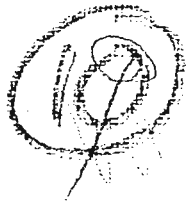


28, 1951

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IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S. W. 1.
Wednesday, 4th July, 1951.

Present:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF MONTREAL

and

SUN LIFE ASSURANCE COMPANY OF CANADA

To Judicial Committee of Privy Council,
H.M. Patent Office, &c., &c.

MARTEN, MEREDITH & Co.,

Shorthand Writers,

11 New Court,

Carey Street, W.C.2

(Midland Circuit and Leeds Assizes)

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Between:

THE CITY OF MONTREAL (Appellant)

and

SUN LIFE ASSURANCE COMPANY OF CANADA. (Respondent)

(Transcript of the Shorthand Notes of Marten, Meredith & Co.,
11 New Court, Carey Street, London, W.C.2).

MR. L. E. BEAULIEU, K.C., MR. HONORE PARENT, K.C., MR. R. N. SEGUIN, K.C. (of the Canadian Bar) and MR. FRANK GAHAN, instructed by Messrs. Blake & Redden, appeared for the Appellant.

MR. F. P. BRAIS, K.C., MR. HAZEN HANSARD, K.C., MR. R. D. TAYLOR, K.C. (of the Canadian Bar) and MR. G. D. SQUIBB, instructed by Messrs. Lawrence Jones & Co., appeared for the Respondent.

MR. A. M. WEST, K.C. (of the Canadian Bar) held a watching brief on behalf of an interested party.

T E N T H D A Y.

MR. BRAIS: My Lords, there are three minor matters that I would like to deal with first. In the course of the argument yesterday, as I re-read it last night, I seem to have said that the Sun Life was occupying the non-lettable space. If I said that it was a lapse; the Sun Life is occupying^{it} which would obtain less money, because the evidence is clear[^] throughout that it is all rentable space and all office space in toto.

LORD PORTER: I thought the kind of suggestion was that wasted space was there and that that was all attributed to the Sun

Life, but I do not know if that is what you meant.

MR. BRAIS: No, my Lord. At the time when I was saying that, the way it appears here is that the lower floors which we occupied are being occupied by us because they are non-lettable space. That is not correct and I did not intend to say that at all. It is all rentable space; the lower floors are not as good lettable space and we ^{receive} get less money than we charge ourselves if we did let them.

LORD REID: Are you saying that the figure which I thought had been agreed in your book entry as representing the rentable value of what you occupy ought to be diminished?

MR. BRAIS: No, I cannot say that, because we are charging ourselves more than we are getting from the tenants upstairs. I have prepared, and will have during the forenoon, a complete breakdown of those figures as they are applicable to space. If I may be permitted to apply myself to the question when we have that before us, it might be somewhat easier for me to make myself more clearly understood.

LORD REID: I would like at some stage to know what it is leading to, whether you are saying that the amount which has been entered in the account as your book entry rent is, or is not, to be regarded as too large; whether you are asking us to alter it or not.

MR. BRAIS: No, I am not asking your Lordships to alter it.

LORD REID: Perhaps you will make it clear, because at the moment I do not quite see where it is leading to, if you are not asking us to reduce it, because I have not grasped it.

MR. BRAIS: The only reason I made the statement here this morning is because I was made to say something which went away beyond my thoughts. I just wanted to have it clarified in the record for future reference.

LORD PORTER: Is this the proposition: we are prepared to accept as a proper rent the rent we charge ourselves, but in fact we are being generous in making that concession?

MR. BRAIS: Yes, my Lord. I must say that we have to accept, and will accept, the rent we are charging ourselves; I must say that, but I am entitled to show that we are not undercharging ourselves, quite the contrary, because the suggestion is made in the judgment that we are undercharging ourselves.

LORD OAKSEY: You are only charging yourselves for the purpose of this case, I suppose?

MR. BRAIS: No, my Lord. We must charge ourselves for the purpose of the department of insurance, and we must charge ourselves vis-a-vis our shareholders and our policyholders to establish some type of value for the building.

LORD NORMAND: I do not remember that it was alleged against you that you were undercharging yourselves.

MR. BRAIS: Some of the witnesses have said so.

LORD NORMAND: The case presented against you is not that you have been undercharging yourselves.

MR. BRAIS: The Board has intimated that it has been generous in accepting our figures but I will come to that, my Lord.

LORD PORTER: Does it matter?

