the Legislature had only excluded an allowance for past or future, and not for present profits. Why, it was asked, if all profits were to be excluded, were the words "past or future" inserted. To my mind the words cover all profits whether made or to be made. And

the reason for their insertion appears to me plain. If the word "profits" alone had been used, it would have been open to contention that only profits actually made were referred to, and that the provision did not exclude an allowance for profits to be anticipated in the future.

Reading the enactment as a whole, I can find no indication, but quite the contrary, that the arbitrator in determining the then value of the tramway was to take into account those rights and powers which had been possessed by the promoters as such by virtue of the statute, and which would be thereafter by the same statute conferred upon the local authority.

Reliance was placed by the appellants upon the provisions of sections 41 and 42 of "The Tramways Act 1870," enabling the Board of Trade, if the promoters discontinued the working of their tramway, or were insolvent, to declare that their powers in respect of the tramway should be at an end. In the first of these cases the Board of Trade were empowered to declare the powers of the promoters at an end from the date of the order; in the latter, at the expiration of six months from the making of the order; but in both cases it is provided that the powers of the promoters shall thereupon cease and determine, "unless the same are purchased by the local authority in manner by this Act provided." Inasmuch as section 43 applies to a purchase by the local authority within three months after any order made by the Board of Trade under either of the two preceding sections, it was contended that this showed that the purchase of the undertaking was regarded by the Legislature as a purchase of the powers of the promoters.

My Lords, I do not think it possible to give the effect contended for to this argument, and to construe the word "tramway" in that part of section 43 which regulates the terms of payment in a different manner to that which a consideration of the section itself suggests on account of the language employed in the two preceding sections. That language is certainly not very felicitous. Whether the undertaking is purchased or not, the powers of the promoters equally cease and determine; the purchase does not keep their statutory powers alive. The powers are possessed thereafter by the local authority by virtue of the statute, in precisely the same manner as they were acquired by the promoters.

For these reasons I think the interlocutors appealed from should be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, these appeals, the one Scotch and the other English, were heard together at your Lordships' bar. They appear to me to raise precisely the same question, under circumstances which differ in no material respect. The majority of the learned Judges in both cases have come to the same conclusion. In Scotland the majority consisted of the Lord Ordinary, with three Judges of the First Division, the Lord President dissenting. In England, the decision of a Divisional Court was

unanimously reversed by three Judges sitting in the Court of Appeal.

The respondents are local authorities who have exercised their statutory option of requiring the appellants, who are street tramway companies, to sell a section of their tramway undertaking on the terms and conditions prescribed by statute. In that event it is enacted that the price payable to the appellants shall be the value to be ascertained, failing agreement, by arbitration, of certain enumerated subjects comprised in that part of their undertaking which has been taken over by the local authority.

In both of these appeals the rights of the parties are regulated by "The Tramways Act 1870." Section 43 of that Act defines the consideration payable to be "the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." In the second, the provisions of the "London Street Tramways Act," which became law on the day after the general statute, and by which the respondent company were incorporated, are also applicable. Section 44 of the latter Act defines the consideration to which, in the event which has occurred, the company are entitled, in terms identical with those which I have just quoted from the general statute.

The parties having failed to agree as to the quantum of consideration, applied to the Board of Trade, who, in the first case, nominated Mr Henry Tennant, and, in the second, Sir Frederick Bramwell, to be statutory referee. These gentlemen issued their respective awards; and the judicial proceedings in which these appeals are taken, though differing considerably in form, were instituted by the tramway company with the same object—viz., in order to have these awards set aside or corrected in so far as objectionable. In so far as concerns the valuation of their lands, buildings, works, materials and plant, the appellants have stated no objection. Their impeachment of the awards is rested solely upon the ground that the referees have failed to give due effect to the enactments of the statutes of 1870 in valuing the particular subject therein described as "the tramway."

It is plain that the expression "the tramway," as it occurs in the clauses already referred to, cannot mean the undertaking of the company, because it is enumerated as one of those parts of their undertaking which are to be separately valued, the sum of their values being the measure of the consideration which the company is to receive. Accordingly it was not disputed in argument that the words must refer to the structure of stone and iron, or other material, which is affixed to the solum of the streets, and upon which tramway vehicles run. So far the parties are agreed as to the identity of the subject

to be valued, but the important question remains, upon what footing it ought to be valued; and upon that point the present controversy turns. I do not regard the question thus raised as one which merely concerns the method of valuation which ought to be followed. In my opinion its solution depends, not upon so-called principles of valuation, meaning thereby the various formulas, some of them alternative, according to which value may be calculated, but upon the nature and extent of the interest which the Legislature intended should attach to and accompany the structure to be valued and paid for under the description of "the tramway."

So far as I can judge, the right of property in a tramway line, as such, may be of three different degrees. It may be no higher than bare ownership of the materials of which the line is composed, without anyone having the right to retain or use them *in situ*. Again, it may be that the property of the line does not carry with it the privilege of future user, but that others than the owner selling may either possess or be in a position to acquire such privilege. Or it may be that the right to use the line for tramway purposes in perpetuity, or for a time limited, is inherent in the right of property. Although physically the subject is the same, the interest in it, which must be regarded as the true subject of valuation, is very different in these three cases.

The referees have dealt with "the tramway" as a subject belonging to the second of these classes; and they have accordingly put upon it what may conveniently be termed a constructive value. The rule which he followed is thus stated by Mr Tennant—"That the proper value of the said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition, and that in estimating such cost I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition." Sir Frederick Bramwell came to practically the same conclusion. He declined to give any effect to evidence led by the company for the purpose of showing "the rental value of the purchased tramways considered as let or capable of being let," whilst he received and took into account evidence adduced on behalf of the County Council, tending to show "the proper cost of construction of the purchased tramways, and the depreciation of such value, by comparing the condition at the time of sale and purchase with the condition when newly constructed." He refused to admit evidence as to the profit arising from previous use of the tramways; and arrived at his valuation, on the basis of cost less depreciation, such valuation to be increased by the sum of £9442 in the event of its being judicially determined that no deduction from the original cost ought to be made in respect of depreciation.

The view maintained by the appellants in opposition to that which has been taken by the referees is fully disclosed in their pleadings. In the first appeal the company crave declarator to the effect that the referee is bound to value the lines of tramway purchased by the local authority according to their rental value, and that by capitalising at so many years' purchase as he may think proper, the rent at which, one year with another, such lines might in their actual state be reasonably expected to let, or by giving effect to such rental value in such other manner as he may find and determine to be just. In the second appeal the notice of motion given by the company to set aside or refer back the award is rested upon these grounds—(1) That the referee ought to have taken into consideration the evidence which they submitted as to the rental value of the tramways, and ought not to have excluded the evidence which they tendered as to the profits which they had derived from traffic thereon; and (2) That the evidence given on behalf of the local authority with regard to the cost of construction either with or without depreciation, ought not to have been considered by him.

If, according to its just construction, the expression "the tramway," as it is used in section 43 of the General, and section 44 of the London Tramways Act of 1870, was meant to designate the lines of tramway, considered simply as structures, and apart from any privilege of user, it would not seem to be doubtful that the awards complained of are in strict conformity with the intentment of these clauses. On the other hand, if the expression, when rightly construed, includes not merely the fabric of the tramway lines, but an exclusive right to use them for tramway traffic in the future, then neither award has exhausted the reference, because it leaves unvalued an important item, which upon that construction the Legislature has appointed to be valued and paid for.

Which of these constructions ought to prevail is to my mind the only point which your Lordships require to decide. I see no reason to doubt that these words "the tramway" are capable of being so employed as to indicate that they embrace the use and occupation of the fabric, as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill of a tramway undertaking. But in their primary and natural sense the words appear to denote nothing more than the fabric of the tramway lines upon which traffic is conducted. In order to give them a wider meaning as they occur in the enumeration of particulars to be valued under section 43, I think it is incumbent upon the appellants to show by reference to their context or to the general scheme of the statute, that they were intended by the Legislature to have that wider significance. In my opinion any inference which can be legitimately drawn from the language and provisions of section 43, or from other enactments

of the statute bearing upon the interpretation of that clause, are hostile to the construction for which the appellants contend.

The exclusive occupation and use of any portion of a public street or highway, whether by an individual or a company, is at common law an invasion of the rights of the public. Accordingly, an exclusive privilege of using rails laid along a street for tramway traffic cannot exist without statutory sanction, and when a right of that kind has been created its extent and its duration must be wholly dependent upon the terms of the authority given by the Legislature. In the present case the right of exclusive user, as against the general public, is not one of the subjects which the appellant companies were authorised to acquire, either by agreement or by compulsion, for the purposes of their undertaking. The privilege of user is conferred upon them by section 34 of the Tramways Act 1870, and they have, in my opinion no right whatever against the public beyond what is given them by that clause.

Section 34 provides that "the promoters of tramways authorised by special Act and their lessees" may use carriages with flange wheels, or wheels suitable only to run on the rail prescribed by such Act. It then goes on to enact that "subject to the provisions of such special Act, and of this Act, the promoters and their lessees shall have the exclusive use of their tramways for carriages with flange wheels or other wheels suitable to run only on the prescribed rail." It is not, in my opinion a consideration to be overlooked, that the Act deals separately with the privilege of exclusive use which is given directly to "the promoters and their lessees." But the appellant companies are not the only promoters to whom the gift is made, and they can have no lessees; local authorities becoming purchasers under sections 41, 42, and 43, are also "promoters" within the meaning of section 34. They are the only promoters who have power to let the tramway; and they are expressly debarred from working the undertaking except through a lessee. In my opinion the plain import of the enactments of section 34 is to give the promoters who construct the tramway an exclusive right to use it, which is strictly personal, and is therefore incapable of being communicated by them to any other person; and also to give the same exclusive right to local authorities who acquire the tramway with the additional power of communicating the privilege to their lessees.

The appellants maintained that the provisions of section 41, 42, and 44 qualify the enactments of section 34, and show the intention of the Legislature to have been that the appellant companies' right of user should not be treated as a privilege personal to them, but as a continuing asset, which they could dispose of to the local authority. For reasons which I shall presently state, I do not think the provisions of section 44 have any bearing upon the point. Section 41 deals with the case of the promoters

discontinuing to work their tramway, and section 42 with the case of their becoming insolvent so that they are unable to maintain and work their tramway with advantage to the public. In either of these events the Board of Trade are authorised to declare that "the powers of the promoters" shall cease and determine, unless the same are purchased by the local authority, "in manner by this Act provided," which admittedly means on the same terms as to price which are prescribed by section 43 in the case of a local authority electing to purchase within six months after the expiry of the period of twenty-one years from the time when the original promoters obtained statutory powers to construct the tramway. It was said by the appellants to be matter of necessary inference from these provisions that "the powers of the promoters" to be purchased by the local authority in the events contemplated must of necessity include the promoter's privilege of exclusive use. With the majority of your Lordships I have been unable to appreciate the force of that reasoning. I cannot understand why the powers to be so purchased ought upon any sound canon of construction, to be read as necessarily including a power or privilege previously given to the promoters in such terms that it was not theirs to sell.

As already indicated, the provisions of section 44 are, in my opinion, of no relevancy to the construction of the terms of sale and purchase prescribed by section 43. Section 44 empowers the original promoters after they have used their tramway for traffic for a period of six months, to sell their undertaking, with consent of the Board of Trade, to any person, persons, corporation or company, or to the local authority of the district. If the transaction be not with the local authority the purchaser comes into the shoes of the seller, and is affected by the provisions of sections 41, 42, and 43. But in no case of sale and purchase under section 44 do the provisions of section 43 with respect to price apply. The parties selling and purchasing are left at liberty to adjust the terms of the transaction according to their own pleasure. The promoters may fix their own price, and decline to accept any other consideration.

I do not suggest that the inference which I derive from the other clauses of the Act with respect to the personal character of the right of user possessed by the appellant companies must necessarily govern the interpretation of "the tramway" in section 43. But I think the inference is sufficient to exclude any presumption that the Legislature intended local authorities to purchase and pay for, as inherent in the subject described as "the tramway," a right of future use which did not belong to the sellers, and had already been vested in the purchasers themselves by an express statutory grant.

I shall now advert to the terms of section 43 upon which these appeals really depend. It authorises local authorities after a certain lapse of time and upon certain conditions, which have been duly observed by

the respondents, to require the promoters "to sell, and thereupon such promoters shall sell to them their undertaking," or such part thereof as is within the district of the authority making the requisition. The word "undertaking" is not defined in the Act, but it appears to me that it must signify all the real and moveable property belonging to the promoters necessary for conducting tramway traffic, together with all rights and interests in or connected with such property which belong to the promoters, and are capable of being transmitted from them to the purchaser. I do not think the word can be reasonably construed so as to include any property or any right or interest which does not belong to the promoters, and does not pass from them to their purchaser under the compulsory contract of sale. On the assumption that the promoters' privilege of use is personal, and therefore limited to the period during which they may continue to be owners of the tramway, the privilege of use after the expiry of that period, which they did not possess, cannot be regarded as having formed part of their undertaking at any moment of time.

I need not repeat the language which is used in section 43 to prescribe the consideration to be paid by the local authority for the sale of their undertaking. The parenthetical words are so introduced as to apply to and qualify the value to be put upon each and all of the particular subjects enumerated. No question has been raised with respect to allowance for compulsory sale or other similar consideration; but the able arguments addressed to us were largely directed to the import and effect of the first part of the parenthesis, "exclusive of any allowance for past or future profits of the undertaking." I understood the appellants to concede that these words are not to be wholly disregarded in estimating the value of the tramway, and in my opinion the concession was inevitable. It was urged on their behalf that the making of an allowance for present or future profits in estimating the value of a tramway line is something quite different from ascertaining its rental value on the footing of its being a lettable subject, and consequently that whilst the first of these things was expressly forbidden, the second was impliedly sanctioned by the clause in question. In the course of the argument an ingenious suggestion was made to the effect that whilst past and future are, present profits are not, excluded from the consideration of the referee. What can possibly constitute present profits, referable to a mere *punctum temporis* and distinguished from past and future profits, was not explained in argument, and is a problem which I am unable to solve to my own satisfaction. I see no reason to doubt that the words occurring in the parenthesis were meant to be and are equivalent to "any profits whether past or future."

The prohibition of any allowance for past or future profits does not appear to me to be compatible with the adoption of rental value for which the appellants contend. It

is in substance an enactment that the profits which the tramway has earned, or may be capable of earning, are not to be taken into account at all in estimating the amount which is to be paid by the local authority. It may be true that there are some heritable subjects upon which a rental value can be put without minute investigation of their capability of yielding pecuniary profits. The yearly value of a dwelling-house in a particular street may be approximately ascertained by reference to the average of the rents actually paid for similar tenements in the same street, and without entering into an inquiry whether its occupation has been or will be a source of profit to the occupant. But it is a mistake to suppose that valuation by rental is a process dissociated from the idea of profit. On the contrary, it is simply one of several methods used for the purpose of arriving at an estimate of the profits arising from the ownership of heritable estate. It is not a satisfactory method in the case of a tramway line which has never been let and has no competing line within its district. The questions whether a hypothetical tenant could be found and what rent he might be reasonably expected to give if he were found cannot easily be solved, if at all, except by estimating what amount of profit the line had yielded in the past and was likely to yield in the future. An intending lessee, whether real or hypothetical, not being a lunatic, would hesitate to pay a rent which was not based upon these data. Again, I can well understand that future profits might be assumed as an element in ascertaining rental value, and yet that in a compulsory sale they might afford grounds for a further allowance in respect of the seller's loss of profit arising from disturbance of his business. But the case of past profits is very different. When past profits have been taken into account as enhancing rental value, I am at a loss to understand upon what possible grounds they could be regarded as entitling the seller to any further allowance. I am unconscious of doing injustice to the opinions of the learned Judges from whom I differ when I say that not one of them has suggested in what shape such further allowance could be made.

These considerations all tend to confirm the inference which I draw from the language of section 43, as well as from the other provisions of the Act to which allusion has been made, that inference being that the Legislature by the expression "the tramway" meant to denote the bare fabric of its lines unaccompanied by an exclusive privilege of using them. I therefore concur in the judgments which have been moved by the Lord Chancellor.

LORD ASHBOURNE—My Lords, the facts of the case have been so fully stated by the Lord Chancellor that I need only refer to them at such length as may make my meaning plain.

The direct question raised before your Lordships is, whether the arbitrator was right in valuing the tramway at what it

would cost to make, or whether he ought to have ascertained what it could have been let for to a tenant who could use it, and then have capitalised its annual value.

The cases of the Edinburgh Street Tramways Company and of the London Street Tramways Company have been argued together, as they depend upon precisely the same point. The question in the Edinburgh case depends upon the construction of section 43 of the General Tramways Act 1870, and the London case depends upon section 44 of the London Street Tramways Act, but the two sections are in identical terms, as in the case of many other sections of these Acts. For convenience I shall refer only to the sections of the General Tramways Act 1870, and shall not deem it necessary to note specially the corresponding sections of the London Street Tramways Act of 1870, which are mentioned in detail in the judgments in the London case. The decision is of deep moment to all the tramway companies in Great Britain, and involves interests of considerable magnitude.

The section is not clear. In any view of the case it is a cumbrous and unfortunate piece of drafting—not plain or direct—and each side is confronted with difficulties in its interpretation. It is not surprising to find that amongst the Judges before whom the case has come there have been wide differences of opinion, and therefore I have applied myself to the consideration of the case with many doubts and misgivings as to the soundness of my own judgment on important points, where, though I might be supported by the opinion of judges of eminence, I know my conclusions have been opposed to authorities for whom I entertain the very highest respect.

The clause requires the closest and most critical examination and analysis in order to see what is the method of the transfer, what is sold, and what is to be paid.

What is the method? As Mr Justice Mathew in the London case has forcibly said—"Nothing would have been easier than to have said that at the end of twenty-one years there shall be a transfer of your undertaking, and you shall be paid for the cost of materials *in situ* capable of being worked, less depreciation." But the Legislature in its wisdom has used a long, complicated, and involved sentence, from which we have to spell out and infer such meanings as we can. The transaction is to take place by a sale. A sale involves a selling and a buying, a bargaining, and here an arbitration. If what was meant was a statutable transfer at a statutable price, it was certainly not felicitous drafting to enact that the transaction should be carried out by the machinery set out at such length in the section.

But a far more important consideration in the matter is what is sold and transferred under the section. The undertaking of course is sold, but the great difficulty is to give the due and proper meaning to the word "tramway." Is it only the tramway *in situ*, or the tramway with the power to

use it? This is really a governing point in the case. Does the sale of the tramway include or involve or carry with it the right to use it? The words of the section are, "when any such sale has been made, all the rights, powers, and authorities of the company in respect of the undertaking sold . . . shall vest" in the purchaser. The words here again are not the best or the clearest. They must be read not only with the rest of the section, but also in connection with other sections, in order to see whether the right to the tramway is treated in the Act as carrying with it the right to use the tramway. Section 41 deals with the discontinuance of tramways, and enacts that in certain cases the Board of Trade may by order declare that from the date of the order the powers of the promoters shall be at an end. "And the said powers of the promoters shall cease and determine, unless the same are purchased by the local authority in manner by this Act provided," *i.e.*, by section 43. Thus section 41 expressly states that the powers—including the right to use—are purchased under section 43. Section 42 is to the like effect. It deals with the insolvency of promoters, and provides for the ceasing of their powers "unless the same are purchased by the local authority in manner by this Act provided," *i.e.*, again by section 43. In this connection it is important to note section 44, which enacts—"Where any tramway in any district has been opened for traffic for a period of six months, the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, corporation, or company, or to the local authority of such district, and when any such sale has been made all the rights, powers, authorities, obligations, and liabilities of such promoters in respect of the undertaking sold shall be transferred to, vested in, and may be exercised by and shall attach to the person, corporation, company, or local authority to whom the same has been sold in like manner as if such tramway was constructed by such person, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters." In my opinion a sale under section 44 would carry with it the right to use the tramway. Similar words are used in section 43; the machinery of sale is resorted to, "the rights, powers, and authorities" are also transferred, and I cannot resist the conclusion that under both sections the buyer was intended to purchase and acquire with the tramway the right to use it.

It was argued before your Lordships that the powers were to be regarded as the creatures of the statute, given independently by its provisions to "the promoters," and that the sale had nothing to say to them, and did not carry, affect, or transfer them. I do not find any such idea in the judgments of the Court of Appeal in the London case. Lord Justice Lindley says—"The vendors have only a right of user, that is, by section 20 they have no land to

sell, they have only an easement so far as the land is concerned, but they have an exclusive right to use the tramway by section 29, and to grant licences to other persons to use it by section 37. These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway used as such by the vendors before the sale, and to be used as such by the purchasers after the sale." The words of Lord Justice Smith on this point are very strong and clear—"I cannot doubt that what is to be sold and bought is not merely the tramway *in situ* as a structure, but the undertaking of the company as a going toll-earning concern—that is to say, the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels to the exclusion of all others, to take the prescribed tolls for so doing, and to exercise the other powers contained in the Act. Of this I have no doubt; the words of the section are clear, 'and thereupon the company shall sell'—not their rails and sleepers—but 'their undertaking,' and when any such sale has been made, 'all the rights, powers, and authorities of the company in respect of the undertaking are to vest in the County Council.'" Lord Justice Smith in the clearest words gave his opinion that the company had to sell "the powers granted to the company of running cars with flange wheels thereon to the exclusion of all others, and of taking the prescribed tolls, and the other powers in the Act mentioned," and he adds emphatically, "that this is what is to be sold by the company to the London County Council I do not doubt." I concur in this view of Lord Justice Smith, which I regard as of the highest importance as stating and explaining the great value of the subject-matter to be sold.

It may be that the language of the section is involved and roundabout, that the conveyancing is defective, but to my mind it is much more in accordance with the language of all the sections of the Act to hold the conclusion I have indicated than to spell out a narrower one in contradiction to what I believe to be the meaning of section 43 itself, as well as to the clear words of sections 41 and 42, and the construction required to give effect to section 44.

If, then, the undertaking sold comprised or included a tramway capable of being used and with a right to use it, the next great question is, what is the price to be paid for it under the section? The section answers (leaving out the parenthesis for the present) "the then value of the tramway and all lands, buildings, works, materials, and plant."

The actual tramway in a very literal sense consists of little else except its iron rails. "The then value of the tramway," from the old iron point of view, would be



a ludicrous mockery, and accordingly every one—judges and arbitrators alike—repudiate any such construction, and admit that a wider interpretation must be sought. Lord Justice Smith says—“There can be no doubt that in any ordinary case where an undertaking such as the present is to be sold and paid for, its present, that is, its then value is in practice arrived at by capitalising its rental value.” Mr Justice Mathew more in detail says—“Value is to be ascertained as it would have to be ascertained where, for instance, the property was rated, and therefore you must use it in its proper sense. This tramway is a hereditament capable of earning profits, and assessable under the Poor Law Act. In arriving at its value it is clear from the *Pimlico* case, L.R., 9 Q.B., that the meaning of the word value is recognised in many cases *in pari materia* statutes, for instance, relating to metropolitan valuation in the Act of 1869, and also in the Union Assessment Act. To get at the value you take the profits, deduct the tenants’ charges and profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit, and which would be earned by the occupier, who is the tenant. That is the rent, and by capitalising that rental you get at the value of the hereditament.” I therefore take it that, apart from the parenthesis, “the then value” would be held to have its ordinary meaning as stated by Lord Justice Smith.

The *onus* of proving that the ordinary meaning should not be given to the words “the then value” is cast upon those who deny it, and the respondents insist that for this purpose they are entitled to rely upon the parenthesis, which says, “exclusive of any allowance for past or present profits of the undertaking, or any compensation for compulsory sale or other considerations whatsoever. *Prima facie*, these words imply that but for their use the thing excluded would have been included. An exception, a parenthesis, an exclusion, under ordinary circumstances would be held to qualify and lessen the generality of preceding words. Here, according to the contention, they are used not to abate but to destroy and contradict the ordinary meaning of the words “the then value.” If the argument is correct that the value of the tramway is only the value of the materials *in situ*, profits would not need to be excluded because not comprised in the original subject-matter.

It is admitted that “the then value” is not to be found in the value of old iron; it is admitted that something very much more is to be assessed. Where is the line to be drawn? Lord Justice Smith well puts the question—“Are the words of exclusion in this section so strong, when applied to the things to be paid for, namely, a tramway *in situ*, as to exclude the ordinary way of ascertaining present value?”

It must be borne in mind that the County Council can only acquire ownership rights under the sale. They can let

but cannot themselves use, occupy, or work the tramway. They are debarred from making occupiers’ profits, and therefore it is most reasonable to provide that no allowance should be made for them in the sale. It is most fair that in a sale to a public authority “the then value” should not be run up by the history of “past” or the anticipation of “future” profits. These words “past or future” are suggested by the word “then.” The provision is that no “allowance” is to be made, and that is very far from an enactment that “the then value” may not be ascertained according to the ordinary rule and practice in like cases. The argument of the respondents concentrates attention exclusively upon the parenthesis, and ignores and belittles everything in the section which would explain its terms. The Lord Justice-General in his judgment well says—“The contention of the Corporation seems to me exposed to the grave objection that it allows words having a subordinate and qualifying position to kill the plain import of the main proposition to which they relate, and does so by ascribing to those words more meaning than *prima facie* they bear. I cannot conceive how the Legislature should describe the transaction as a sale, and say the terms are to be the payment of the existing value of the tramway, and then incidentally and by way of exclusion put in words which make the terms inconsistent with sale and purchase, and inconsistent also with payment of existing value.”

It must be remembered that “the then value” of lands and buildings has also to be measured under the same section, and it would be almost impossible to ascertain the value of land and buildings without considering what rent a tenant would pay for them. The land and buildings may have cost vast sums, and no one could suggest the reasonableness of giving less than their fair value under this provision. No “allowance” is here to be made for “past or future profits,” but “the then value” is to be arrived at by the ordinary methods.

It is also not to be forgotten that under this section a tramway company might be compelled to sell the most paying and successful part of its undertaking, retaining only the part which barely, if at all, paid its expenses. Under this section, admittedly, they could get no compensation for compulsory sale or for severance. The company concede that they, under its terms, are debarred from “any allowance” for their profits in “the past” or their hope of greater profit in “the future,” but could it have been intended that in providing they were to get “the then value,” they were to get less than would come to them under the ordinary rule, and be subjected to an arbitrary standard discovered by the arbitrator?

The *Kirkleatham* case is important as showing (to quote Mr Justice Henn Collins) “the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the mate-

rials, and not the right to use the materials." The section in the present case is framed in an entirely different manner, because in my opinion the Legislature contemplated a different operation with different results.

No question of hardship can be considered. The construction of this section is all that is before your Lordships. I venture to think that the construction suggested by the County Council is unreasonable, and that it would be natural to expect that if the Legislature contemplated such a meaning they would have said so in plain language. The weighty words of Mr Justice Mathew are worthy of attention — "This Act of Parliament was intended to inform the public who were disposed to become shareholders in any undertaking of this sort, and one would expect plain language addressed to such persons and their advisers as to what Parliament meant. If Parliament meant to inform the public, 'You shall not have at the end of twenty-one years compensation for the value of the undertaking, but the undertaking shall be sold and the materials *in situ* less depreciation,' I cannot help thinking that very few tramways would have been constructed under these circumstances, because a shareholder proposing to take shares must satisfy himself that the profits of the undertaking would not only pay him interest upon his investment but would restore to him wholly or partially at the end of twenty-one years his capital."

My Lords, I have already intimated the doubts which I must entertain of the soundness of my views when I recognise the high authority of those who have reached a different conclusion, but with all deference and submission in my opinion the judgment appealed from should be reversed.

LORD CHANCELLOR — My Lords, my noble and learned friend Lord Shand is unavoidably prevented from being present. He has prepared a judgment which he desires should be read to the House,

*The following judgment was then read by Lord Watson:—*

LORD SHAND—My Lords, the two appeals of the Edinburgh Street Tramways Company against the Magistrates and Town Council of the city of Edinburgh, and the London Street Tramways Company against the London County Council, involve the decision of the same question, and the arguments of counsel in both cases have been presented on that footing. The question depends on the true meaning and effect of section 43 of the General Tramways Act of 1870, which is incorporated in the special Acts of the Edinburgh Street Tramways Company, and which is substantially in its terms embodied in the London Street Tramways Act, section 44.

The Magistrates and Council of Edinburgh and the London County Council have respectively availed themselves of their statutory powers to acquire portions of the tramway systems belonging to the appel-

lants respectively, having served notices requiring these companies to sell parts of their respective undertakings on the terms prescribed by the provisions of the statutes above-mentioned. In order correctly to define these terms, as to which the parties so widely differ, it appears to me to be of importance to ascertain, in the first place, what are the rights or powers belonging to the appellants under their statutes, and whether or how far they are enabled to transfer these rights and powers to the local authorities as purchasers of their respective undertakings.

The promoters were authorised to lay down their tramway lines or rails on the public streets without making any payment or compensation for the ground so occupied to the local authority or other corporation or body in whom the right to the *solum* of the streets might be vested. The Tramways Companies, however, acquired no right of property, but a right of user only, viz., the right of "exclusive use by themselves or their lessees of their tramways for carriages with flange wheels or other wheels suitable only to run on the prescribed rail." And the right acquired was not in perpetuity, for at the end of twenty-one years, and of every succeeding seven years the promoters might be required by the local authority to sell their undertaking on the terms specified in section 43 of the General Tramways Act of 1870, while the same result might follow within a shorter period than twenty-one years under sections 41 and 42 of the statute in consequence of the discontinuance of the promoters to work the tramways, or the insolvency of the promoters, followed by an order of the Board of Trade, and a notice to purchase given with consent of the Board of Trade by the local authority.

The Edinburgh Tramways Company could not assign their rights, which were given to them only, and not to assignees, and though by section 46 of the London Tramways Act there was given a power of sale of the undertaking with consent of the Board of Trade, this was subject to the company's obligations and liabilities, one of which was the obligation to sell the undertaking to the local authority after the lapse of twenty-one years on the terms specified in section 44 of the company's Act.

Having regard, on the one hand, to the privilege given to the promoters of laying their tramways on the public streets without making compensation for the ground occupied, and, on the other, to the limited rights conferred — limited as to time, in the option of the local authority, and limited also as to extent, the right of user only being conferred, it might reasonably be expected that should the local authority, who it may be presumed have themselves a right of property or other direct interest in the *solum* of the streets, desire after the lapse of twenty-one years to avail themselves of the statutory power conferred on them to acquire the tramway system or a part of it, they should be enabled to do so.

on terms which would have relation to the peculiar nature of the promoters' rights, and the privilege which the promoters had obtained to occupy and use the public streets without payment. Accordingly, reading section 43 in the light of these considerations, while it must be conceded that the construction of the language used is attended with great difficulty, I have come to be of the opinion expressed by the large majority of the learned Judges who have considered the question in the two cases under review, and as I concur in the reasons which have been already stated by the Lord Chancellor, and by my noble and learned friend Lord Watson, I shall content myself with making very few additional observations.

The promoters are required to sell their "undertaking," or so much of the same as is within a defined district, and for that undertaking the local authority are required to pay. The clause proceeds, however, to say that the sale is to be made "upon terms" of payment followed by a specification which expressly excludes certain elements or items from consideration, and expressly enumerates others, for which payment is to be made. The undertaking is to be sold "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." In my opinion the defined terms of payment for the undertaking does not include a capitalised rental of the tramway system as contended for by the appellants.

It must be observed that the promoters, unless in default from having ceased to work the tramways with advantage to the public, have the full benefit of twenty-one years' enjoyment of the exclusive user which the statute on very advantageous terms confers on them, but the notice by the local authority determines the right of the promoters to any continuance of that right of user, which is the sole right they have. Excepting under section 43, the promoters had no right to sell their undertaking. They have no power to assign their rights. The interest which belongs to the promoters, and may be transmitted or transferred by them, does not include a right either of property, such as a railway company has in the line which it owns, or even of user by the promoters, for that right was in effect temporary, being subject to determination by a notice which has been given. It includes only, therefore, their tramway as laid upon the ground, and the houses, plant, and other property enumerated in section 43, used in connection with the working of it, and of which they are proprietors. It is true that the local authority by the purchase acquires a more extensive right—a right of a permanent nature. This might follow, as it appears to me, because of the direct right of property, or other direct interest, which the

local authority has in the streets, and because having once acquired the undertaking the local authority is under no obligation thereafter to sell it, as the promoters were. But the permanent right thus acquired is not conferred by the promoters or acquired from them, for their rights being of user only, and in effect temporary, were determined by proper notice. The permanent right is conferred by the special provision of the statute in section 43 which declares that "when any such sale has been made" all the rights of the promoters in respect of the undertaking sold shall be transferred to the local authority "in like manner as if such tramway was constructed by such authority, under the powers conferred upon them by a Provisional Order under this Act, and in reference to the same they shall be deemed to be the promoters."

These considerations appear to me to have a very material bearing on the meaning to be attached to the very specific terms of payment expressed in section 43 of the statute, and to exclude the contention that the value of the undertaking was to include a capitalised rental, or an estimate founded on profits, or any of the other items included in the parenthetical clause, viz. "(any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever)." I think the terms of the section used were inserted with the purpose of making it clear that the company was to be paid the value of the property it possessed in the tramway and in connection with the working of the tramway, and for that property only, but not for rights which they could not assign, and which they could only exercise for a defined period, and thereafter determinable on notice by the local authority. I agree with the learned Judges who have held that an allowance given on an estimate of rental, past or future, would be in truth an allowance for profits of the undertaking past or future, and that this is excluded by the statute; and I am further of opinion that the enumeration of subjects for the value of which payment is to be made, "the tramway and all lands, buildings, works, materials, and plant of the promoters," includes exhaustively all that is to be paid for, and does not include any sum as for estimated rental value or estimated profits.

The word "tramway" throughout the statutory provisions by which the appellants acquired their rights is used as meaning the tramway lines or structure laid down. It is in my judgment used in the same sense in section 43; and does not include rental value of a subject which had been held in effect under a temporary right of user, which came to an end by the notice to purchase.

It has been said that if the Legislature intended to deprive the sellers of any estimate or allowance for such return as a tenant might give for the use of the tramway system, this would have been expressed in terms clear—in some such terms as are suggested by Mr Justice

Mathew in his very able opinion. There is no doubt that the language used has left room for great discussion and great diversity of opinion. But there is an enumeration of the subjects for which payment is to be made, which does not include profits of any kind, and an exclusion of items by language which does mention profits (and thus, as I think, includes the return or rental which a tenant might give), and is otherwise of a very comprehensive kind—an exclusion of “any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever.” It seems to me that these general and comprehensive words are at all events so clear that if it had been intended to give the appellants what they now ask, the words “or other consideration whatsoever” would

have been qualified by such words of exception as “excepting an allowance for such return or rental as a tenant might give for the use of the undertaking.”

On these grounds I am also of opinion that the appeals in both cases should be dismissed.

The House (Lord Ashbourne dissenting) affirmed the interlocutors appealed from with costs.

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END OF VOLUME XXXI.