Privy Council Appeal No. 89 of 1936

International Railway Company - - - - - - *Appellants*

v.

The Niagara Parks Commission - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1937.

Present at the Hearing:
VISCOUNT SANKEY.
LORD BLANESBURGH.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

The main question to be determined in this appeal relates to the basis on which the appellants are entitled to be compensated on the transfer to the respondents of an electric railway constructed by the appellants on the Canadian bank of the Niagara River. There are also subsidiary questions (1) as to whether certain items of property should be included in computing the compensation, (2) as to the allowance of interest, and (3) as to costs.

The respondents, the Niagara Parks Commission, formerly known as the Commissioners for the Queen Victoria Niagara Falls Park, are a statutory body which controls for the Government of Ontario a large area of land on the bank of the Niagara River above and below the Falls which has been developed as a public park under statutes of 1885 (48 Vic. c. 21) and 1887 (50 Vic. c. 13).

The appellants are the successors of the Niagara Falls Park and River Railway Company which was incorporated in 1892 by a statute of the Ontario Legislature (55 Vic. c. 96). By that statute an agreement dated 4th December, 1891, entered into between the promoters of the railway in question and the Parks Commissioners was ratified and confirmed.

The agreement narrated that the promoters (who, and the company thereafter to be incorporated, are designated "the company") desired to construct and operate an electric

railway along the top of the west bank of the Niagara River from the village of Queenston in the County of Lincoln, to the village of Chippawa in the County of Welland; that they intended to apply to the Legislature for a charter of incorporation to enable them to construct and operate the railway; and that the Parks Commissioners had agreed to grant on terms the requisite rights of way through the park lands, and other lands belonging to them or over which they had rights. The Parks Commissioners by the first article of the agreement licensed and permitted the company to construct a first-class electric railway in and through the park and their other lands and by the second article the company undertook to construct, equip and operate the railway. By the third article the railway was required to be constructed of material and according to plans and specifications to be approved by the Parks Commissioners and by the Commissioner of Public Works of the Province. By other articles it was provided that the company should make payment to the Parks Commissioners of a sum of $10,000 for the right of way over a strip of land along the river bank known as the chain reserve and for the benefit of certain contracts made by the Parks Commissioners with various land owners; that the company should have the right to construct and operate inclined railways and elevators and to acquire those already existing on terms to be agreed or fixed by arbitration; and that the Parks Commissioners would not grant to any other persons any right to construct or operate a railway or tramway within the limits of the park and, so long as the agreement was in force, would not themselves engage in any such construction or operation. The Parks Commissioners further agreed to assent to the company arranging with the municipal corporation of Niagara Falls for a supply of power for working the railway and, if a satisfactory arrangement could not be made with the municipality, undertook themselves to grant to the company such necessary rights as would enable them to procure the requisite power from the waters above the Falls.

Article 16 of the agreement provides that the right to operate the railway "shall begin on the first day of September next or so soon (before or after that date) as the said railway or any section thereof has been constructed and shall extend to a period of forty years from the said first day of September one thousand eight hundred and ninety-two and shall be renewable on the request by the company for a further period of twenty years as hereinafter provided." By the 17th article it was provided that if at the end of the 40 years the Parks Commissioners should demand from the company for the succeeding period of 20 years a larger annual sum than that agreed on for the 40 years the amount to be paid, which was not to be less than that previously paid, should, if not agreed, be fixed by three arbitrators or a majority. The article went on to provide that "the award of such arbitrators shall be

subject to the same provision of law as if the said arbitrators had been appointed by the said parties upon a voluntary reference under the Revised Statute of Canada respecting Arbitrations and References. Either party to such arbitration may appeal from the award upon any question of law or fact to the . . . provincial Court of ultimate appellate jurisdiction for Ontario and the said Court shall have the same jurisdiction therein as a Judge has on an appeal from a report or certificate under section 4 of the aforesaid Revised Statute respecting Arbitrations and References."

By the 19th article the company were required to pay to the Parks Commissioners by way of rental an annual sum of $10,000 for every year of the period of 40 years and if the company should exercise their option of operating the railway for the further period of 20 years, such sum as might be agreed or fixed by arbitration for every year of such further period. There were also articles dealing with the construction of a low level railway on the river bank and the payment of an additional annual rent if it should be constructed, but as this project was never carried out it need not be further considered.

The material articles for the present purpose are articles 26 and 29 and their terms are of so much importance and have been subjected to such minute analysis that it is necessary to set them out in full as follows:—

> " 26. If at the end of the said period of 40 years, the company are unwilling to renew, or at the end of the further period of 20 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 low level railway, if the same shall have been constructed and then held by the company under this agreement, as also the high level railway from Chippawa to Queenston, and including also their works in Chippawa and Queenston, but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or in case of difference, by arbitration as in paragraph 17 of this agreement, but the failure before the expiration of any such term, to fix such compensation in manner aforesaid, or to pay before such expiration, the amount of compensation so fixed, shall not entitle the company to retain possession meanwhile of the said railways, equipment, machinery and works, by this agreement to be constructed or operated, but the same shall nevertheless and notwithstanding that the commissioners may have taken possession thereof remain subject to such liens and charges save as to possession as aforesaid, as may exist in favour of bond-holders or debenture-holders of the company and the company shall retain a lien or charge thereon, save as to possession as aforesaid for the compensation of their railway, equipment, machinery and works to be agreed upon as aforesaid, or so to be awarded to them provided, however, that all such liens and charges shall not exceed the amount that may be agreed upon or may be awarded for such compensation as aforesaid.
>
> " 29. Subject always to the terms and provisions of this agreement and to the rights of the commissioners as the owners in fee simple of the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement shall upon such construction or acquisition, as the case may be, be vested in and shall

> be the property of the company who shall, subject as aforesaid be entitled to operate, manage and control the same, during the period or periods respectively above-mentioned, it being however hereby declared, understood and agreed that at the end of the said first or second periods as the case may be the whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway if then held by the company under this agreement together with their equipment and the machinery and works aforesaid including the elevators or lifts acquired or built and including also the works in Queenston and Chippawa shall become the property of the commissioners subject to the payment of compensation to be agreed upon or awarded as the case may be and as is hereinbefore provided for."

The last article of the agreement provides that "the company's tariff for passenger fares shall be a reasonable one and shall be subject to the approval of the commissioners, provided however that the commissioners shall not have the right to insist upon such a tariff as will prevent the company operating the said railway or railways at a fair profit, but it shall be their privilege to exact from the company the imposition of reasonable rates only."

The agreement was, as already stated, "approved, ratified, confirmed and declared to be valid and binding on the parties" thereto by an Act of the Ontario Legislature, 1892, 55 Vic. c. 96, to which the agreement was scheduled. The effect of this statutory confirmation was to render every provision and stipulation of the agreement as obligatory and binding on the parties "as if these provisions had been repeated in the form of statutory sections" (*per* Lord Chancellor Cairns in *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, 1874, 2 Sc. App. 347 at p. 349).

By the statute the appellants' predecessors were incorporated with a capital stock of $1,000,000. Section 4 conferred on the company the requisite powers for the construction and operation of the undertaking, and section 27 imposed an express obligation on the company to operate the high level railway during the existence of the agreement. Section 18, which refers to the compensation payable under article 26 of the agreement, is of importance for the present purpose; it enacts as follows:—

> "18. The directors of the said company shall have power to issue bonds of the company for the purpose of raising money for prosecuting the said undertaking, the whole amount of the issue of such bonds not to exceed in all the sum of $45,000 for each mile of the said railway and the actual cash value of the wharves, piers, docks, steamers, vessels and other water craft, incline railways, elevators and hotels of the company and the equipment thereof respectively, but such bonds shall be limited as a charge so as not to interfere with the terms of section 26 of the agreement; and the amount of compensation under section 26 for the railway, its equipment, machinery and works between Queenston and Chippawa shall not include the value of hotels, vessels, steamboats nor the value of any other equipment or works than such as may be incidental to the use of electric power, nor any excess of the value of the class of work prescribed by the plans and specifications which shall have been approved by the Commissioner of Public Works,

> nor stocks in navigating companies or in companies building or operating elevators or incline railways, nor the cost or value of elevators or inclined railways, except the elevators or inclined railways expressly authorised to be built or acquired under the agreement, nor of any other works not expressly and specifically provided for by the said agreement set forth in the schedule hereto."

The 40 year period of the company's franchise was due to expire on the 1st of September, 1932. Before the arrival of this date the company notified the Parks Commissioners that they did not desire a renewal of their franchise for the further period of 20 years. Consequently on 1st September, 1932, "the whole of the company's said high level railway from Queenston to Chippawa," with its equipment, machinery and works, became, under article 29 of the agreement, the property of the Parks Commissioners, subject to the payment of compensation.

The parties failed to agree on the sum payable as compensation and the question was referred under articles 17 and 26 of the agreement to three arbitrators. The arbitrators, after hearing evidence and argument for the parties, differed in opinion as to the correct method of calculating the compensation payable to the company, two of them taking one view and the third another. The award was thus an award by a majority. On appeal under article 17 of the agreement the view of the majority was approved by the Court of Appeal for Ontario (subject to certain variations in minor matters). A cross appeal by the Parks Commissioners to the Court of Appeal was dismissed. The company have now appealed to His Majesty in Council.

For the present their Lordships disregard the minor questions raised and proceed to deal with the important matter of the proper method of computing the compensation payable to the company.

It appears from the reasons annexed by the majority arbitrators to their award that the contest between the parties was a contest between two rival principles:—

> "The Railway Company directed practically all its evidence to the compensation proper to be fixed on the basis of reconstruction less depreciation. The Parks Commission, while also submitting evidence as to compensation on that basis, contended from the outset that compensation on the basis of the cost of reconstruction less depreciation was wholly inapplicable to the present case because the railway when turned over had no value as such to either the Railway Company or the Parks Commission, its sole value, according to this contention, being the value that could be realised from the disposal of its component parts."
>
> "Having concluded," they proceed, "that the proper basis of fixing the compensation is not by ascertaining the reconstruction cost of the railway in 1932 as a whole less depreciation, we think it is a question of law as to whether or not this conclusion is right and we have thought it advisable, in order to prevent unnecessary expense to the parties to fix the amount of the reconstruction cost and the depreciated value, should it later be determined that that basis should have been adopted."

Basing their award on the value that could be realised from the disposal of the component parts of the railway as at 31st August, 1932, or in other words on "scrap value"

as at that date, the majority arbitrators fixed the compensation at $179,104.

In case this should be held to be the wrong basis, they also set out what they found to be the value on the basis of cost of reconstruction less depreciation as at 1st September, 1932, which they fixed at $967,592. There is thus a wide difference between the figure awarded on the scrap basis and the figure brought out on the basis of reconstruction cost less depreciation.

Their Lordships have not overlooked the fact that with regard to a few items comprised in their award the majority arbitrators have departed from the scrap basis and have allowed either reconstruction cost less depreciation or what they otherwise thought to be the full value thereof, but the broad question of law argued at their Lordships' bar was whether, on a sound construction of the agreement and statute, the majority arbitrators were entitled to fix on the basis of the scrap or residual value of the component parts of the railway the compensation to be paid on the transference of the property in the railway to the Parks Commissioners on 1st September, 1932. If not, the only alternative, as recognised by all three arbitrators and by counsel for the parties, is to assess the compensation on the basis of reconstruction cost less depreciation. It is important to emphasise this point. Their Lordships recognise, as has more than once been said in previous cases, that arbitrators must in general have a wide discretion in selecting their methods of valuation, but where as here they have considered two methods and two methods only and have chosen one of these methods and have rejected the other, it becomes a question of law whether, having regard to their terms of reference, in this instance contained in the agreement and statute, their decision can be justified. The dissentient arbitrator has furnished a reasoned statement setting out the grounds on which he differs from his colleagues and justifying the adoption of the basis, which they rejected, of cost of reconstruction less depreciation.

The remaining facts which it is necessary to state are few but important. The high level railway was duly constructed and opened for traffic at first as a single track and subsequently, under a supplementary agreement of 27th March, 1894, as a double track. For the whole term of 40 years it was operated by the company in fulfilment of the obligation assumed and imposed on them by the agreement and statute. Payment of the annual rental of $10,000 was duly and regularly made to the Parks Commissioners. The railway, as events have turned out, has proved financially a most unfortunate enterprise. This sufficiently appears from figures which the majority arbitrators in the reasons for their award have abstracted from a statement put in by the company:—

> "During the last 13 years of operation," they say, "the annual loss, after allowing for depreciation and after paying 5 per cent. interest on the $600,000.00 bond issue, ranges from $25,980.42

> in 1921 to $112,303.72 in 1931 which was the last full year of operation and for the last eight months the loss was $78,350.34. . . . The evidence establishes beyond question that there was no prospect of any change in this condition for the future."

They accordingly reach the conclusion that the railway

> " at the time that it was handed over to the Parks Commission was of no value for operation as a railway to the Railway Company or the Parks Commission or to anyone else."

The cause of the disappointment of the high expectations entertained at the inception of the project is to be found in the advent of automobiles and the construction of improved roads to serve this new form of traffic. Visitors to an increasing extent have preferred to use private automobiles or public buses to reach and to view the Falls, and the electric railway as a mode of transportation has been effectively superseded, with no prospect of revival. Notwithstanding the calamitous falling off in their receipts the company continued to the end of the term of 40 years to maintain and operate the railway. As the majority arbitrators find

> " the railway as a whole when turned over to the Parks Commission was capable with proper maintenance of performing its functions as an operating railway and up to that time was in fact performing these functions."

But they also find that

> " it was obsolete as a whole in the sense that by reason of the changed conditions already referred to it became incapable of earning the cost of operating it and competing satisfactorily with other modes of transportation."

Put briefly the main ground on which the majority arbitrators discard the principle of assessing compensation on the basis of reconstruction cost less depreciation and adopt the principle of breaking up the undertaking into its component parts and valuing them separately is to be found in their interpretation of the agreement as not excluding consideration of profits and losses and as justifying them in fixing compensation on the principle applicable to the case of a landlord taking over his tenant's buildings at the expiry of a lease, namely on the basis of the value to the taker. As the railway had not been earning and could not in the future earn profits they consequently held that it possessed for the Parks Commission only a break-up value. The Court of Appeal unanimously agreed with the view of the majority arbitrators.

Their Lordships have reached a different conclusion. They agree that in the terms of the agreement of 1891, to which they would also add the provisions of the confirming statute, are to be found the principles on which the company are to be compensated, but they can find in these terms no justification for assessing the compensation at break-up value.

In the first place—and this is fundamental—it is a railway complete with equipment, machinery and works which the company were bound to hand over to the Parks

Commissioners on the 1st of September, 1932, and not the components of a railway. The company maintained and operated the railway, as they were bound to do, up to midnight on the 31st of August, 1932, and it was this railway, capable of being at once operated by the Parks Commissioners that they in fact handed over, as they were bound to do. They could not legally, if it had been possible in fact, have dismantled the railway at the end of the 40 years and tendered the broken-up material to the Parks Commissioners in fulfilment of their obligation. That for which they are to be duly compensated is the same thing as that which they were bound to hand over, namely their railway with its equipment, machinery and other works, a going concern and not a mere collection of materials. Their Lordships know of no instance in which the compensation payable by the transferee of a public utility undertaking as a going concern to the transferor has been fixed at the break-up value to the transferee and they find no indication of any such intention in the documents before them. It would require very clear language indeed to lead to such a result. The Legislature of Ontario in authorising, by section 18 of the confirming Act, the issue of bonds by the company makes express reference to the bonds being made a charge on the compensation payable to the company at the expiry of their franchise, as contemplated in article 26 of the agreement. If intending bondholders had been informed that the compensation on which they were asked to rely as security for repayment of their capital "need amount to no more than" the break-up value of the railway material, it is not likely that there would have been much response to the issue. Neither the agreement nor the Act contains any such warning either in the plain language which would have been proper, or implicitly. If the terms of transfer rightly construed, "may" entitle the company only to the break-up value of their railway at the termination of their franchise, sound accounting would have indicated the propriety of building up an amortisation fund out of earnings during the currency of the franchise. It is at least questionable whether under the last article in the agreement, requiring the imposition of reasonable passenger fares only, the Parks Commissioners would have approved of the cost of such a fund being represented in the fares. It is significant that, notwithstanding the large number of cases which have come before the Courts in which many different formulæ of compensation have been construed, counsel were unable to refer their Lordships to any case in which the acquiring authority have been found liable only *in quantum lucrati,* as they have been by the majority arbitrators in the present case. A result so contrary to practice and doctrine would require for its justification the clearest directions in the terms of transfer.

With all respect to the learned Judges of the Court of Appeal and the majority arbitrators, it would appear that they have allowed themselves in construing the terms of transfer to be unduly influenced by the unfortunate financial

experience of the company. But the interpretation of the terms of transfer cannot be affected by the events that have happened. The majority arbitrators held that "consideration of profits is not excluded as an element in fixing value" and the Court of Appeal agreed that as it had been demonstrated that the railway had not been and could not be worked so as to make any profit the basis of compensation must be the value of its component materials to the Parks Commissioners. But the meaning of the agreement must be the same whether the railway proved a success or a failure. Let it be assumed that instead of being a financial disaster it had been highly prosperous. In that event, according to the reading of the terms of transfer adopted below the compensation payable by the Parks Commissioners would have had to have regard to the large profits which the company were earning and the Parks Commissioners would have had to compensate the company not for the value of their railway as a structure but for the loss of the profits which they were making by it. The compensation might thus be out of all proportion to the value of the railway as a structure which was all that the Parks Commissioners acquired, and would be based upon an estimate of future profits in which, as their franchise had expired, the company had no interest whatever.

Their Lordships are of opinion that such an interpretation is a misreading of the terms of transfer. It is a familiar feature common to all cases in which a franchise for a public utility is granted to private undertakers for a limited period, coupled with an obligation to transfer the undertaking to a public authority at the conclusion of the period, that the undertakers must look to reap the reward of their enterprise in the profit which they may make during the currency of their franchise and on its expiry shall receive only the value of the structure which they have created without any compensation either for the profits or the losses which they may have made or sustained while in the enjoyment of their franchise. This is plainly just, for with the termination of the franchise the power to make profits or the liability to incur losses simultaneously terminates. The promoters have had their chance to make what they can out of their undertaking in the knowledge that it was of limited duration and that they must part with it at a fixed date. To compensate them on the basis of the profits which they have made and are surrendering would be to assume that they had a right to go on making profits although *ex hypothesi* the franchise which gave them that right had come to an end.

It is these considerations which in their Lordships' view render it erroneous in principle to have regard to profits earned or losses sustained when what is in question, as here, is the compensation to be paid to private undertakers at the expiry of their limited franchise for the physical structure which they have created and which has then to be transferred to a public authority. In the present case the agreement

expressly stipulates that the company are not to be compensated "in respect of any franchises for holding or operating" their railway. That is to say, they are to receive nothing in respect of the loss of the right to make profits which the franchise conferred upon them. The effect of these words is equivalent to the exclusion of any allowance for past or future profits. As the dissentient arbitrator states: "A long line of cases has approved this [i.e., the principle of reconstruction cost less depreciation] as a correct method of valuing a public utility where the value of the franchise is excluded from consideration."

It is said that the present is not a case of compulsory acquisition and that this circumstance affects the nature of the compensation payable. The company, it is said, are thankfully relinquishing a *damnosa hereditas*. But again it has to be remembered that the terms of transfer must be read as equally applicable to a transfer of the railway in 1952, when the company's franchise definitely expired and also to a transfer in the height of prosperity. If the company had been highly prosperous and had applied for and obtained an extension of their franchise to 1st September, 1952, they would on the arrival of that date have had compulsorily to relinquish, however, reluctantly, their profitable undertaking to the Parks Commissioners and the same terms of transfer, construed in the same way, would have been applicable.

Their Lordships are accordingly of opinion that the majority arbitrators have misdirected themselves in law in their interpretation of the terms of transfer and that the judgment of the Court of Appeal in affirming that interpretation is erroneous. The company have transferred to the Parks Commissioners their railway as a complete entity duly equipped and capable of performing its functions as an operating railway and in that sense capable of earning a profit. That it cannot in fact earn a profit owing to the development of motor transport is not a relevant consideration in assessing the compensation to be paid for the railway under the terms of transfer.

It follows that the alternative method of valuation which the majority arbitrators rejected must receive effect, and the company must be compensated on the basis of reconstruction cost less depreciation. Fortunately the majority arbitrators contemplated this possibility and have provided the necessary figures which they fixed, as they tell us, after making "proper allowance for the age and obsolete type of the machinery and equipment."

The minor matters in dispute now call for consideration. The majority arbitrators excluded ten items from their valuation on various grounds. Item 1 consists of two parcels of land. The Court of Appeal reversed the decision of the majority arbitrators and held that this item should be included at the figure of $1,100, being the figure fixed by

the majority arbitrators, and the respondents have acquiesced. Item 2 relates to the Lewiston bridge line. The Court of Appeal refer to this work as a bridge, whereas it was really a section of line, but it is unnecessary to discuss the matter for the Court of Appeal held that the item should be included though only on a salvage basis, suggesting an allowance of $500. The majority arbitrators valued the item on the reconstruction cost less depreciation basis at $9,375 and as the inclusion of the item is not now disputed it will, in conformity with their Lordships' opinion on the main question, be included at this figure of $9,375. Item 3 relates apparently to a disused spur line laid on the highway for the purpose of connecting the company's railway with a former but no longer existent waiting room of another railway company. The Court of Appeal agreed that this item should be excluded as being valueless to the Parks Commissioners, who were not shown to have any right to remove the rails. While not accepting this reasoning, their Lordships do not propose to disturb the decision of the Court of Appeal. The item is valued at only $405 and it has been left obscure as to whether this small section of line was really at 1st September, 1932, an effective part of the railway at all. Items 4 and 9 are not really excluded items. Item 4 relates to bridges Nos. 1 to 7 and Item 9 to the power house. The majority arbitrators took the view that if these structures were to be valued at reconstruction cost less depreciation, the cost of reconstructing them in concrete should be taken and not the cost of reconstructing them (as they were in fact constructed) in masonry. The so-called excluded items represent the difference between these two reproduction costs. Their Lordships see no justification for assuming reconstruction in a material different from that of the original structures which were no doubt approved by the Parks Commissioners and the Commissioner of Public Works. In consonance therefore with the principle of valuation which their Lordships have held to be applicable, these items should be included at the majority arbitrators' figures of $17,886 and $24,044. Items 5, 6 and 10 relate to the substructure and superstructure of railway bridge No. 8 and to an enlarged and lengthened intake for water to the power house. The majority arbitrators disallowed these items because the work "was done under an agreement between the Canadian Niagara Power Company and the Railway Company without the approval of the Commissioner of Public Works as required by the agreement." The Court of Appeal did not agree that "the want of evidence to establish the concurrence of the Commissioner of Works warrants the disallowance of these items," but found that "while those assets might have value to the commissioners as component parts of a railway under actual operation, yet, as a separate disassociated part the intake has no value whatever to the Parks Commissioners and the bridge has value only as scrap." Their Lordships cannot accept these reasons for

so dealing with the items in question and they should accordingly be included at the figures of $3,055, $11,522 and $22,862 at which the majority arbitrators assessed them on the basis of reconstruction cost less depreciation. Finally there are the items 7 and 8 which relate to the highway bridge No. 8a, substructure and superstructure. The majority arbitrators find the reconstruction cost less depreciation of these items to be $6,587 and $4,853, together $11,440. This sum was, the parties agreed, inadvertently included under the designation of " highway bridge " in the majority arbitrators' total award of $179,104 from which figure it was accordingly deducted by the Court of Appeal. The reason given by the Court of Appeal for not allowing anything for this highway bridge is that it " forms no part of the physical assets handed over to the commissioners," adding that " whatever might be argued if reconstruction less depreciation was the basis of compensation, no allowance can be made on the footing of 'scrap' value." This highway bridge appears to have been constructed under arrangement with the Canadian Niagara Power Company with the consent of the Parks Commissioners who stipulated that the railway company should have no recourse against them in respect of it. The company have not satisfied their Lordships that the decision to exclude this item ought to be disturbed.

Next arises the question of interest on the compensation money. The majority arbitrators state that they " have not included any sum for interest on the amount of the compensation, being of opinion that this is a matter beyond our jurisdiction." The question is apparently not dealt with in the judgment of the Court of Appeal. In the case of *Toronto City Corporation v. Toronto Railway Corporation* [1925] A.C. 177, this Board, while recognising " the general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid," held that arbitrators whose only duty was " to ascertain the actual value of certain property at a certain time " had no power to include interest in their assessment of value (see *per* Viscount Cave at p. 193). Their Lordships are of opinion that this principle applies to the present case and that the company must seek enforcement of their claim to interest, if any, outside the present arbitration.

The last question relates to costs. The majority arbitrators awarded to the company their " taxable costs of this arbitration excluding therefrom such costs as have been the subject of agreement between the parties." The Court of Appeal varied the award in this respect so as to give the company " its costs of the arbitration incurred with relation to matters upon which it succeeded." In view of their Lordships' opinion that the company ought to have been substantially successful in the arbitration and in view of the relatively unimportant points on which they have been unsuccessful, their Lordships think that the award of the majority arbitrators as to costs should be restored.

The result is that the sum which in their Lordships' judgment should have been awarded is as follows:—

	$	$
Reconstruction cost as at 1st September, 1932, less depreciation, as found by the majority arbitrators		967,592
Add items excluded in award, but now to be included, on the same basis of valuation—		
(1) Land	1,100	
(2) Lewiston Bridge Line ...	9,375	
(4) Bridges Nos. 1 to 7— Additional cost of reconstructing in masonry	17,886	
(5) and (6) Railway Bridge No. 8—		
Substructure	3,055	
Superstructure	11,522	
(9) Power House, additional cost of reconstructing in masonry	24,044	
(10) Intake	22,862	
		89,844
Total		1,057,436

Their Lordships accordingly will humbly advise His Majesty that the appeal be allowed; that the order of the Court of Appeal of 31st December, 1935, be recalled except in so far as it ordered the Niagara Parks Commission to pay to International Railway Company their costs of the cross appeal and motion for leave to cross appeal; and that the case be remitted to the Court of Appeal with a direction to pronounce an order that the award of the majority arbitrators be varied and as varied be as follows:—" (1) We fix, award, adjudge and determine the amount of the compensation to be paid to International Railway Company to be the sum of one million, fifty-seven thousand, four hundred and thirty-six dollars ($1,057,436). (2) We fix, award, adjudge and determine that the Niagara Parks Commission do pay to International Railway Company their taxable costs of this arbitration excluding therefrom such costs as have been the subject of agreement between the parties."

The appellant company will have the costs of their appeal to the Court of Appeal and of their appeal to His Majesty in Council.

(41909—3A) Wt. 8151—17 110 5/37 P. St. G. 338

In the Privy Council

INTERNATIONAL RAILWAY COMPANY

v.

THE NIAGARA PARKS COMMISSION

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