trary intention; and therefore in agreeing with Lord Adam that the presumption is recognised in our law, I do not think that we are saying anything at all contrary to the *dictum* ascribed to Lord Watson in the case of *Hughes* v. *Adams*, that whether a revocation of a will is to be presumed from the subsequent birth of a child is, according to the law of Scotland, a question of circumstances, because I apprehend his Lordship did not thereby mean to say that in the absence of special circumstances there was no presumption in law to support revocation, but only that the fact of the presumption may depend upon the circumstances of each particular case. I therefore agree with Lord Adam that the true principle is this, that the subsequent birth of the child presumes revocation, that the inference which the law requires us to draw from that single fact may be rebutted, and the law will not allow it to stand if there be evidence of a contrary intention on the part of the testator; but in the absence of such evidence the presumption must hold.

Now, the only facts that are stated in this case do not appear to me to suggest any contrary inference from that which the law directs us to draw, because the material facts are that the child born after the execution of the will was a son, and that a considerable part of the testator's property consisted of heritage, all the previous children alive at the date of the will being daughters. Now, if these facts affect the presumption at all, they would certainly tend to support and not to rebut. The only other fact that we are required to consider is, that the testator lived for ten months after the execution of his will without actually revoking it, and therefore the question seems to me to be whether the mere fact of the testator's survivance for such a period as that is of itself sufficient to rebut the presumption; and I do not think it is. The principle upon which evidence may be admitted in such cases is elaborately discussed by Lord St Leonards in the case of *Hill* v. *Hill*. The decisions which that great judge considers in his opinion are all of them English, but the principles which he deduces from those decisions are common to the law of both England and Scotland, and are indeed necessary consequences of the legal conception of a presumption of law as applicable to a will which the law of the country requires to be expressed in writing. The principle which Lord St Leonards lays down, as I understand it, is this—that the law draws certain presumptions from particular facts, that these presumptions may be rebutted, and therefore that the Court must admit parole evidence to rebut the presumption. But if the law itself benignantly draws such a presumption from the facts parole evidence cannot be resorted to to fortify the presumption, because that would tend to the introduction of parole evidence in every case. If the presumption is rebutted by the terms of the gift, then to let in evidence contrary to the words or legal effect of the instrument would be contrary to the law. If it is not rebutted, then the presumption stands in place of parole evidence, and parole evidence is not admissible at all. But then if the Court is required to admit evidence to rebut presumption it follows that the like evidence must be admitted on the other side to set it up; and therefore if we were asked to allow a proof of facts tending to show that the testator did intend to revoke the will, tending to set aside the presumption of law, then it would be quite right and necessary that all relevant facts on the other side should be admitted to probation also. But in a case like the present where no such proof is asked, it appears to me that it would be contrary to settled rules of law to admit evidence of such facts as are alleged in the claim that we are sustaining for the purpose of fortifying presumption. I therefore agree with Lord Adam that the claim should be sustained as it stands.

The effect of that finding upon the other questions raised upon the record I do not know that we are asked to consider.

LORD PRESIDENT—I concur. We recal the Lord Ordinary's interlocutor. The result is that Mrs Margaret Blair, the guardian, is ranked and preferred in terms of the first of her alternative claims. I suppose the case must go to the Outer House.

The Court recalled the interlocutor of the Lord Ordinary, and ranked and preferred Mrs Blair as guardian of her pupil child, in terms of the first of her alternative claims.

Counsel for Mr Elder's Trustees—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Mrs Reid and Mrs Lockhart—M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for Mrs Blair or Elder—Shaw—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

EDINBURGH STREET TRAMWAYS COMPANY *v.* MAGISTRATES AND COUNCIL OF EDINBURGH.

Tramway—Sale to Local Authority—Profits—Rental Value—Tramways Act 1870 (33 *and* 34 *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.

In an action for reduction of an award pronounced by an arbiter under this section—*held* (*aff.* Lord Low—*diss.* Lord President) 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 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.

The Edinburgh Street Tramways Company were incorporated by the Edinburgh Tramways Act 1871 (34 and 35 Vict. cap. 89), and further statutory rights were conferred upon them by subsequent special Acts. The Tramways Act 1870 was incorporated with the company's special Acts.

In exercise of the powers conferred upon them the company constructed a system of tramways in Edinburgh and the vicinity, and carried on the business for which they had been incorporated.

On 12th August 1892 the Corporation of Edinburgh served a notice upon the Tramway Company, requiring them to sell to the said Corporation, as the local authority under the Tramways Act of 1870, so much of the tramways, works, and undertaking as were within the county and city of Edinburgh (with the exception of one section of the lines), and that on the terms and conditions and in the manner provided by the 43rd section of the Tramways Act 1870. The company and the Corporation having differed as to the price to be paid by the latter, made a joint application to the Board of Trade, for the appointment of a referee, who should, in terms of the 43rd section of the said Act, determine the price or value of the subjects to be sold to the Corporation, and upon this application the Board of Trade appointed Henry Tennant as referee. Mr Tennant accepted, and appointed W. S. Haldane, Writer to the Signet, as clerk to the reference.

In the course of the proceedings before the arbiter the Tramway Company claimed that the owners' rental interest in the tramway lines falling under the statutory sale was a distinct item or part of the subjects of sale which it was the duty of the referee to take into account and value, and that the lines should be valued by capitalising the rent at which one year with another they might in their actual state be reasonably expected to let.

After evidence had been led and parties heard, the referee issued to the parties a revised draft of his award on 27th September 1893, in which he found that "the sum of £212,979, 7s. 6d. is the value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of so much of the tramways as are within said royal burgh, city, and county, other than as aforesaid, as were authorised by said Acts, and of all lands, buildings, works, materials, and plant of the said tramways, both suitable to and used by them for the purposes of their undertaking authorised by said Acts."

The referee stated the principle upon which he had proceeded in valuing the tramways thus—"I am of opinion that I must assume . . . Second, that in valuing the tramways I am not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of 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. . . . Third, that I am entitled in valuing said tramways, according to the cost of construction and establishment, to make allowance both for the sums expended by said company in obtaining Parliamentary authority, in so far as I consider such expenditure necessary or proper, and also for the sum of £2500, which sum I consider was a necessary and proper expenditure by said company, to enable double lines of tramways to be laid over said North Bridge, and which double lines form part of the undertaking."

On 13th November 1893 the company raised an action against the Corporation, Mr Tennant, the arbiter, and Mr Haldane, the clerk to the reference, in which, *inter alia*, they sought declarator (1) that Mr Tennant was bound to proceed with and exhaust the reference; "(2) that the defender the said Henry Tennant, as referee foresaid, is not prevented by anything contained in the said Tramways Act, and the said section 43 thereof, from considering, taking into account, and valuing so much of the pursuers' lines of tramways as are the subject of the said reference according to the rental value belonging to such lines, and that by capitalising, at so many years' purchase as he may find 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;" and (3) that he was bound to value the lines of tramways according to their rental value.

On 18th November Mr Tennant issued an

award in the terms of the revised draft above mentioned, as his final award, and two days later the Tramway Company brought an action for reduction of the same, which was conjoined with the action of declarator.