MR. BRAIS: It does not matter, my Lord. The only purpose of bringing this up is -----

LORD PORTER: To correct yourself.

MR. BRAIS. To correct myself on a statement which is not correct so far as the record is concerned, as I read it. The second point was the question put by my Lord Asquith referring to page 842 of volume 4 where Mr. Perrault, after having arrived at a replacement value said, at line 32: "In order to arrive at the real value for taxation purposes, that is to say, the value established in a transaction between a seller who wishes to sell but does not have to do so, and a buyer who wishes to buy but is not obligated to do so, the above valuation of 8,202,600 dollars may be subject to a fluctuation, depending on the net revenue of the property". We were concluding with that yesterday. "It is quite evident that this net revenue is a very important factor in determining the true real value of this property. The net revenue should be determined after deducting from the gross revenue all operating charges against the property and setting aside an amount to amortize the capital invested in the building, so as to compensate for the physical depreciation of the structure".

My Lord Asquith asked whether that was further applied to Mr. Perrault's figures. The answer there is that Mr. Perrault does not use this method of revenue to arrive at the figure, but he says that to check his figures they are on a depreciated replacement value basis and that the buyer would then check those figures against the capitalisation of the revenue.

LORD ASQUITH: When he reaches the figure of 8 millions odd he takes an annual figure and multiplies it by something. I thought he was saying here that the annual figure is a net figure from which has been deducted something to compensate for the physical depreciation of the structure.

MR. BRAIS: No.

LORD ASQUITH: That is wrong?

MR. BRAIS: That is wrong. That is not what he does. He says: I have arrived at a net figure of 8,200,000 dollars taking replacement cost on a cube basis, but he says, if you want to check that figure, which is an actual figure, with the net revenue which would interest a buyer, you will then proceed as follows, and he then sets out the theory but does not apply it to any of his figures.

LORD ASQUITH: It is a figure on depreciation which you would have to deduct in other circumstances and which would operate as a check, but he has not done it.

MR. BRAIS: He has not done it. He just sets forth the theory.

May I now return to page 983-A-15, volume 5. We have had Mr. Perrault's figures. Then at the top of page 16 we find that conclusion in Mr. Perrault's report to which I have already referred, but which has nothing to do with the figures which appear in his report.

Then we come to Mr. Archambault. We examined yesterday Mr. Archambault's report, and unless your Lordships wish to direct my attention to some particular portion of it, I think I can proceed, because he adopts the same kind of

formula that Mr. Perrault did; he takes away from the building as being of no value those things which he considers are waste or of no value other than in material space and arrives at that result.

LORD ASQUITH: He employs the cubic method.

MR. BRAIS: He has the cubic method also. In that approach, we will see from the Board's own finding, that the cubic method ~~are~~ employed by these two witnesses has resulted in a basic figure approximately similar to what has been found by the others. There is no criticism of the result as a figure which is on the cubic method.

Then page 17, line 9: "Other witnesses for the complainant were Mr. William MacRossie, Mr. H. J. Nobley, Mr. D. L. McCaulay and Mr. McAuslane. They have given evidence on point of details" etc.

We can pass on to the deposition of Mr. MacRossie. "He is a real estate broker and appraiser" etc. "He said that he doubted whether the method followed by Mr. Vernot proved that the figure arrived at was the actual reproduction cost at the date the assessment was made. He also doubted if any one would give out a contract to build this building if it was not already built, at a figure thus arrived at. 'Historical cost (says he) is knowledge and it undoubtedly is a guide but it is not usually accurate in reflecting current reproduction cost'".

Then Mr. MacRossie's methods are continued in the following paragraph.

Then he refers to the witnesses for the City and at the bottom of the page he discusses Mr. Hulse and then he discusses the preparation of the memorandum on page 18. We have then the paragraph of the memorandum which has been read and re-read, and I do not propose to re-read it.

At the bottom of the page there is a reference to "Mr. Victor E. Fournier, civil engineer, has examined the Sun Life buildings", on behalf of the City, of course, "and studied its plan in view of determining their replacement cost. He has arrived at his prices in taking an ordinary building of 40 cents per cubic foot". Then he adopts that rather extraordinary method of saying: I have there an ordinary building to survey and he comes to a figure of so much per cubic foot. He takes off depreciation at 1 per cent only and arrives at his replacement cost of 16 millions.

LORD ASQUITH: The suggestion is with regard to the cubic method that a man with sufficient experience can tell at a glance, more or less, what a thing is worth per cubic foot. Here you get two people, one says 80 cents and the other says 40.

MR. BRAIS: With regard to Mr. Fournier, the 40 cents that he uses is not the value of the building. He uses it in a very peculiar way. He takes a building of this size and builds up in his mind at 40 cents per cubic foot, a brick building and so forth.

LORD ASQUITH: Can you explain it a little more?

MR. BRAIS: He takes a cheap building which would cost 40 cents and he starts adding various things which you would not find in a 40 cents building but you would find in an 80 cents building, which he reaches for the Sun Life.

LORD ASQUITH: He starts with the notional building.

MR. BRAIS: Yes.

LORD ASQUITH: Why does he start with a building worth 40 cents instead of 10 or 100?

MR. BRAIS: He says he has never built a large building, never anything more than six or seven storeys. So he takes this building as though it was 40 cents. He puts 40 cents per cubic foot into the 22 million cubic feet. Then he starts destroying this building and building the other one and adds up to where he arrives.

LORD ASQUITH: Is he one of your witnesses?

MR. BRAIS: No, my Lord.

LORD PORTER: Actually what he says is this. In the ordinary building 40 cents is what you would expect, but this is an exceptional building and you have to find out what it would normally cost.

MR. BRAIS: It is another method of cubing. It may be good or bad, depending upon the ability of the individual. It is a very peculiar method of cubing, apparently unknown to others.

LORD ASQUITH: What is meant by a normal building?

MR. BRAIS: Somewhere in the evidence he describes what a normal building is.

LORD OAKSEY: What have we to do with this, because none of the judges have adopted it?

MR. BRAIS: No, my Lord, I am not stressing it.

Then there is Mr. Perry, consulting engineer, who reconstitutes the building for the City. He arrives at a figure and he takes off 13 per cent depreciation for 13 years.

LORD PORTER: Mr. Perry goes upon the actual replacement value, does he not?

MR. BRAIS: Yes.

LORD ASQUITH: The historical value.

LORD PORTER: I do not know that he adds much to our knowledge.

MR. BRAIS: He does not add much to our knowledge. He takes everything he finds in there and gives it all the value he can. I do not think I would like to go into his prices. I can go into this, the criticism made of Mr. Perry's prices. The prices he used are entirely out of line with the actual prices which were paid for the building, that has been discussed by a number of witnesses, and if your Lordships would desire me to carry through the criticisms of Mr. Perry's prices we would see that he arrived at this figure and really, in arriving at the figure apparently, there is very serious criticism of the prices that he used.

LORD PORTER: Do you mean he charged too much?

MR. BRAIS: He charged too much and there are examples of what was actually paid for certain things and what he charges in his figures. There are a whole series of things on that.

LORD PORTER: In other words, you say, when he came to deal with

replacement cost on a quantity survey method, the amount he charged in respect of the quantities which he surveyed was too large?

MR. BRAIS: Yes.

LORD REID: Was he asked how he reconciled that with the City's schedule of 1936 prices?

MR. BRAIS: No, my Lord. Then Messrs. Desaulniers and Mills are two real estate agents and "they have formed the opinion that the real value of the subject property as of December 1st, 1941, is 15,800,000 dollars". They are using reports as to the value of the building. "They take the land at another price than the assessed value, and in making the necessary correction, as the land value is not in dispute, they would arrive at 15,674,700 dollars. They put the replacement cost of the main building at 14,400,000 dollars. and of the heating plant at 470,000 dollars".

LORD PORTER: This is after deducting depreciation?

MR. BRAIS: Yes, my Lord. Then we come to this very unique paragraph which is all we have as regards the City's system. It is at line 45 and we read: "There remains the evidence of Mr. Cartier, architect in charge of the Valuation Department of the Technical Service of the City of Montreal. He has filed and explained the report of inspection of the property by the staff of the Technical and the cards based on the said report.

"There were three inspections made of the Sun Life building by the employees of the Technical Service Department, the first in June, 1938" - when we say two and a half months were spent - "the second in December, 1941" - a matter of a few hours - "and the third in November, 1942. Since the date of the first inspection, the company admits having spent 674,788 dollars and 81 cents.

"The estimate amounting to 18,706,115 dollars and 53 cents was prepared at the end of 1942. The admissions of the company, as filed in the record, were known in March, 1943, and the Technical Service then compared its estimate with the sums spent by the company brought to the index 109 for 1939 as used in 1941 with the following results: From 1913 to 1941, the company spent 20,686,587 dollars and 62 cents, which amount reduced to the index 109 comes to 18,985,585 dollars and 92 cents which represents the cost of the construction of the main building. In taking off the depreciation and adding the power plant and the land for both buildings, the Technical Service figures come to 17,301,320 dollars".

LORD PORTER: If we are going to get anything out of this we must know how the Technical Service arrive at 17 millions. How did they arrive at it?

MR. BRAIS: They arrived at 17 millions on figures which we had here the other day.

LORD PORTER: This is the third.

MR. BRAIS: This is the third and last report. We have had admissions which were never heard of before and do not appear in the manual. We have had en hauteur.

LORD PORTER: I did not want you to stop and criticise them, we have had the criticisms. What page is the actual final conclusion?

MR. BRAIS: All the figures are in volume 4, page 737.

LORD ASQUITH: It is all P.36?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: The final calculations are pages 2 and 2A?

MR. BRAIS: That is the final calculation. There is one exhibit I must draw to your Lordships' attention there, because one could be easily misled. If your Lordships would first look at volume 1, page X, you will see there the admission which went in in 1943. There is the figure of 20,627,000 dollars actually spent which is referred to by the Board at line 11. "The estimate amounting to 18,700,000 dollars was prepared at the end of 1942. The admissions of the company, as filed in the record, were known in March, 1943, and the Technical Service then compared" etc.

The implication there, my Lords, is that it is only after the assessors or the valuers had made up their own figure, which we see here in these figures, that they found out what the historical value was. When I read that I said 'Well, they arrive at that independently, but if one looks at page 717 we find there what the Board has overlooked or failed to mention, and that is that on the 10th June, 1941, the company, at the request of Mr. Hulse, wrote to the chief assessor and told him that the total amount spent was 20,627,873 dollars and 92 cents. The assessors or the valuers had those figures long before they started their three rather frenzied trips to the Sun Life building, and made these interesting calculations which we see on page 36.

LORD ASQUITH: The first frenzied trip was in 1938?

MR. BRAIS: That was a long careful trip.

LORD ASQUITH: That is three years before June, 1941.

MR. BRAIS: And they spent two and a half months working on the building.

LORD ASQUITH: There were only two frenzied trips after this letter.

MR. BRAIS: But there are three sets of calculations. I should not have used the word "frenzied".

LORD ASQUITH: On page 983-A-20, from which you have been reading, it talks about Cartier's operations and the Valuation Department and they end up with the figure of 17,301,000 odd dollars. When you look at page 2A of the calculation, page 737, there is a slightly different figure of 77,161,000 dollars. Is there any importance to be attached to that slight discrepancy?

MR. BRAIS: There is no discrepancy. You have 17,161,000 dollars and then you add the power plant and the land for both buildings and that comes out at that figure.

LORD ASQUITH: I follow.

MR. BRAIS: It is in this last apportionment that we find that the value of the buildings is based upon the historical value of the construction, but the valuation of each building is being re-stated there and it is in conformity

with the detailed admissions, but the total amount was available long before the date which is indicated by the Board in its decision which, in this paragraph, necessarily leads to the inference that it is just a coincidence that these figures came together and that the assessor did not know anything about the historical cost. They had had it since June, 1941.

Then we come to the rather important part of the findings of the Board, where the Board is instructing itself as to its duties vis-à-vis a taxpayer. At line 22 we read: "After this necessarily brief review of the evidence, there remains for us to decide if the complainant has established that the real value of its immovables, as at the 1st December, 1941, was not in excess of the sum of 8,433,200 dollars to which we are asked to reduce the assessments, and consequently if the assessors have grossly exaggerated the real value in assessing this property at 14,276,000 dollars. There are three main questions: (1) The validity of the theory in virtue of which this property should be assessed on the revenue approach exclusively, using the said revenue to establish an 'imaginary market'. (2) Does the proof reveal that the assessors have erred, (a) in figuring the replacement cost of the buildings; (b) in giving an importance of 90 per cent to the replacement cost and of 10 per cent to the commercial value. (3) Does the proof reveal that there has been discrimination?"

"On the first question, we have no hesitation in declaring that we cannot find fault with the assessors for having not adopted such a method. For Messrs. Lobley and Simpson there is only one way to value the Sun Life property: it is to imagine a 'willing seller and a willing buyer' and to figure what maximum price the buyer should pay, if he wants to make a reasonably safe investment".

Now we come to the most pertinent finding of the Board: "There is no proof of the existence of such a willing buyer. As to the willing seller, he could not be any other than the Sun Life itself, and the only figure contained in the record as to the price at which this prospective seller puts its property is 16,258,050 dollars and 27 cents" which is the schedule of the admission.

Then on those premises he continues: "This disconcerting argument has likely been suggested to its sponsors by the reading of the following extract of the decision of the Privy Council in the case of Cedars Rapids". Then he cites that.

Then he continues: "This was an expropriation case and the subject was an island situated to the north of the medium filum of the St. Lawrence River which at this place is in rapids. The project was to construct a dyke in the bed of the river and to provide for an uninterrupted flow towards the power house. The appellant had reserved for himself the exclusive right of exploiting a water power, and it has been decided that the extinction of such rights was worth the amount granted above the value of the bare land. It is a possibility which was expropriated, and the 'imaginary market' was referred to, not to find the real value of the land but to value the rights and possibilities and the expropriation indemnity which the appellant was entitled to". That is directly contradictory to what this Board found in the Lacoste case when the case was sent back for reference.

LORD PORTER: I do not know that I follow this. Perhaps Mr. Beaulieu will tell us, but I always thought that when you are

valuing property for expropriation, the valuation is almost invariably higher than it is for tax purposes.

MR. BRAIS: Yes. There you must take possibilities into account. The only application of the Cedar Rapids case is that this Board laid down the firm rule that in arriving at real value you must take into account the willing buyer and the willing seller with this exception, that in the expropriation cases you are expropriating once and for alltime, and then you must take into account the future possibilities of the property which might be considered by a purchaser, whereas in assessment cases you are valuing year by year, or three years by three years, and then you must let the future take care of itself, and you are not allowed to speculate as to what is to happen in the future as the memorandum has done in this case; we are to be charged more because at some future time we are going to occupy the whole building.

That is the doctrine which has been referred to by the Chairman of the Board as this "disconcerting argument". We have not only the very clear statement which is found in the manual, based upon the text of law, but we also have in this particular case very definite evidence that this property is one which can be bought and sold.

LORD ASQUITH: The disconcerting argument is supposed to be disconcerting to you, is it not?

MR. BRAIS: It was disconcerting to the Board.

LORD ASQUITH: Disconcerting to the Sun Life.

MR. BRAIS: Because they cast it aside.

LORD ASQUITH: If it was sound.

MR. BRAIS: The argument was made by the Sun Life that you have to have regard to the ordinary principles of valuation, no matter what the building.

LORD ASQUITH: When the Board says that the arguments are disconcerting and when one asks to whom is it disconcerting in the eyes of the Board of Revision, it is disconcerting to the Sun Life?

MR. BRAIS: No, my Lord, it is disconcerting to the Board.

LORD ASQUITH: Is it?

MR. BRAIS: It is not disconcerting to the Sun Life.

LORD ASQUITH: They are saying, there is not a market value, not only really. I should have thought that that was disconcerting to the Board but probably to you and to anybody who advocates these economic criteria.

MR. BRAIS: They may possibly refer to Mr. Lobley's view that the economic value of the building should be used alone, but there is the paragraph which follows "There is no proof". Mr. Lobley and Mr. Simpson did add, my Lords, that the only way to value the Sun Life property is to imagine a willing seller and a willing buyer and to figure the maximum price that a buyer would pay if he wanted to make a reasonable offer for investment. There may be some criticism of thinking of the investment alone, although it can be used alone, and then he says: "There is no proof of the existence of such a willing buyer. As to the willing seller he could not be any other than the Sun Life itself, and the only figure contained in the record", is the figure which appears

of our book value and market value in reports to the department of insurance, to which I will have to come later. Then he says "This disconcerting argument".

I think we can see his thinking if we continue at line 38: "There is absolutely no parity nor analogy between this case and the Sun Life case. Here is a completely developed - and even over developed - property, which is actually and fully and tangibly in existence. Its real value is all there. Why imagine a different situation which may never present itself, a change of proprietor when it can be inferred from the evidence and circumstances that the present one does not contemplate selling?".

If I may stop there for just one moment, it is of the essence of the doctrine of the willing buyer and the willing seller and of the finding of exchange value, that you must consider what a willing seller will at some time be willing to sell. If you do not do that you are just absolutely impossible at any time to apply the theory, and if you do not do it you are falling squarely into what was referred to by Lord Halsbury as a blackmailing argument, of telling a man: because you will not sell your property we will assess it until you come down to a price for which you are willing to sell.

LORD ASQUITH: The willing seller is a hypothetical person.

MR. BRAIS: Completely hypothetical, and when he says here "Why imagine a different situation which may never present itself", you must imagine the situation which may never present itself. I am in agreement, the Sun Life may never want to sell, but you must imagine this situation as having presented itself.

LORD PORTER: The real difficulty is the use of the words "real value" in that phrase, and by "real value" he means "replacement value".

MR. BRAIS: He means "replacement". He is upending the whole doctrine, as you will see later, when he upends Mr. Parent's carefully prepared analysis of the law. He upends that too to say what was said before he contradicts what was said afterwards. We are coming to that.

LORD PORTER: What he is really dealing with at the moment is the first point, and the first point is: Should they have taken solely the revenue value?

MR. BRAIS: Yes, that is the first point, but then he carries on to destroy, starting from that first point, completely the doctrine of the willing seller and the willing buyer. Whether he had considered the other witnesses first or Mr. Perrault makes no difference. When he arrives at the bottom of page 21, where he just wipes everything away and says that the doctrine does not apply to the Sun Life, whether it is predicated on the evidence that you must consider commercial value in arriving at the willing buyer and the willing seller and whether you must try and blend the two in so doing, that makes no difference; he has ceased to consider the formula to be looked at or the method to be arrived at.

LORD OAKSEY: He is making a comparison of the Sun Life case with the Cedars Rapids case and says "There is absolutely no parity nor analogy between this case and the Sun Life case". In one case there was the question of possibilities

along the St. Lawrence which had been bought and turned into water power and the whole property had a real value.

MR. BRAIS: Then he continues from that point on and he casts it aside and says "Why imagine a different situation which may never present itself" - that has nothing to do with the Lacoste case. He makes a general statement - "a change of proprietor which can be inferred from the evidence and circumstances that the present one does not contemplate selling".

There he makes a broad statement. He takes the building bodily out of possibility of the future and considers not the formula which all the courts at all times have said should be applied. Then he continues: "Moreover, there is nothing either in this decision of the Privy Council or in any of the other decisions quoted which would justify the contention that the assessors should have made the assessment on the revenue approach only". I cannot agree with him fully because some buildings have been assessed on the revenue approach only, as other buildings have been assessed on the replacement approach only. "The stereotyped formula which is so frequently quoted 'la valeur réelle est le prix qu'un vendeur'" -----

LORD PORTER: Need we have this again, we have had it once? He quotes a well known phrase in French which is also common in English, and he does go on to say: Well, Mr. Parent himself does not take that view; he says you have to take all the matters into consideration. He continues to quote from Mr. Parent down to the end of line 17 on page 24. Then he quotes various cases which he says do not bear out what the complainant says. Apparently he goes on: The question of how far the amount of revenue is agreed between the various parties - really there is no quarrel about that at the moment.

MR. BRAIS: There is a quarrel on two points on page 22. At line 8 he quotes the formula and says that "does not constitute" the formula of a willing buyer and a willing seller. If I may respectfully submit, in my mind this is of the greatest importance. "does not constitute a complete definition of the real value, but is merely a qualification of one of the numerous elements which may help in determining same. This sentence is not limitative".

I say there that he has very clearly misdirected himself, because it is the only qualification. The method by which you arrive at it comes first, and we see when he says it is merely one of the numerous elements, it is the whole element.

Then he continues: "To sustain the thesis developed by their experts, the learned counsels for the complainant have also had recourse to the authority of Honore Parent, K.C., and invoked the following passage of the 'Real Estate Valuation Manual'. 'Whatever be the angle from which this problem is considered, there is only one solution possible'" - those words are in direct opposition to and in contradiction to what he is saying in the previous paragraph - "that the property tax rolls should have current value for their sole basis; that is to say, the valuation should be based upon 'the price which a person who is not obliged to sell could obtain from a buyer who is not obliged to buy'".

When he says that is only one formula, he contradicts himself immediately afterwards by the conclusion or Mr. Parent's finding, which is the conclusion of the law, and then destroys all Mr. Parent has said. He quotes from pages

previous to the conclusion, various things which have been said as regards various things which have to be considered to arrive at what the law says and what Mr. Parent says is the only solution, and the willing buyer and the willing seller is not one element, it is the only element, and to reach that element you take these other considerations. As I have already drawn to your Lordships' attention, Mr. