Privy Council Appeal No. 16 *of* 1936

The Mayor, Aldermen and Citizens of the City of Port of Spain *Appellants*

v.

The Trinidad Electric Company, Limited - - - - *Respondents*

The Trinidad Electric Company, Limited - - - - *Appellants*

v.

The Mayor, Aldermen and Citizens of the City of Port of Spain *Respondents*

Consolidated Appeals

FROM

THE SUPREME COURT OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1937.

Present at the Hearing :

LORD BLANESBURGH.

LORD MACMILLAN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD MACMILLAN.]

By notice in writing dated 6th January, 1933, the City Council of Port of Spain, in the exercise of the right conferred on them by section 121 of The Electric Lighting and Tramways Ordinance, Chapter 310 of the Revised Laws of Trinidad and Tobago (hereinafter referred to as " the Ordinance of 1901 ") required the Trinidad Electric Company Limited to sell to them the Company's undertaking on the terms set out in that section. The City Council and the Company having failed to reach agreement with regard to the purchase price an arbitration ensued in the course of which certain questions of law arose which the arbitrators were requested to state for the opinion of the Court. They accordingly made their award in the form of a Special Case in which, subject to the opinion of the Court upon these questions of law, they awarded and determined " that the fair value of the undertaking of the Company and of the electric works and lines, tramways, lands, buildings, machinery, mechanical appliances, plant and materials of the Company suitable to and used by the Company for the purposes of the said undertaking as at 7th January, 1933," was the sum of $1,559,543.40.

This sum was made up as follows:—

	$
(*a*) Cost of reproducing new as at 7th January, 1933, the physical assets of the Company in existence at that date less depreciation but not including customs duties or site value of land	1,045,000.00
(*b*) Book debts of statutory business	37,454.40
(*c*) Site value of land (including fair value of special adaptability)	67,720.00
(*d*) Customs duties to be included in reproduction cost less depreciation	69,369.00
(*e*) Preliminary expenses	200,000.00
(*f*) Value resulting from expenditure made for the purpose of energising physical assets, that is to say the value inhering in the undertaking over and above the actual value of the physical assets because of the fact that the undertaking has an established organisation, business and staff ...	140,000.00
	$1,559,543.40

The Special Case having come before Mr. Justice Manning in the Supreme Court of Trinidad and Tobago, that learned Judge found that the arbitrators had erred in certain respects and remitted to them to make a fresh award in terms of the opinion expressed by him. Both parties being dissatisfied with the judgment of the Court appealed to His Majesty in Council and their Lordships have heard full and able arguments on the important questions on which the parties remained at issue.

To an understanding of these questions a narrative of the facts attending the original promotion of the Company and an examination of the provisions of the relative Ordinance are necessary.

Before the Company came into existence there were in the City of Port of Spain two tramway undertakings and one electrical undertaking. For convenience the tramway undertakings were designated "The Payne Undertaking" and "The Toppin Undertaking" and the electrical undertaking was designated "The Warner Undertaking." The Payne Undertaking consisted of a horse-car tramway with two branch lines and was owned and operated by the Tramways Company of Trinidad Limited, under a series of Ordinances of 1882, 1883, 1895 and 1896. The exclusive rights conferred on the undertakers by these Ordinances were due to expire at different dates between 31st December, 1902, and 31st December, 1915. The Toppin Undertaking

consisted of a tramway system connecting Port of Spain and Belmont and was owned and operated by the Belmont Tramways Company Limited, under an Ordinance of 1892 which conferred exclusive rights for a period terminating on 30th September, 1913. The Warner Undertaking supplied electric light and power in the City of Port of Spain and its environs and was owned and operated by the Trinidad Electric Light and Power Company Limited under an Ordinance of 1887, which conferred exclusive rights for a period terminating on 28th April, 1908.

There arrived on the scene in 1899 a Mr. Cahan who conceived the project of forming a single company to provide a combined system of electric tramways and electric lighting and power for the City and its environs. As the three companies just mentioned were already in possession it was essential to Mr. Cahan's scheme to acquire their undertakings. By agreements dated respectively 21st November, 1899, and 31st January, 1900, he secured options to acquire the Payne Undertaking for the sum of $174,533.33 and the Warner Undertaking for the sum of $290,000. On 16th February, 1900, the Trinidad Electric Company Limited was incorporated and on the same day Mr. Cahan presented a petition to the Governor and Legislative Council of Trinidad for leave to introduce a private bill to confer on the Company exclusive rights with respect to the acquisition, construction, maintenance and working of tramways and works for the supply of electrical energy in the City of Port of Spain and its environs. The bill was enacted as Ordinance No. 4 of 1901 and came into force on 19th March, 1901. An option to acquire the Toppin Undertaking for the sum of $30,010.00 was secured by Mr. Cahan on a date prior to June, 1901. The total sum paid by Mr. Cahan for the three options was thus $494,543.33.

By an offer dated in March, 1901, and accepted on 1st May, 1901, Mr. Cahan agreed to transfer the Payne and Warner Undertakings to the new Company and to pay to the Company a sum of $312,850.81 in cash in consideration of the Company issuing to him (*a*) Thirty Year Five Per Cent. Gold Bonds to the amount of $600,000 secured by a mortgage of the Company's property and undertaking and (*b*) Fully paid shares of the Company of the par value of $960,000. Subsequently Mr. Cahan agreed to transfer the Toppin Undertaking to the Company for $30,010. In pursuance of these agreements Mr. Cahan in June, 1901, paid to the Company $312,850.81 in cash and procured the transfer to the Company of the three Undertakings, whereupon the Company issued to him the bonds and shares above mentioned and paid to him $30,010 in cash. The new Company was thus placed in complete command of the situation and proceeded to comply with the requirements of the Ordinance of 1901, one of the most onerous of which was to increase to standard the gauge of the tramway tracks and to provide new rails. In the early months of 1904 the Company had completed the work necessary to consolidate the

Undertakings and establish the electric and tramway works contemplated by the Ordinance. By Ordinance No. 17 of 1904 all the Ordinances applicable to the Payne, Toppin and Warner Undertakings were repealed, with a saving clause as to anything already done or suffered, or any existing status or capacity or any right or title acquired or accrued, or any remedy or proceeding in respect thereof. For historical accuracy it should also be mentioned that the Ordinance of 1901 itself was subsequently repealed and re-enacted without material alteration as Chapter 310 of the Revised Laws of Trinidad and Tobago.

The Ordinance of 1901 is divided into three Parts. Part I (sections 7 to 70) refers to "the acquisition, construction maintenance and operation of electric works and lines other than tramway works and lines and to the supply of electrical energy through such electric works and lines"; Part II (sections 71 to 113) refers to "the acquisition, construction, maintenance and operation of tramway works and lines." Part III (sections 114 to 135) refers to "the whole undertaking authorized by this Ordinance."

The First Part of the Ordinance, after defining the area of supply of electrical energy, provides in section 9 that "subject to the provisions of this Ordinance the undertakers shall have for the period of 30 years from the commencement of this Ordinance [19th March, 1901], and for any extension thereof under the third Part of this Ordinance, the exclusive right to acquire and to erect or lay down electric lines and works and to generate and supply energy for all public and private purposes" within the defined area of supply. Elaborate provisions follow as to the execution of works including the breaking up of streets, and as to the conduct of the electrical undertaking, and provision is also made for the revocation or suspension of this Part of the Ordinance in certain contingencies.

The Second Part of the Ordinance, which relates to the "construction and operation of tramways," begins with section 71, which enacts in part as follows:—

> "(1) The undertakers are hereby authorised and empowered and they are hereby required within the area hereinafter defined to acquire or lay down, make, construct, and to complete, maintain and from time to time alter, remove, rebuild, work and operate daily and every day . . . all the tramways hereinafter described with all necessary poles, sleepers or concrete structure, wires, feed wires, side tracks, loops and switches for the passing of cars and carriages and all necessary and convenient works, stations, plants, buildings and mechanical appliances for the due and efficient working of the said tramways . . . and generally the undertakers shall do and execute all and any works necessary for the efficient construction, equipment and operation of the said tramways. . . .
>
> "(2) Subject to the provisions of this Ordinance the undertakers shall have for the period of thirty years from the commencement of this Ordinance [19th March, 1901] and for any extension thereof under the provisions of the third Part of this Ordinance the exclusive right to acquire, construct, maintain and operate tramways under the provisions of this section within the area hereinafter defined."

Section 72 defines the tramways area; section 73 requires the tramways to be worked by electricity or any other mechanical power (except steam) which the Governor in Council may permit and contains the proviso that " pending the completion of the tramways or any of them hereinafter described the undertakers may operate and work by animal power any existing lines of tramways in the said area which may be acquired or controlled by them "; section 74 provides that the routes of the tramways shall be those defined in the Fifth Schedule and also provides for extensions and substitutions.

The Third Part of the Ordinance, entitled " Miscellaneous Provisions," contains under the heading " Extension of Rights," two sections of cardinal importance for the present purpose. These sections read as follows:—

> " 120. It shall be lawful for the Governor in Council on the application of the undertakers to grant an extension of the exclusive rights mentioned and described in sections 9 and 71 of this Ordinance for a further period not exceeding twenty years at any time within one year previous to the expiry of such exclusive right or of any such extension thereof: Provided that in the case of an extension of the exclusive rights so applied for being refused by the Governor in Council the Governor in Council shall purchase the electric works and lines, tramways, lands, buildings, tracks, machinery, mechanical appliances, plant and materials belonging to the undertakers and used by them for the purposes of their undertaking at their fair value at the time of such purchase such value to be determined under the provisions of section 121 hereof, and until the completion of such purchase the undertakers shall possess and exercise all their rights, powers, privileges and franchises conferred upon them by this Ordinance.
>
> " 121. When the said period of thirty years or of any period in extension thereof is about to expire and the undertakers have made application to the Governor in Council for a further extension of the same it shall be lawful for the Governor in Council or for the local authority or local authorities within whose jurisdiction such area or any part thereof lies at any time within three months after such application is made by notice in writing to require the undertakers to sell and thereupon the undertakers shall sell to them their undertaking upon terms of paying the then value of the same and of the electric works and lines, tramways, lands, buildings, machinery, mechanical appliances, plant and materials of the undertakers suitable to and used by them for the purposes of the said undertaking such value to be in case of difference determined by arbitration."
>
> * * * *
>
> " Provided also that the value aforesaid shall be deemed to be the fair value at the time of the purchase, due regard being had to the cost of acquisition and construction less depreciation, the nature and condition of the buildings, works, materials and plant, the state of repair thereof and to the circumstance that they are in such a position as to be ready for immediate working and to the suitability of the same for the purposes of the undertaking, but without any addition in respect of compulsory purchase or of good will or of any profits which may be or might have been made from the undertaking or of any similar considerations."

On the approach of the expiry of the period of 30 years the Company on 5th June, 1930, without having made application to the Governor in Council under section 120 for any extension of their exclusive rights, initiated proceedings in the Supreme Court of Trinidad and Tobago

claiming *inter alia* that all the rights conferred by the Ordinances prior to 1901 (except the exclusive rights therein mentioned) relating to the three original Payne, Toppin and Warner Undertakings were vested in them and that the rights conferred by the Ordinance of 1901 and the earlier Ordinances, or at any rate the rights conferred by the earlier Ordinances, entitled them after the expiration of the exclusive powers to work their undertakings with non-exclusive powers. Those claims were negatived by Belcher C.J. in a judgment delivered on 9th January, 1931, and an appeal was by leave taken to His Majesty in Council. As the 30 years' period was due to expire on 18th March, 1931, an Ordinance was meantime passed which came into force on 13th March, 1931, whereby the period of the exclusive rights of the Company and of their right to apply for an extension was prolonged to a date 30 days after judgment should be given by this Board in the appeal. On 9th December, 1932, judgment was delivered by this Board affirming the decision of Belcher C.J. and holding that the Company did not possess, in addition to an exclusive right for a limited period, the non-exclusive right in perpetuity which they claimed. (*Trinidad Electric Company Limited* v. *Attorney-General of Trinidad and Tobago,* No. 72 of 1931, not reported.)

On 23rd December, 1932, being within the 30 days after judgment in the appeal, the Company made application under section 120 of the Ordinance of 1901 for an extension of their exclusive rights for a further period of 20 years. Before this application was disposed of by the Governor in Council the City Council of Port of Spain, as already mentioned, served a notice on the Company on 6th January, 1933, requiring the Company to sell their undertaking to the Council under section 121 of the Ordinance of 1901. It may be observed, though it is irrelevant for the present purpose, that on 7th January, 1933, the Governor in Executive Council, on a recital of the Company's application for extension, the City Council's notice to acquire, and section 2 of the Ordinance of 1901 (which provides that the local authority on the exercise of its right of purchase shall from the date of such purchase be the undertakers in lieu of the Company) granted an extension of the exclusive rights conferred by the Ordinance of 1901 for a further period of 20 years " to the intent that from the date of such purchase by the said Corporation the said Corporation shall be the undertakers in relation to such undertaking for the purposes of the Ordinance in lieu of the Company."

At the arbitration both parties agreed that the relevant date for the purpose of making the valuation under section 121 of the Ordinance of 1901 was the 7th of January, 1933, and that the cost of reproducing new as at that date the existing physical assets of the Company, less depreciation but exclusive of the site value of the lands owned by the Company and of the allowance if any to be made in respect of customs duty, was $1,045,000.00 The printed cases of

the parties before this Board each contain a statement, as does the arbitrators' award, that it was not contended by either party that it was relevant to consider the actual cost to the Company of the construction of the physical assets which were in existence on the 7th of January, 1933. It nevertheless appears from the award that evidence was led as to what the physical assets in existence on 7th January, 1933, had actually cost to construct and the arbitrators find the sum to be $940,783, after making due deduction for depreciation. As this sum is less than the sum agreed as the hypothetical cost of reproducing the physical assets at 7th January, 1933, the Company had the best of reasons for not challenging the adoption of the hypothetical method of valuing the physical assets. The City Council also supported this method not only as being the recognised one but also to preserve the consistency of their arguments on other points. In adopting the hypothetical method of ascertaining the present value of the physical assets of the Company the arbitrators followed what has long been the recognised practice in arbitrations in the United Kingdom under section 43 of the Tramways Act, 1870, a section which, however, differs in certain important respects from section 121 of the Trinidad and Tobago Ordinance. The justification for discarding actual cost, as pointed out by Lindley L.J. in *London Street Tramways Company* v. *London County Council,* [1894] 2 Q.B. 189 at p. 206, is that "cost price is well known to be no real criterion of the value of an outlay on land." The justification for depreciating the hypothetical present cost of reproducing the existing physical assets is that "the then cost of construction gives a new tramway but the purchaser gets an old tramway with a certain amount of wear and tear and therefore a reduction should be allowed from the then cost of construction to get the then value" (p. Scrutton L. J. in *Oldham, Ashton and Hyde Electric Tramways Limited* v. *Ashton Corporation,* [1921] 3 K.B. 511 at p. 527).

There is therefore no controversy with regard to the first item of the arbitrators' award, viz., $1,045,000, being "cost of reproducing new as at 7th January, 1933, the physical assets of the Company in existence at that date, less depreciation, but not including Customs duties or site value of land." But the Company contend that there should be added a sum representing what it cost the Company to acquire the Payne, Toppin and Warner Undertakings in 1901. Under this head the Company claimed alternatively a sum of $1,260,006.43 or a sum of $772,146.71. The former of these sums represented the figure which on balance the Company paid to Mr. Cahan in money or securities for the Payne, Toppin and Warner Undertakings, less the agreed value of the book debts and physical assets acquired on taking over these Undertakings and plus interest at 6 per cent.; the latter represented the sums paid by Mr. Cahan for the options acquired by him on the three Undertakings, less book debts and physical assets as before, bringing out a sum of $428,440.29, plus $300,000 as an estimated sum for

preliminary expenses, with interest at 6 per cent. on the total sum so calculated. The arbitrators held that neither of these sums ought to be brought into the reckoning; the learned Judge held that the cost of acquiring the three pre-existing Undertakings should be allowed, but that as Mr. Cahan and the Company were "sufficiently identified to make them one and the same," the lesser sum of $428,440.29 only was admissible, to which the learned Judge added $100,000 as "promoter's expenses" which he found to be legally allowable. The City Council challenge the admissibility in any event of the addition of this sum of $100,000 as "promoter's expenses" but conceded that in addition to the value of the physical assets the valuation should include a sum representing what would be "properly and reasonably spent by anyone undertaking the acquisition and construction at 7th January, 1933, of the undertaking authorised by" the Ordinance of 1901. The arbitrators in their award, as has been seen, included a sum of $200,000 as "preliminary expenses," being the sum which they "considered would be properly and reasonably spent by anyone undertaking the acquisition and construction of the purchased undertaking," i.e., the undertaking purchased by the City Council.

From this somewhat complicated narrative there emerges for decision by their Lordships the broad question whether under the terms of the relative Ordinance the Company are entitled to include and receive as part of the price to be paid by the City Council for the Company's present undertaking any sum in respect of what the Company paid in 1901 for the acquisition of the three then existing Undertakings, viz., the Payne, Toppin and Warner Undertakings. Put in its simplest and most general form the Company's contention was that the expenditure which they incurred in buying up those pre-existing Undertakings was essential in order to bring their present undertaking into existence. These three undertakings, they say, occupied the field; they had to be got rid of as cumberers of the ground and the only way to do so was to buy them up and demolish them. If the three Undertakings had been taken over with a view to working them in amalgamation and they had been subsequently reconstructed and modernised the Company conceded that the price of their acquisition would not now be an admissible item in a question with the purchasing Corporation. But inasmuch as the Undertakings were acquired in order to be destroyed the expenditure on their acquisition was comparable to expenditure incurred in removing physical obstacles, widening roads or otherwise facilitating or improving the tramways. They further contended that if, to arrive at the "then value" of the undertaking it was proper to assume a hypothetical reproduction of the physical assets, it was no less proper that that reproduction should be assumed to take place under all the circumstances which attended the original establishment of the undertaking, one of which circumstances was the existence of the previous undertakings which it cost money to clear away. As the Ordinance contemplated the acquisition of the previously

existing undertakings and required the new system to be put in operation, which could only be effected by scrapping the old undertakings, the cost of fulfilling the obligation thus imposed ought to be taken into account as an incident of the hypothetical reproduction of the present undertaking. It was also submitted on behalf of the Company that the cost of acquiring the pre-existing undertakings legitimately formed an item in the " preliminary expenses " of promoting the present undertaking. Much emphasis was laid by the Company on the fact that whereas in section 43 of the British Tramways Act of 1870 the purchasers are empowered to acquire the undertaking " upon terms of paying the then value . . . 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 section 121 of the Ordinance of 1901, on the other hand, the purchasers are to acquire the undertaking " upon terms of paying the then value of the same and of the electric works and lines, tramways, lands, buildings, machinery, mechanical appliances, plant and materials of the undertakers suitable to and used by them for the purposes of the said undertaking." Thus, under section 43 of the Act of 1870 the value of the tramway was to be measure of the price, while under section 121 of the Ordinance of 1901 it was the value of the undertaking, a comprehensive term which included intangible as well as tangible rights and benefits. The Company founded in particular on the proviso to section 121 which provides that " the value aforesaid shall be deemed to be the fair value at the time of the purchase, due regard being had to the cost of acquisition and construction less depreciation." Here, they said, was a direct injunction to take into consideration " the cost of acquisition," which they construed to mean the cost of acquiring the previously existing undertakings, as contemplated in the Ordinance itself. It was this last argument which prevailed with Mr. Justice Manning.

Their Lordships were not convinced by any of these arguments, persuasively as they were presented, and they are clearly of opinion that the arbitrators rightly excluded from their award any sum in respect of the cost originally incurred by the Company on taking over the three pre-existing undertakings. Among the reasons adduced on behalf of the City Council in answer to the Company's arguments their Lordships accept as fundamental that the main principle implied in the transaction is that the purchasers are to pay only for what the Company are in a position to transfer. So far as any of the physical assets of the pre-existing undertakings remained extant at 7th January, 1933, they found a place in the arbitrators' valuation. No other vestige of the original undertakings remained. The powers conferred by the original Ordinances were superseded or impliedly repealed by the Company's Ordinance of 1901, and the original Ordinances were all expressly repealed in 1904. They would all in any event have expired by efflux of time long before 1931, and by the judgment of this Board

in 1932 it was found that neither the Company nor their predecessors had any powers conferred on them other than their exclusive rights of limited duration. The Company were thus not in a position at 7th January, 1933, to transfer to the City Council anything which they had derived from the pre-existing undertakings, other than the surviving physical items represented in the arbitrators' award, and were not entitled to ask payment for what they could not transfer.

Their Lordships do not think that much assistance is to be derived from the reported cases which have arisen under section 43 of the British Tramways Act of 1870 or under other enactments expressed in language different from that of the Ordinance now before the Board. In particular the cases of *The Edinburgh Street Tramways Company* v. *Lord Provost &c. of Edinburgh* [1894] A.C. 456, which arose under the general Tramways Act, incorporated in the local Act, and *The London Street Tramways Company* v. *London County Council* [1894] A.C. 489 which arose under a section of a local Act identical with section 43 of the general Act, both of which cases were much discussed at the Bar, were concerned not only with different language but also with quite a different point from that now under discussion. But there is a passage in the speech of Lord Watson in the former of these two cases which, as a general statement unaffected by the particular controversy, appears to their Lordships to be very much to the present purpose and to support the principle which their Lordships regard as inherent in the present transaction.

> " The word ' undertaking ','' (said Lord Watson, at p. 474) " is not defined in the Act; but it appears to me that it must signify all the real and movable 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.''

The City Council in the present case are purchasing the Company's undertaking upon the terms of paying the then value of the undertaking and in their Lordships' view that means upon terms of paying the then value of all that the Company can transfer to the purchasers as comprised in their existing undertaking as defined by Lord Watson. The pre-existing undertakings no longer existed at 7th January, 1933, and could not then be transferred by the Company to the City Council.

The Company, however, argued that in transferring the undertaking at 7th January, 1933, they were in effect transferring the benefit of their original expenditure in acquiring the pre-existing undertakings, as had it not been for their acquisition of these undertakings their present undertaking could never have come into being. But it cannot be said

that this expenditure is now represented in the undertaking as owned by the Company which they are compulsorily selling. If the Company had bought the previous undertakings and, after carrying them on for a period—as indeed they did for a short time—had then completely reconstructed the works, they plainly could not have claimed both the cost of the original acquisition of the previous undertakings and the cost of reproducing at the date of the purchase their reconstructed works. Their Lordships see no reason why such a claim should be any more supportable because the Company bought the previous undertakings with a view to scrapping them and reconstructing the whole system.

The analogy of sums paid under statutory obligation in connection with an undertaking was invoked by the Company but is fallacious. In the *Edinburgh Tramways Case* (*cit. sup.*) the promoters had under their constituent Act to contribute a sum towards the widening of a bridge over which the tramways passed. This was a proper item to take into account in fixing the price to be paid on the purchase of their undertaking for they were selling a tramway system which had the benefit of being laid in a widened street. That benefit was extant at the date of the transaction. The case of the *Oldham Ashton and Hyde Electric Tramways, Ltd.* v. *Ashton Corporation* (*cit. sup.*) affords an excellent contrast. There the tramway company were placed under a statutory obligation to divert their lines temporarily at their own expense whenever certain railway companies whose lines the tramway crossed by a bridge should require to widen and alter the bridge. The tramway company were called upon to fulfil this obligation and incurred expense in doing so. This expense was held not to be an admissible item in computing the price to be paid by the local authority which subsequently acquired their undertaking, for the very good reason that the expenditure, though imposed on the Company by Act of Parliament, was not represented in any asset, tangible or intangible, which the Company was in a position to transfer to the local authority. The case of physical operations carried out by promoters, the benefit of which persists, is in quite a different position. Atkin L. J. (as he then was) in the *Oldham* case (*cit. sup.*) at p. 531 deals with the situation " where the Order imposes upon the tramway company as part of the conditions of allowing the undertaking that structural alterations, such as construction or widening of bridges or streets be made by the company at their cost. In such a case, inasmuch as the value is to be the cost of construction at the valuation date as if the undertaking had not existed at that date, the cost of such alteration might reasonably be imputed to the hypothetical constructor ". The purchasers, in such a case, get the benefit of the expenditure. Not so, in the present case. Indeed in the present case it was not the Legislature which imposed on the promoters the obligation to purchase the pre-existing undertakings. It was because the promoters on their own initiative had obtained control of these undertakings that they were able to represent themselves as being

in a position to establish their improved system and so induced the Legislature to give them their Ordinance.

Their Lordships are also of opinion that the argument that the Company were entitled to recover the cost of acquiring the pre-existing undertakings as an item of "preliminary expenses" is unsound. The argument is that if the undertaking is by a fiction to be assumed to be non-existent at the date of purchase and the price is to be the then cost (less depreciation) of reproducing it, all the circumstances favourable and unfavourable which confronted the promoters at the date of their original promotion must be fictionally reproduced and taken into account. As the promoters had to acquire control of the pre-existing undertakings in order to supersede them it is argued that the local authority now acquiring the present undertaking must be assumed to be faced with the same circumstances and must pay as an item in the purchase price what it would cost them if the undertaking were being reproduced now under those circumstances. Their Lordships have already dealt with the general implications of this argument but they are further of opinion that it is quite hopeless to attempt to justify the item in question as falling within the designation of preliminary expenses. The fiction of the hypothetical reproduction cannot legitimately be carried to any such length. It is recognised, and the City Council concede, that in fixing the purchase price it is legitimate to include, as the arbitrators have included, an item representing the cost which would be reasonably and properly incurred by a promoter in obtaining the requisite powers to carry on and use the undertaking, for the undertaking is to be sold as a going concern. The nature of these outlays is familiar to all who are conversant with the practice in Parliamentary promotions and by no stretch could such an item as that now in question be properly included.

There remains to consider the point arising on the special provision of section 121 of the Ordinance which is said expressly to justify the inclusion of the cost of obtaining control of the pre-existing undertakings. The words are "the value aforesaid shall be deemed to be the fair value at the time of the purchase due regard being had to the cost of acquisition and construction less depreciation." There is no such provision in section 43 of the Tramways Act of 1870. In considering the effect to be given to it some embarrassment was occasioned to the learned Judge as also to their Lordships by the attitude taken up by the parties. To their Lordships the words "the cost of acquisition and construction," according to their ordinary meaning, appear to refer to the actual cost to the Company of what they are to sell to the purchasers. But, as the learned Judge records, there was evidently agreement between the counsel for the parties before him, that "the cost of construction" referred to the hypothetical cost of reconstruction at the date of purchase and not to the cost of construction actually incurred by the Company. Nevertheless counsel for the Company submitted

that " the cost of acquisition " referred to the cost actually incurred by the Company in acquiring the pre-existing undertakings. An interpretation of the composite phrase " the cost of acquisition and construction " which would read the cost of acquisition to mean the actual cost of acquisition in 1901 and the cost of construction to mean the hypothetical cost of construction in 1933, is in their Lordships' view untenable. As the learned Judge observes, " the words are too closely joined to admit of any such interpretation." But their Lordships do not agree with the learned Judge when he holds that the " cost of acquisition includes the cost of acquiring the pre-existing rights." In their Lordships' view " the cost of acquisition and construction " means what it actually cost the Company to acquire and to construct the subjects which they are in a position to transfer to the purchasers. This reading is supported by the words " less depreciation " which are appropriate in relation to partly used assets and by the context which refers to buildings, works, materials and plant, etc. The Company cannot transfer to the purchasers the pre-existing rights which no longer exist and the direction to allow for depreciation would seem inappropriate to the cost of acquiring the pre-existing rights. It appears to their Lordships quite a natural and sensible direction that in ascertaining the then value of the undertaking due regard should be had to what it actually cost the Company to acquire and construct what they are selling. No doubt some of the items were acquired by them, and others were constructed.

The learned Judge, holding, contrary to the view taken by their Lordships, that the statute requires due regard to be had to the cost of acquiring the pre-existing rights, has given effect to the arbitrators' alternative award finding that the amount paid to the undertakers of the pre-existing undertakings amounted after deduction of physical assets and book debts to $428,440.29 and determining that this sum should be added to the amount of their award. But even if the words " the cost of acquisition " were to be taken as referring to the cost of acquiring the pre-existing rights, the statute does not say that such cost is to be an item in the purchase price; it says only that " due regard " is to be had to the cost of acquisition, which is quite a different thing. The result of paying due regard to some circumstance may quite well be that nothing is awarded in respect of that circumstance; it may be merely a check or element in the process of valuation.

In point of fact the arbitrators had before them evidence as to the actual cost of purchasing and constructing the physical assets of the Company in existence at 7th January, 1933, and they have awarded a larger sum than those assets actually cost to the Company. They find that with the exception of those physical assets remaining in service on 7th January, 1933, whose value is included in their award, no assets physical or intangible formerly belonging to the pre-existing undertakings remained in existence on 7th January, 1933.

Their Lordships have accordingly, as the result of their survey of the whole matter, reached the conclusion that the learned Judge erred in finding "that the arbitrators were wrong in holding that no regard need be had to the cost of acquiring the pre-existing rights." That being so, the question whether this cost should be subjected to depreciation, which is discussed by the learned Judge and is the subject of the cross-appeal by the Company does not now arise.

The second point argued before their Lordships, which the Company describe as a "minor issue", may be much more briefly stated and determined. In section 132 of the Ordinance of 1901 (which became section 133 of chapter 310 of the Revised Laws of Trinidad and Tobago) it is provided that all plant, etc., imported into Trinidad "for the original construction of any and every part of the undertaking" authorised by the Ordinance "shall be free of all duty whatsoever thereon imposed by any Ordinance of this Colony." Accordingly so far as regards material imported by the Company for the original construction of the tramways the Company had the benefit of this exemption. On the other hand the Company had to pay duty on materials from time to time imported by them for any purpose connected with their undertaking other than original construction. The question is whether in ascertaining the cost of a hypothetical reproduction of the existing assets as at 7th January, 1933, the hypothetical reconstructor is to be treated as enjoying the same exemption; in other words, whether customs duty on materials which the hypothetical reconstructor would have to import ought to form an item in the purchase price. The arbitrators found that "the reproduction cost new, less depreciation, should include customs duties as at 7th January, 1933, on the items that would, upon such hypothetical reproduction, have been imported and been subject to duty at that date and at the rates then in effect and that the amount of such duties to be added to such reproduction cost new was $69,369, due deduction being made for depreciation in such added value." They accordingly included this sum in their award. The learned Judge held that they had erred in doing so. On the other hand he held that so far as the Company had in fact paid duty on imported material which was extant and transferable to the purchasers (such material not having been used in original construction of the undertaking) the Company were entitled to an award. As the arbitrators had found that the customs duty that would have been payable on 7th January, 1933, on the import of assets similar to those on which customs duties had in fact been paid by the Company and which were still in existence at that date amounted to $25,061, the learned Judge held that the $69,639 awarded by the arbitrators must be reduced to $25,061. "It would not be fair", he says, "to allow for import duty which had never entered into the cost of construction or to disallow import duty which had". Their Lordships agree with the learned Judge that the arbitrators' award of $69,639 under the head of customs duties cannot stand and that the lesser

sum of $25,061 should be substituted, but they reach this conclusion on grounds somewhat different from those upon which the learned Judge proceeded. It may be noted that the Company did not challenge the allowance of only the lesser sum unless it should be held that no part of the cost of the pre-existing rights should be included in the valuation.

The accepted principle of valuation which assumes the reproduction of the assets as at the date of the sale involves the further assumption that the hypothetical reconstructor enjoys all the advantages conferred and is subject to all the obligations imposed by the Ordinance which authorised the undertaking. The reconstruction is assumed to take place under the same statutory conditions as the construction. As it is by the Ordinance that the acquisition of the undertaking is authorised and the sale takes place on the terms thereby prescribed, so the other provisions of the Ordinance relating to the conditions of the construction of the undertaking must be taken into account in conceiving it to be hypothetically reconstructed. Reference may be made to the case of the *London Deptford and Greenwich Tramways Company* v. *London County Council* [1905] 1 K.B. 316. There it was proved to be the practice of Parliament at the date of the purchase to impose upon tramway promoters an obligation to contribute to the cost of widening streets on which the tramways were to be laid, whereas no such practice existed at the date when the tramway in question was laid. The selling Company claimed that as the hypothetical reconstructor at the date of the purchase would if he then went to Parliament for the requisite powers have been placed under obligation to pay for street widenings, a sum representing the cost of fulfilling this supposititious obligation should be included in the valuation. The claim was disallowed. The statutory conditions under which the hypothetical reproduction is conceived as taking place must be the statutory conditions under which the undertaking was authorized by Parliament.

But the exemption from customs duty which the Company enjoyed under the Ordinance of 1901 applied only to the plant which they imported into Trinidad for the original construction of their undertaking. The exemption did not extend to materials imported by the Company for replacements, repairs, etc. The City Council argued that as the hypothesis of the valuation was that the whole undertaking should be conceived as being reproduced new as at 7th January, 1933, therefore the statutory exemption from customs duty should be treated as applicable to the cost of reproducing all the assets extant at 7th January, 1933, and no item for customs duty should accordingly be allowed. While recognising the strict logic of this contention their Lordships are of opinion that to give effect to it would be to push too far what is after all only a convenient fiction designed to produce a fair valuation. It would put the hypothetical reconstructor in a better position in reproducing some of the assets than that which the Company occupied under their Ordinance in producing them. The view

which commends itself to their Lordships is that in reckoning the cost of reproducing at 7th January, 1933, those assets of the Company then extant which formed part of the original construction of the undertaking there should be no allowance in the award for customs duty but that on the other hand as regards those assets of the Company which did not form part of the original construction of the undertaking the cost of reproducing those assets should be reckoned as including customs duty. This view is consonant also with the instruction to the arbitrators contained in the proviso to section 121 that they are to have due regard to the cost of acquisition and construction. The cost of acquisition of the assets forming part of the original construction of the undertaking included nothing for customs duty, while the cost of the assets subsequently acquired included customs duty. Their Lordships have accordingly reached the conclusion that the sum of $25,061 should be allowed for customs duty.

The only points on which the award of the arbitrators was assailed before their Lordships have now been dealt with and in the result they are of opinion that the award should be upheld with the single variation of the substitution under head (*d*) of the sum of $25,061 for the sum of $69,369.

Their Lordships will humbly advise His Majesty that the appeal be allowed and the Order of the Supreme Court of Trinidad and Tobago of 7th December, 1935, be recalled; that the case be remitted with a direction to find that the arbitrators in their award dated 22nd June, 1935, have not misdirected themselves in law except as regards the sum of $69,369.00 awarded by them under head "(*d*) Customs Duties", for which the sum of $25,061.00 must be substituted, with the result of reducing the total sum of $1,559,543.40 to $1,515,235.40; and that the cross-appeal be dismissed.

As the City Council have been in the main successful in their contentions they will have three-fourths of their costs of the consolidated appeals to His Majesty in Council and of their costs in the Supreme Court of Trinidad and Tobago from the Company.

(40407—3A) Wt. 8136—2 150 3/37 P. St. G. 338

In the Privy Council

THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF PORT OF SPAIN

v.

THE TRINIDAD ELECTRIC COMPANY, LIMITED

THE TRINIDAD ELECTRIC COMPANY, LIMITED

v.

THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF PORT OF SPAIN

CONSOLIDATED APPEALS

DELIVERED BY LORD MACMILLAN

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1937