The pursuers pleaded, *inter alia*—"(3) The referee is not prevented by the Tramways Act 1870 from considering, taking into account, and valuing the tramway lines of the pursuers falling under the statutory sale according to their rental valuation; and in refusing such valuation as being excluded by the statute, he has acted in error and *ultra vires*, and has failed in his duty to proceed with and exhaust the reference, and to issue a complete and final award and determination."

The defenders pleaded, *inter alia*—"(3) The referee having valued the tramway lines in accordance with the provisions of the Tramways Act 1870, the defenders should be assoilzied. (4) On a true construction of the Tramways Act 1870, and especially of section 43 thereof, the defenders are not liable to pay for the rental value of the lines, and decree of absolvitor should therefore be pronounced."

Section 43 of the Tramways Act 1870 is quoted in the Lord Ordinary's opinion, and the other sections of that Act and of the company's special Act of 1871 bearing on the question between the parties are there referred to.

On 22nd February 1894 the Lord Ordinary (Low), having considered the conjoined causes, repelled the pursuers' pleas-in-law, sustained the defences, and assoilzied the defenders.

"*Opinion.*—The question to be determined in this case depends upon the construction to be put upon the 43rd section of the Tramways Act 1870.

"The leading provisions of that Act which it is important to keep in view in construing the 43rd section are as follows—

"It is in the first place provided that the local authority of any district in which it is proposed to construct a tramway, or any person, corporation, or company, with the consent of the local authority, may, subject to the conditions of the Act, obtain a provisional order and relative Act of Parliament authorising the construction of the tramway.

"By section 19 it is provided that a local authority which has completed or purchased a tramway, may by lease 'demise to any person or persons, corporation or company, the right of user of the tramway, and of taking in respect of the same the tolls and charges authorised,' but no local authority is entitled 'to place and run carriages on such tramway and take tolls and charges in respect of the use of such carriages.'

"By section 34 it is enacted that 'the promoters and their lessees shall have the exclusive use of their tramways for carriages for flange wheels or other wheels suitable only to run upon the prescribed line.'

"The 41st section provides that if at any time after the opening of the tramway the promoters discontinue working it, the Board of Trade may by order declare the powers of the promoters in respect of such tramways to be at an end, 'and thereupon 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.' The manner in the Act provided, here referred to, is that set forth in the 43rd section. The 42nd section contains provisions similar to those of the 41st section in the case of the promoters becoming insolvent.

"By section 45 the promoters of a tramway are authorised to take in respect of such tramway certain tolls and charges.

"By the 57th section it is provided that notwithstanding anything in the Act contained, the promoters of any tramway shall not acquire any right other than that of user of any road along or across which they lay any tramway.

"Turning now to the 43rd section, it is there provided—'Where the promoters of a tramway in any district are not the local authority, the local authority, if, by resolution passed at a special meeting of the members constituting such local authority, they so decide, may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, and within six months after the expiration of every subsequent period of seven years . . . by notice in writing require such promoters to sell, and thereupon such promoters shall 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 to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs. And when any such sale has been made, all the rights, powers, and authorities of such 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 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.'

"Twenty-one years from the time when the Edinburgh Street Tramways Company was empowered to construct their tramways having expired, the Lord Provost and Magistrates of Edinburgh, as the local authority, exercised the right given to them by the 43rd section to purchase the

undertaking, and Mr Henry Tennant was appointed by the Board of Trade as referee to determine the value.

"In his award Mr Tennant states the principle upon which he has proceeded in valuing the tramways, thus—'I am of opinion that I must assume . . . that in valuing the tramways I am not entitled to take into account the present profits or rental value of the undertaking, but 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.'

"The Tramway Company contend that the principle of valuation thus adopted by the referee is unsound, and that, in terms of the 43rd section of the statute, he was bound to value the tramway lines according to their rental value as in a voluntary sale.

"The company argued that the undertaking which the Corporation was authorised to purchase, and had purchased, included not only the tramway lines, buildings, carriages, and so forth, but the exclusive right to use the lines, and to take tolls; that the local authority were bound to pay for the whole undertaking, and not only for part of it; that according to the usual and recognised method of valuing such an undertaking the arbiter was bound to ascertain the rent at which the tramways with the exclusive right to use them, might have been let; and that the parenthetical enactment only provided that the company was not to have any allowance for past or future profits over and above the rental value, or any allowance in respect that the sale was compulsory.

"The word 'undertaking' is no doubt wide enough to include the exclusive right to use the tramway and the power to take tolls, but to say that the Corporation is bound to pay for the whole of the undertaking is really to beg the question, because the question and the only question is, whether the Legislature has not authorised the purchase upon payment of something less than the value of the whole undertaking.

"If it had been intended that the local authority was to pay for the whole undertaking, including the exclusive right to use the tramways, I think that the Act would simply have said that the promoters should sell to the local authority their undertaking at a price to be determined, in case of difference, by a referee; and it would have been very easy to add that the price was to be fixed upon the basis of a voluntary and not a compulsory sale. But that is not what the Act does. On the contrary, the terms of the 43rd section seem to me to imply that the transaction is a purely statutory one, and that while on the one hand the whole undertaking is to be acquired by the local authority, on the other hand the value of certain specified things alone is to be paid.

"The words are—'The promoters shall sell the undertaking . . . upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking . . .) of the tramway, and all lands, buildings, works, materials, and plant of the promoters.'

"The words 'upon terms of paying' appear to me to be important as showing that the Act was fixing a statutory price for a statutory sale. The promoters were to sell the undertaking, but the terms of payment were to be those specified in the Act and nothing more.

"Then the purchasers are to pay the value of the 'tramway,' and it is important to see what is meant by that word. The company contended that it must be construed according to the interpretation clause of their special Act—the Edinburgh Tramways Act 1871. By the 3rd section of that Act it is enacted that the expression 'the tramways' or 'the undertaking' shall mean 'the tramways and works and undertaking by this Act authorised.' The company therefore argued that the word 'tramway,' in the 43rd section of the Act of 1870, must be read as meaning the tramways and works and undertaking authorised by the special Act. Although the general Act is incorporated with the special Act, this case in my opinion depends upon the construction of the former Act alone. In it there is no definition of 'undertaking' or 'tramways,' and if the framers of the Act had regarded 'tramways' and 'undertaking' as synonymous terms, I cannot believe that they would have done anything so misleading as to use the word 'undertaking' when defining what was to be sold, and the word 'tramway,' along with a number of other words, when specifying what was to be paid for. Further, even if the 43rd section fell in this case to be construed as part of the special Act, I should think that the connection in which the word 'tramway' is used renders it impossible to construe it as equivalent to 'the tramways and works and undertaking by this Act authorised,' because the word 'tramway' is followed by the words 'and all lands, buildings, works, materials, and plant'—an enumeration which would have been altogether unnecessary and redundant if the word 'tramway' was used in the extended sense for which the company contend. I therefore think that the word 'tramway' in the 43rd section must be read in its ordinary sense as meaning the tramway line.

"But then the company argued that assuming that the word 'tramway' is to be construed as meaning the tramway line and nothing more, it must be valued as a tramway line which the purchasers have acquired the exclusive power to use for the purpose of earning profit. That view I think may mean one of three things—either (1) that the company are entitled to be paid not only the cost of construc-

tion, but also the value of the exclusive right to use the tramway; or (2) that the value of the tramway is to be ascertained upon the basis of the rent for which it could be let; or (3) that the tramway is to be valued as a completed tramway, ready and fit for immediate use.

"I assent to the company's argument to the extent of the third of these alternatives, but it seems to me that the first two are inconsistent with the provision that the value to be paid for the tramway is to be "exclusive of any allowance for past or future profits of the undertaking.'

"The first alternative is, I think, clearly inconsistent with that provision, because it is impossible to my mind to find any basis upon which the company could be paid the value of their right to use the tramway, except the profits which they had earned or might expect to earn.

"I come to the same conclusion in regard to the second alternative. If a valuator was set to fix the rental value of a subject which had been in possession of and successfully worked by the proprietor, it seems to me that the only reliable method upon which he could proceed would be to ascertain what were the profits which had been earned, and from that to estimate what rent could have been obtained if the proprietors had let the subject. But I think that that would involve the making an allowance for profits, because as the profits were larger or smaller, the rent would be greater or less.

"The company argued—and I think rightly—that what is excluded from the value by the parenthetical clause would but for that exclusion have been included. I do not, however, see how that helps the company. Supposing that there had been no parenthesis, and that the referee had proceeded to ascertain the rental value (which the company say would have been the proper way), I do not know upon what principle he could have allowed any additional sum for profits.

"I suppose that the company might, if they had chosen, have let the tramway instead of working it themselves. The general Act does not prohibit promoters letting their tramway, and section 12 of the special Act authorises the company to enter into agreements with any other company or person for the use of the tramway, and the tolls, rates, and charges to be paid for such use. Now, suppose the company had let the tramway, the rent would have represented their whole profit, and in that case I think that a rental valuation would clearly have been one making an allowance for profits.

"I would also point out that two practical men of great eminence—Mr Tennant in this case, and Sir Frederick Bramwell in the London case (to which I shall afterwards refer), have come to the conclusion that it is impossible to value the tramway lines upon the basis of rental without making allowance for profits.

"I therefore come to the conclusion that the provision that no allowance is to be made for profits means that in valuing the tramway the referee is not to take into consideration, either directly or indirectly, past or future profits.

"Something was also said as to the inequity of taking from the company the right to use the tramways without paying them for that right. Such considerations do not go far in construing an Act of Parliament, but I confess that I do not appreciate the alleged inequity. For the convenience of the public a tramway company which has obtained a provisional order is allowed to take the use of the public streets without paying anything for that use. But the Act gave to the local authority in whom the streets were vested right to acquire the undertaking of the Tramway Company at the end of twenty-one years, and I do not see anything inequitable in the Legislature providing that upon condition of the local authority paying the Tramway Company for everything which had cost them money, the right of use for which the Tramway Company had paid nothing should pass to the local authority without price.

"The company further called in aid of their argument the 41st and 42nd sections, which provide that in the event of a tramway company discontinuing the working of the tramway, or being insolvent, 'the powers' of the tramway company shall, upon an order by the Board of Trade, 'cease and determine unless the same are purchased by the local authority in manner by this Act provided.' What the local authority may purchase under these sections is 'the powers' of the Tramway Company, and the purchase is to be made in manner provided by the 43rd section. The company therefore argued that the 43rd section must include the purchase of the 'powers' of the Tramway Company. I assume that the purchase authorised by the 43rd section does include the powers of the Tramway Company, because it is the purchase of the undertaking, but it does not necessarily follow (it depends upon the enactment) that compensation for the loss of the powers is to be included in the price. Further, although I do not think that the meaning of the 41st and 42nd sections is doubtful, it seems to me that the phraseology is unfortunate. To purchase the powers would be of little benefit to the local authority unless they could also purchase the tramways. If instead of 'powers' the word 'undertaking' had been used in the 41st and 42nd sections, it seems to me that the object in view would have been more clearly expressed.

"I am therefore of opinion that the pursuers are not entitled to compensation for the loss of the exclusive right to use the tramway, nor to have the value of the tramway ascertained according to its rental value. In my opinion they are only entitled to the value of the tramway as a completed tramway, ready and fit for immediate use, or (to adopt the language used in the case of *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board*, 1893, L.R., App. Cas. 444, to which I shall presently refer) the value of

the tramway 'regarded as plant *in situ* capable of earning a profit.'

"The case of *Stockton and Middlesborough Water Board*, to which I have just referred, arose in the following circumstances — Prior to 1876 the Stockton and Middlesborough Waterworks Company had the right to supply with water Stockton and Middlesborough, and also a number of other places, and among them Kirkleatham. In 1876 Stockton and Middlesborough Corporations Waterworks Act was passed, which upon the narrative that it was expedient that the undertaking of the Waterworks Company should be vested in the corporations of Stockton and Middlesborough, enacted that the company should 'sell to the corporations their undertaking, property, rights, powers, and privileges.' The consideration for the sale was to be perpetual annuities to the amount of the maximum statutory dividend of the company, or, in the option of the company, a sum representing twenty-five years' purchase of the dividend. The corporations were also to pay and take over the debts and liabilities of the company, and to pay the company a sum for compulsory sale, and for the prospective value of the company's undertaking.

"The Act also provided that the joint board which in terms of the Act was elected to represent the corporations, should, when so required by the sanitary authorities of certain districts, 'sell to such sanitary authorities all mains, pipes, and fittings . . . belonging to the joint board within that district . . . at a price to be fixed in default of agreement by an arbitrator, and after such sale the joint board shall cease to supply water within such district.'

"Kirkleatham was one of the districts the sanitary authority of which was entitled to require a sale by the joint board in terms of the enactment which I have quoted. The sanitary authority of Kirkleatham was, prior to 1876, under the Public Health Act 1875 (section 52), deprived of the power to construct waterworks within the limits of supply of the Stockton and Middlesborough Company if and so long as that company was willing to give a reasonable supply at the statutory rate.

"The Kirkleatham sanitary authority in 1891 required the joint board to sell to them the mains, pipes, and fittings within the district of Kirkleatham, and the question of price was referred to an arbitrator.

"Two views were submitted to the arbitrator as to the method of valuation, or rather the subject to be valued. The joint board maintained that the value of the mains, pipes, and fittings was to be ascertained not only by the cost of construction, but by the revenue which the joint board was enabled to earn by their means. The sanitary authority on the other hand contended that the board was only entitled to the value of the mains, pipes, and fittings regarded as plant *in situ* capable of earning a profit.

"The arbitrator adopted the former of these views, but it was held by the House of Lords, affirming the judgment of the Appeal Court, that he was wrong in doing so, and that the basis of valuation proposed by the sanitary authority was the sound basis in terms of the Act.

"Of course the construction put upon one Act of Parliament is not an authority for the construction of another Act unless the words used are practically identical, but the principles upon which the *Kirkleatham* case was decided appear to me to apply to that which I am now considering. Indeed it seems to me that in some respects the considerations in favour of including in the valuation an allowance for the revenue which the joint board was enabled to earn by means of the pipes were stronger than those urged by the company for a similar allowance being made in this case. Because (1) the joint board had actually paid, when they purchased from the Water Company, for the right to supply water; and (2) the Act only said that the sanitary authority was to take over the pipes at 'a price' to be fixed by an arbitrator without providing, as the Tramway Act does, that no allowance should be made for the profits or for compulsory sale.

"No doubt the Tramways Act provides that the 'undertaking' shall be sold to the local authority, whereas in the *Kirkleatham* case the Act only provided that the 'mains, pipes, and fittings' should be sold to the sanitary authority. But, as I have already said, it appears to me that the important part of the Tramways Act is that which deals with the price which the local authority shall pay, and if the two cases are regarded from that point of view they are almost identical. In the *Kirkleatham* case the joint board was to be deprived of its undertaking upon receiving the price of the mains, pipes, and fittings, while under the Tramways Act the promoters are to be deprived of their undertaking upon receiving payment of the then value (exclusive of any allowance for profits) of the tramway, buildings, &c.

"It was said, however, that there was this material difference between the *Kirkleatham* case and the present, namely, that the Kirkleatham sanitary authority had right to supply water to the district under the Public Health Act, and therefore only required to buy the pipes, whereas here the local authority had no right of user except under the purchase, and therefore required to buy both the tramways and the right to use them. Now, assuming that the sanitary authority had power to bring in a water supply for the district, the joint board had also right to supply it with water. That right must have been worth something, especially as the joint board were in possession, had mains and pipes *in situ*, and were actually supplying water. Yet the statute, as construed by the House of Lords, took that right from them without any compensation whatever. Again, it is not the case that the local authority here only acquire the right to use the tramways by virtue of the purchase, because the 43rd section after providing what price is to be paid, enacts, 'and when any such sale has

been made, all the rights, powers, and authorities of such promoters in respect of the undertaking sold . . . shall be transferred to, vested in, and may be exercised by the local authority.'

"I therefore regard the judgment of the House of Lords in the *Kirkleatham* case as having a very direct bearing upon the present case.

"The only remaining question is, whether the referee has adopted the principle of valuation of the tramway directed by the Act as I have interpreted it. I think that he has. He has allowed the cost of construction less depreciation, he has taken into account that the tramways are successfully constructed and in complete working order, and he has further made allowance for the sums expended by the company in obtaining Parliamentary authority and in widening the North Bridge to enable a double line of rails to be laid across it. The company contended that the referee in making the latter allowances, while refusing to allow anything for the sale of the exclusive right to use the tramways, acted inconsistently. I do not think so. The referee has proceeded upon the footing of giving to the company the value of everything which has cost them money, in so far as the same is available to the Corporation, and that, as I have said, appears to me to be what the statute directs.

"I was referred to a judgment given in the Queen's Bench Division of the High Court of Justice in England in a similar question between the London County Council and the London Street Tramways Company. In that case Matthew and Collins, J.J., set aside an award of Sir Frederick Bramwell, the referee appointed by the Board of Trade. Sir Frederick had only allowed to the Tramway Company the cost of construction of the tramway less depreciation. In so far as he did not take into consideration the fact that the tramways were completed and capable of being immediately worked, I agree that the award was wrong; but in so far as the learned Judges of the Divisional Court held that the rental value was the basis upon which the tramways should have been valued, I must, for the reasons which I have given, respectfully dissent from the judgment.

"I shall therefore assoilzie the Corporation in the actions of declarator and reduction."

The pursuers reclaimed, and argued—The arbiter had not exhausted the reference, as he had excluded one item of value—the rental value of the tramway—from his consideration. The question whether he was bound to take rental value into consideration turned upon the construction of the 43rd section of the Tramways Act 1870, under which the Corporation were to acquire the "undertaking" of the pursuers. In approaching this question it was necessary to keep in view what the rights of the pursuers were which constituted their undertaking and were to be transferred to the Corporation. Now, the right which the pursuers had in the streets was the exclusive right of using the same for flange wheel traffic—section 34. Apart from the provisions of the Tramways Act, the Corporation had no right to use or prevent others using rails in the streets, if these were once laid. It was this exclusive right which constituted the value of the pursuers' undertaking. The right was not given to the pursuers only for twenty-one years, but permanently, though it was made subject to the right of the local authority to buy them out—*People* v. *O'Brien*, 1888, 7 Amer. State Rep. 684. It was necessarily given in perpetuity unless otherwise determined. It had been treated as a permanent right in questions of assessment—*Craig* v. *The Edinburgh Street Tramways Company*, May 27, 1874, 1 R. 947. The case of *The Toronto Railway Company* was distinguished by the fact that in that case the right to use the rails was vested in the Corporation prior to the date of the sale. Coming to the 43rd section, that section provided that the Corporation might buy the company's "undertaking," and that word naturally and necessarily included the business as well as the physical subjects belonging to the company. It was at least probable that what was to be bought and sold was also what was to be paid for, and this consideration led directly to the conclusion that "tramway" in that section was equivalent to "undertaking." "Tramway" was capable of meaning either lines or undertaking, and was used in the Act sometimes in the one sense and sometimes in the other. The conclusion that it had the latter meaning in the 43rd section was supported by a reference to the interpretation clause (section 3) of the company's special Act of 1871, where "the tramways" was declared to mean "the tramways and works and undertaking by this Act authorised." The general Act of 1870 was incorporated with that Act, and as it contained no definition of "tramway" or "tramways," the definition in the special Act was necessarily imported into the general Act. No reasonable distinction could be drawn between "tramway" and "tramways." The conclusion that the Corporation were to pay for the "undertaking" was not at variance with the part of the 43rd section which dealt specially with the terms of payment. What the Corporation were to pay was the "then value" of the tramway, and other enumerated subjects. The enumeration was necessary without the reason assigned for it by the Lord Ordinary, in order to define what the "undertaking" included, and for what subjects the company were entitled to demand payment from the Corporation. The arbiter had only allowed the cost of the tramway, less depreciation, but "value" and not "cost" was what the section said the Corporation should pay. "Then value" must include more than the *corpus* of the lines, otherwise there would have been no need expressly to exclude any allowance for past and future profits. An "allowance" must be for something over

and above what was to be given otherwise. The only reasonable explanation was to hold that "then value" meant the then value as a letting subject, for in this way only could a sensible meaning be given to the parenthetical clause excluding any allowance for past and future profits. Profits were not equivalent to returns less working expenses. Rent had to be paid or allowed for before profits were reached. In claiming rental value, therefore, the company were not asking any allowance for profits. Further, "allowance" was not equivalent to "estimate," and the parenthetical clause did not mean that present earnings were not to be taken into consideration in fixing the rental value. On the contrary, "then" value was opposed to "past and future" profits, and the intention of the Legislature was that in forming his estimate of the rental value of the undertaking, the arbiter should look only to present earnings. This interpretation of the section led to reasonable and equitable results. On the one hand the Corporation were not required to pay anything in respect of profits, which would have been unfair, as they were not allowed to carry on the business themselves, but only to let it. On the other hand they had to pay for what they got—an undertaking of large rental value, while the company received some compensation for its risk. The view now presented had been adopted in England—*London County Council* v. *London Street Tramways Company*, 10 Times Law Rep. 211. The arbiter was not consistent in refusing to take rental value into consideration, while he valued the lines not at their break-up value but as plant *in situ*, and capable of earning profit, and also allowed for the expense of obtaining Parliamentary authority and widening the North Bridge. The *Kirkleatham* case was not in point. All that was bought there was the mains and pipes. The right to supply water was not acquired along with these subjects, but was already possessed by the local authority, having been acquired *aliunde*.

Argued for the defenders—The arbiter had adopted the right principle of valuation. The whole that the company had acquired in the streets under their Acts was an exclusive right to lay lines and use them for flange wheel vehicles. There was a broad distinction between their right to the tramway lines and to the heritable subjects which belonged to them in absolute property—Tramways Act 1870, sections 34 and 57; Edinburgh Street Tramways Act 1871, sections 4 and 9. The right of exclusive use was only given them for twenty-one years, or at all events it was subject to defeasance at the end of twenty-one years. Such a right was only a right for a term of years—*Toronto Street Railway Company* v. *Corporation of City of Toronto*, L.R., 1893, App. Cas. 511. There was no material distinction between that case and the present. There the right of using the railway originally belonged to the local authority, and could be resumed. Here it was acquired, not from the company, but under the Act. The company had paid nothing for their exclusive right to use the streets for flange wheel traffic, and the Corporation were in the position of proprietors resuming their property subject to the condition that they should use it in a particular way. In *Craig's* case the question now being argued was never considered. The only question there was how the property was to be assessed, and the answer to that question depended on the definition of "owner" in the Poor Law Act. These preliminary points were, however, only of use in so far as they assisted in the construction of the 43rd section. It was on the construction of that section that the question between the parties had to be decided. The section was divided into two parts. The first part stated the terms upon which the physical subjects belonging to the pursuers were to be transferred. The second part gave the Corporation the right to use the subjects transferred. The question between the parties narrowed itself to this. It being conceded that the company had no right to compensation for being deprived of the right to make profits, the question was whether they were entitled to compensation for being deprived of their right to rent. The first point of controversy under the section was whether "undertaking" referred to the physical subjects alone or to the business as well. The defenders maintained that "undertaking" as there used related only to the physical subjects, for the reason that the Corporation were only entitled to buy what was situated within the district. In other words, the Legislature were speaking only of what had a local situation. In the next place, the word "value" might mean the value either to the buyer or to the seller, or the one not excluding the other. The first would mean break-up value; the second rental value. The arbiter had adopted the third and most reasonable course of valuing the lines as plant *in situ*, and capable of being immediately used for traffic. Further, if the pursuers' contention were sound, and "tramway" meant "undertaking," there would have been no need to enumerate the other subjects belonging to the company such as lands and buildings. They attempted to account for the enumeration by saying that it was necessary in order to prevent the company from foisting on the Corporation a number of subjects not forming part of its undertaking, but it would have been unnecessary for that purpose, as such subjects would not have formed part of the undertaking. [LORD PRESIDENT—Was it not the scheme of the section that the undertaking should be permanent, and that there should be a transference to another hand?]—The latter part of the section would be unnecessary if the transference included the right of user. But whether "undertaking" meant physical subjects only or physical subjects and rights, the Corporation were to acquire it upon terms of paying for the physical subjects only,

and the company having paid nothing for the right of user were not entitled to any compensation for being deprived of it. "Tramway" did not mean tramways and undertaking. The word could not be construed by an interpretation clause in an Act of later date; and further, the word in the interpretation clause in the special Act was not "tramway" but "tramways" —a material difference. If "tramway" had meant tramways and undertaking, there would have been no necessity for the enumeration which followed. "Tramway" therefore meant the tramway line, and the reason for the separate enumeration was that there were two classes of subjects to be transferred—(1) subjects of which the company had only a right of use; and (2) subjects in which they had a right of property. The word "allowance" in the parenthetical clause could not have the limited meaning sought to be put upon it by the other side unless it were only applied to future profits. To exclude any allowance for past profits necessarily excluded any estimate of past profits. Rental value was merely an allowance for profits or a part of profits. Profits might include either proprietor's profits or tenant's profits. In both cases it was assumed that the Corporation was to pay for the revenue-earning right, and in both cases the sum which the Corporation would have to pay was arrived at by estimating past, and so computing possible future profits. [LORD PRESIDENT — Were not the other enumerated subjects in the same position as the "tramway?"]—The other enumerated subjects were in a different position from the tramway, because, in the first place, the parenthesis did not apply to them, and, in the second, the company had only a right of user of the tramway for twenty-one years, whereas they were proprietors of the other subjects. No one had suggested any way of reaching rental value except through an estimate of profits. Past and future profits were exhaustive of all profits, and the exclusion of any allowance for such profits excluded all reference to profits. [LORD M'LAREN—A direction not to allow for past or future profits would certainly have been a curious way of directing an arbiter to take present profits into consideration.] It would have been extremely easy to say that rental value should be taken into account if that had been intended. There were three answers to the pursuers' contention on this part of the section. First, The fact that the word "allowance" was used in reference to past profits indicated that "allowance" was equivalent to "estimate." Second, Past and future profits exhausted all profits. Third, Present profits being excluded for one purpose, were necessarily excluded for all. The defenders' argument was greatly strengthened by a consideration of the second part of the section, which proceeded on the footing that the power to use the tramways was not acquired under the sale, but directly from the Legislature by separate grant. This was inconsistent with the pursuers' argument, which necessarily led to the conclusion that the right to work was involved in the transfer of the undertaking. The decision in the case of the *London County Council* was unsound, and the fallacy arose from a wrong meaning being put upon the word "tramway" in the 43rd section. The keynote of the judgment was the idea that the price to be paid must correspond to the subject of sale, and that as the undertaking was the subject being sold, that was the subject to be paid for. This led Justice Matthew to the conclusion that "tramway" in section 43 of the Act of 1870 must be construed as meaning undertaking, and that conclusion was supported by a fallacious reference to the interpretation clause of a later Act where "tramways" was defined as meaning undertaking. [LORD ADAM—Did not the enumeration of subjects to be paid for imply a direction to value each of the subjects enumerated separately in the manner appropriate thereto?]—It did. The method adopted by Justice Matthew in getting at the rental value showed that profits must be taken into account in order to ascertain what a tenant would be willing to pay. Rent was merely the allowance which a tenant would pay for the right to earn profits, and was just one part of profits. While Justice Collins arrived at the same result as Justice Matthew, he differed in holding that the right of the company was from the first a right subject to defeasance at the end of twenty-one years. The present case fell under the rule applied in *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board*, 1893, L.R., App. Cas. 444. That decision was pronounced under a section practically identical, for the purposes of this case, with the present. There were two differences between the cases, which made the rule there applied even more applicable to this case. In the *Kirkleatham* case the section under consideration contained no words corresponding to the parenthetical clause in section 43, and the seller there had bought and paid for the right to supply water which was being taken from him. In none of the opinions in that case was the consideration founded on that the purchaser's right to supply water was derived not from the seller but *aliunde*.

At advising—

LORD ADAM—The question at issue in this case arises out of the purchase by the defenders of so much of the undertaking of the pursuers as lies within the district of which they are the local authority.

The undertaking embraced not only the tramway lines, lands, and other material subjects acquired by the pursuers for the purposes of the undertaking, but also the monopoly of using the tramway lines, and the right of exacting tolls, which had been conferred by Parliament. The purchase is a compulsory purchase by the defenders, under powers contained in the Tramways Act 1870, under the terms and conditions set forth in the 43rd section of the Act.

As I have said, the subject of the sale was so much of the undertaking of the pursuers as lay within the district of which

the defenders are the local authority. The price which the defenders are to pay for it is defined by the Act as the value of the tramway, and all lands and buildings, works, materials, and plant of the promoters (that is, the pursuers) suitable to and used by them for the purposes of their undertaking within such district, exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever, such value in case of difference of opinion to be determined by a referee to be nominated by the Board of Trade. Now, it will be observed that it is not the undertaking that is to be valued, as one would perhaps naturally expect, but it is certain enumerated subjects which are to be valued for the purpose of ascertaining the price which is to be paid for the undertaking.

It was argued before us that the word 'tramway' in this enumeration must be read as 'the undertaking.' But in this Act which we are construing there is nothing in the interpretation clause, as there is in the private Act, with which we are not at present concerned, which says that tramways may mean the tramways and works and undertaking authorised. But even if there were, I think it could not be so construed here, because in that case it would necessarily include lands, buildings, and others which are specifically enumerated, and render these words altogether superfluous and insensible, and I agree therefore with the Lord Ordinary that a construction of the Act which leads to that result cannot be accepted. I think that 'tramway' here means tramway line, a sense in which it is certainly used in the two immediately preceding sections—the 41st and 42nd. I think, therefore, it was the duty of the referee to value the tramway line as a separate subject, just as he is directed to value the lands, buildings, and other specific articles enumerated in the clause. But it is said that if this be so, no value will be put on, and therefore no price paid for the monopoly of the use of the tramway lines and the right to levy tolls, which are valuable parts of the undertaking, and that the Legislature could never have intended to deprive the promoters of a part of their property without being paid for it.

It is to be kept in view, however, that the Legislature was dealing with a very peculiar subject. The promoters never acquired any exclusive right to use the tramways in perpetuity. All that they acquired was an absolute right to the use of the tramways for a period of twenty-one years certain, modified, however, by the agreements set forth in the first schedule appended to the private Act. They knew when they entered on their undertaking that it was in the power of the defenders, the local authority, to terminate by notice their exclusive use at the end of that time, or at the end of any succeeding period of seven years. Moreover, it is to be remembered that the only possible purchasers were the local authority, who, as owners of the tramways, were in quite a different position from the promoters. The local authority were themselves the owners of the streets on which the tramway lines lay, and I can quite understand that the Legislature considered that when they became owners of the tramways they should not be called upon to pay for the right of using the streets, which were their own property, in this particular way for the benefit of the inhabitants, and that it was sufficient that the pursuers should be paid for the material subjects which had cost them money, but that they should not be paid for these powers which had cost them nothing. But however that may be, the whole matter is statutory, and I think that the direction of the statute is clear as to the subjects which alone are to be valued in order to fix the price to be paid by the local authority.

It will be observed that the matters which the referee was directed to value were not certain selected articles, but everything that made the tramways a profit-earning subject, and I think that the referee, seeing that this was a compulsory and not a voluntary sale, would, in the absence of directions to the contrary, have been entitled in estimating the value of the subjects to add an allowance for loss of profits in respect of the pursuers being deprived of a profit-earning subject, just as he would have been entitled to add a percentage or allowance for compulsory sale. Therefore I think the clause introduced in the parenthesis to the effect that the value put on the subjects should be exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever, was necessary, if it was, as I think it was, the intention of the Legislature that all question of profits should be excluded from the consideration of the referee.

That this was the construction put upon the Act both by the pursuers and defenders appears from the 14th section of the agreement entered into between them when the undertaking was authorised by Parliament, and which is set forth in the first schedule appended to the Act, and which is made part of the Act. By that section the defenders are empowered to require the pursuers at the expiry of seven years to sell their undertaking to them, which they are bound to do, upon the terms of paying the then value of the tramway and all lands and others, just as in the 43rd section of the statute; but in this case there is no exclusion of an allowance for compulsory sale or for past or future profits. The parties evidently assumed that the terms of this clause would not exclude an award for the loss of future profits, but that such an allowance would be made, because by the 17th section of the agreement they specify the limits within which such an award is to be confined. That section provides that the allowance for past and future profits, including compulsory sale, and every other consideration whatever, should not be less than 10 per cent. nor more than 12½ per

cent. on the expended capital of the company for the period to elapse between the date of the purchase and the expiry of twenty-one years from the time the promoters were empowered to construct the tramway. It is significant that such allowances were to terminate at the end of twenty-one years, that being the period with which we are now dealing.

But it was further said that the ordinary and well-recognised mode of estimating the value of such an undertaking as this was by rental value, and no doubt that is so. The task, however, set to the referee in this case was not, as I have said, to value the undertaking as a whole, but certain material subjects which were part of it. But however that may be, it is clear that the rental value could not be arrived at in this case in the ordinary and recognised way. That is, as I understand, by taking into consideration, *inter alia*, the past, present, and probable future profits, with a view to ascertaining the true rental value; but if the referee is prohibited from making any allowance for past or future profits, he is prohibited, it appears to me, from taking these elements into consideration in fixing the value. But these are the main elements which determine the rental value, and how that value can possibly be arrived at without taking them into consideration I fail to see.

It was further maintained that the fact that the referee is prohibited from making any allowance for past and future profits, shows that rental value or a consideration of profits was to be the rule of the valuation, as otherwise there would be no meaning in the exclusion of past and future profits. I think, however, that such an allowance is excluded only in the sense that it is not to be added to the amount of the valuation otherwise arrived at. That is certainly the meaning of the clause as regards the allowance for compulsory sale, which is equally excluded.

On the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD M'LAREN—I also am of opinion that the Lord Ordinary's interlocutor is well founded, and I concur generally in the grounds of judgment as stated in his Lordship's opinion.

I understand the 43rd section of the Tramways Act 1870 as making a conditional contract of sale between the "promoters" of any tramway company which may come into existence, and the "local authority" of the district within which the "undertaking" is locally situated.

The subject of sale is to be the undertaking; the condition is that a notice and requisition to the promoters to sell shall be given by the local authority, and the price to be paid is defined as the "then value," or, we may now say, the present 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 within such district," exclusive of certain things which I shall presently consider.

The question relates to the ascertainment of the price—whether the price to be paid by the local authority is the value of the corporeal subjects described, considered as plant *in situ* capable of earning a profit, or whether the price is to be ascertained on the principle that the Tramway Company is selling a revenue-earning right, and by fixing its value at so many years' purchase of a hypothetical rental.

1. It is worth noticing (though the use of the term may be accidental) that throughout this section the sellers are called the "promoters;" and this indicates to my mind that attention is called to the fact that the section is not imposing terms of compulsory sale upon existing companies, but is making a contract of sale which is to be a condition of the powers given to any new company that may be formed, and the terms of which must be accepted by its promoters as a part of the consideration for the powers which they propose to obtain from Parliament.

2. The statutory contract of sale is a sale of the company's undertaking, but the price to be paid by the local authority is not described as the value of the "undertaking," but as the value of "the tramway, and all lands," &c. It was argued to us that the expression "the tramway" means the undertaking; but even according to the definition clause of the local Act founded on, that meaning is only attributed to "tramways" (in the plural), and this is consistent with a known use of language in which the plural form of a word may have a generalised meaning if the context be consistent with such a meaning. If "tramway" in the singular means the undertaking, it is difficult to see what separable meaning can be attached to the enumeration of subjects which follows that word. But I think that "tramway" in the expression quoted means only the corporeal subject, or tramway line, consisting of rails, points, and their supports *in situ*. This tramway line I take to be one of the assemblage of things enumerated, the aggregate value of which, when ascertained by arbitration, is to constitute the price of the transfer of the undertaking to the local authority.

3. I next consider the words which in the printed Act of Parliament are put within brackets, and which I do not here repeat. Their purport is to exclude certain possible elements of value. It was argued that the words of exclusion applicable to past and future profits would not have the effect of preventing the referee from taking into account present profits at the time of the statutory sale. But as it seems to me there could be no reason for excluding inquiry as to profits realised in the past or expected in the future, except for the purpose of excluding profits as an element in the present value. Again, it was suggested that valuation on the basis of rental does not necessarily include the element of "allowance" for profits, because in the method of valuation proposed the gross revenue is to be first ascer-

tained, and then a sum is to be subtracted under the name of profits in order to arrive at rental value. But then there are also the words exclusive of "any compensation for compulsory sale or other consideration whatsoever," and I cannot help thinking that revenue is one of the other "considerations" which are not to be taken into account for the purpose of determining the value. Of course, if I am right in construing the word "value," and the words which it governs, as being equivalent to a direction to value the assemblage of the corporeal subjects *in situ*, the exclusion of profits in the sense in which I read it would naturally follow, and the whole clause or description of the terms of sale would be consistent, because the valuation to be made is a valuation into which neither gross nor nett profits would enter as an element. I have difficulty in seeing how, under the method of valuation based on rental, effect can be given to the statutory direction to exclude any allowance for past or future profits, because it seems to me that the hypothetical rental which the referee would have to determine is really a species of profit. It is the return which the company would get by letting the subject, and this would be greater or less according to the success of the undertaking, which seems to me to be the true criterion of profit as distinguished from interest of money or fixed return.

4. I think that the Lord Ordinary's judgment is supported by the decision of the House of Lords in the *Kirkleatham* case, L.R., 1893, App. Cas. 444, although the terms of the enactments in the two cases are not identical. The chief difference in the enactments is that in the *Kirkleatham* case the thing to be determined is the "price" of the corporeal subjects, while here the word used is "value," though there is also a difference as to the description of subjects enumerated. Now, I do not agree with the argument that the word "value" has a fixed meaning in an Act of Parliament, and is always identical with rating value. I do not doubt that for rating purposes the value of the undertaking of this Tramway Company would properly be estimated on the basis of rental; but then the value referred to in this statute is not expressed to be the value of the undertaking, but (as I think), of the corporeal subjects enumerated, and therefore, as I think, rental value is not applicable. I think that what is meant in this Act of Parliament is the exchangeable value of the subjects specified, or the value to the purchaser, as it is put in the *Kirkleatham* case.

5. I have carefully considered the opinions of the learned Judges who decided the case of *The London Tramways* v. *The County Council*. As I have formed a different opinion on the question, I should not think it proper to discuss their Lordships' judgments, or to enter upon the subject at all, except to say that I agree with Mr Justice Collins in thinking that we are not concerned to inquire whether either of the methods of valuation offers adequate compensation to the company. But I may point out that Tramway Companies are enabled to earn their profits by the use of the public streets in a way peculiar to their traffic, for which I understand no consideration is paid; and one effect of the statutory notice to purchase on the expiration of the term of twenty-one years is, that this qualified right of use of the public streets ceases, or reverts to the local authority. This may be one of the reasons why the Legislature made these special provisions for valuing the tramway property on a different principle from that which would be thought proper in case of a transference from one company or mercantile undertaking to another. But I do not consider at all whether the method of valuation preferred by the referee is equitable or adequate. It appears to me on the best consideration I am able to give to the question to be in accordance with the requirements of the Act of Parliament.

LORD KINNEAR—I concur in the opinion delivered by your Lordships.

LORD PRESIDENT—The leading proposition in the enactment which we have to construe is, that in a certain event the promoters shall sell their undertaking to the local authority.

Much has been said of the limited nature of the right of the Tramway Company under the statute. It is said that their right to the tramway being conferred by this statute and being terminable as under this section, they are not to be regarded, or rather it is not to be expected that the Legislature would regard them as ordinary owners. To that the plain answer is to be found in the words of section 43. Having to describe what I quite agree is the termination of the Tramway's rights to the tramway, and the terms on which it is to be effected, Parliament states the transaction as being a sale. It might quite well have done otherwise—might have declared the right of the company to be terminated, and the compensation to be payable on a specified scale. To say that this is a mere question of language is precisely to point out the significance of the choice of language actually made.

This is then a sale, and a sale of what? Of the undertaking; the transaction contemplated is a sale of a living undertaking—the transfer by sale of a going concern. This is what, on the theory of the section, the Corporation get and the company give.

Now, of course, the words upon which I have hitherto commented are not those which immediately and primarily are before us. The words immediately before us are those which state the terms upon which the transaction takes place. But I own to thinking it important, in construing the terms, to realise what is the transaction of which these are the terms; or rather, what is the mode in which the Legislature describes the transaction for the purpose of stating the terms. This

being asserted by Parliament to be a sale of an undertaking, it seems to me most legitimate to adopt that construction of any ambiguous description of the terms which best accords with the nature of a sale of an undertaking.

It is of course true that (apart from the parenthesis) the section when it states the terms does not say that there shall be payment of the value of the undertaking, but proceeds by way of enumerating various assets of the company, the principal of which is the tramway. This method seems to have been adopted to cover the case dealt with by the section—of an undertaking overlapping the bounds of the purchasing local authority, in which event only part of the undertaking is bought; it clearly and distributively applies to the several parts of the undertaking the process of selection by which only such things, but all such things, are to be valued as are useful for a body whose operations are limited to its own district.

Well, then, among the things enumerated is the tramway. Now, of the word tramway (the singular) there is no definition either in the general or the local statute. Its meaning, therefore, must be its ordinary meaning in relation to the context. Now, the proper way to read the section is surely in the first instance to miss out the parenthesis (inasmuch as it purports to state an exclusion), so as to understand from what it is that the exclusion is made. If so, then we find that the consideration for the sale of this undertaking is to be the value of certain specified things, and, first of all, the tramway. What, then, is "the then value of the tramway?"

I suppose if any man of business, not to say man of sense, were asked what was the value of any stated thing at any given time, he would rejoin by inquiring what was it then used for. To this inquiry, made regarding any tramway at the date of a notice under this section, the answer must be, carrying passengers over it for hire. The profit over the outlay on this operation was its value. Nobody can make any use of a tramway but this; and if you demur that I am assuming that I have a right to run over it, the reply must be that if I have none, the thing has no value at all, and the hypothesis of the inquiry, that it has a value, is upset. The only qualification to the statement that the thing would have no value is, that it would have the value of old metal; but then this theory is rejected by the Corporation of Edinburgh, who think it is to be valued as an established tramway only one of which no use could be made at the moment in question. Now, I pause to say that (doing as I am going to do, full justice to the plausibility of their argument so far as it is founded upon the parenthesis) I consider their view, applied to the words without the parenthesis, to be an impossible view. In the *Kirkleatham* case that construction was manifestly right; in the present case, reading the whole section (parenthesis and all), even if I did not know that it has been adopted by the Lord Ordinary and the majority of this Court, I should consider it a tenable conclusion; but if section 43 be read (in the meantime and for the sake of argument) without the parenthesis, I do not think this construction tenable. The words are "the then value of the tramway." I say the then value is determined by the then use; and the then use was, in fact and in the contemplation of the section, that which I have stated.

And now I take the parenthesis into account. It is expressed as a qualification or explanation of the words in which it is interpolated. Neither party to the controversy is able to say that these words are specially well adapted to express the result which he maintains. 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 why 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, &c., 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. No such result is, in my opinion, necessary. The words "past or future" in the parenthesis are, I think, clearly suggested by the "then" which goes before; they emphasise present value by excluding allowance for past and future value. It is the existing state of things at the moment of the notice to sell that is to be the standard of valuation; neither the history of the past nor the anticipation of the future is to be made the ground of any separate "allowance." This leaves untouched the usual, and as far as I know, the only rational way of ascertaining value; which is the consideration of use and resulting profit. It seems to me that this construction satisfies the words on which the controversy turns, gives them their natural sense, and keeps them in their proper place. On the other hand, the defenders seem to me to commit a cardinal error of construction even within the parenthesis itself, for they give no effect whatever to the words "past or future." Indeed, their argument was that "past and future profits" is merely "profits" writ large—for this reason, that time is exhaustively divided into past and future, and the present is merely a dividing line between the two. This is, of course, a profound and impressive truth; but there are times and places for everything; and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching business men metaphysics unawares—more especially as this statute applies to England as well as to Scotland. If the Act had meant that profits were not to be looked at at all, it would have said so; and it would not have said so in a parenthesis to a plain direction that the present value of a tramway at present

in use is to be paid, for the purchase of the undertaking of which it is part.

The defenders have relied on the *Kirkleatham* case. It seems to me to form a complete contrast to the present case. In *Kirkleatham* there was no sale of the undertaking, for the best of reasons—the local authority did not require it. The only things directed to be sold were the mains, pipes, and fittings; and what had got to be paid was their own value. This being so, the structure of the section construed in the *Kirkleatham* case was as different from that now under consideration as were the things transferred and the theory of transference.

My opinion on the section before us is in accordance with the judgment of the Divisional Court of the High Court of Justice in England. As I differ from your Lordships, I have thought it proper to write this opinion. I should otherwise have been content to express my general concurrence in the views of Mr Justice Matthew and Mr Justice Henn Collins.

The Court adhered.

Counsel for the Pursuers — Graham Murray, Q.C. — Vary Campbell — Clyde. Agents—Drummond & Reid, S.S.C.

Counsel for the Defenders—Ure—Cooper. Agents—W. White Millar, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

WELSH *v.* RUSSELL.

Property—Sale—Servitude—Warrandice.

W purchased an urban property, consisting of a house and back garden, from R for £600. The subjects were conveyed free of all burdens, and the disposition contained a clause of absolute warrandice. Shortly after the sale S intimated to W that he claimed a servitude of passage through the garden, and raised an action of interdict against W to establish his right. The dependence of this action was intimated to R, who declined to interfere, and decree was allowed to pass in absence. W then brought an action against R to have him ordained to free the subjects sold of the servitude, and failing his doing so, for payment of £750 as the present value of the subjects.

Held that under the clause of warrandice the pursuer was only entitled to be indemnified for the diminution in the value of the property caused by the existence of the servitude, and that as he had neither averred nor proved partial damage, the action fell to be *dismissed* as incompetent.

In June 1890 William Welsh purchased a house and back garden in the town of Selkirk from James Russell for £600. The disposition contained a clause of absolute warrandice, and the subjects were conveyed free of all burdens.

In December 1892 Welsh brought an action against Russell in order to have the latter ordained to free and relieve (1) the house and (2) the garden of, in the first place, a servitude right possessed by Thomas Scott of free ish and entry through the house to subjects belonging to him at the back thereof; and, in the second place, of a servitude right also possessed by Scott of passage through the garden, and failing the defender procuring from Scott a conveyance or renunciation of these servitude rights, for decree ordaining him to pay the pursuer the sum of £750, "being the present value of the subjects."

The pursuer averred—"(Cond. 3) In or about the month of June 1892 Mr Thomas Scott, tailor, High Street, Selkirk, claimed servitude rights of way through the house and also through the garden conveyed to the pursuer in said disposition, and by letter dated 3rd June 1892 the pursuer's agents intimated this claim to the defender. (Cond. 4) In order to vindicate his rights to the said right-of-way through the pursuer's garden, the said Thomas Scott raised a petition for interdict against the pursuer in the Sheriff Court at Selkirk, which was served upon the pursuer on 15th August 1892. In the condescendence annexed to the said petition the petitioner reserved his right to pass through the pursuer's house, which he stated had not hitherto been challenged, and was not therefore included in the said petition. (Cond. 5) The pursuer's agents on 17th August 1892 intimated the said petition to the defender. Thereafter, on inquiry into the claims of the said Thomas Scott, they advised the pursuer that the same were valid in law, and by letter dated 22nd August 1892 they intimated this to the defender, and that the action was not to be defended so far as the pursuer was concerned. The defender, although he denied the existence of the said servitude rights, refused to give the pursuer any information or assistance to enable him to state competent defenees to the said petition, if the same could be stated. The said Thomas Scott thereafter on 7th October 1892 obtained interdict in terms of the prayer of his petition. (Cond. 6) The said servitude rights specified in the summons are legal burdens over the subjects in question, and they have existed the pursuer believes and avers from time immemorial. The said Thomas Scott and his predecessors in the subjects have fully and completely possessed and used the same since their constitution to the present time. . . . (Cond. 7) The said servitude rights were not disclosed to the pursuer at the time of the sale. They are of a very burdensome nature, and materially depreciate the value of the subjects, and the pursuer would not have purchased the subjects at any price had he known of their existence. By and through the existence and exercise of the servitudes described in the summons, and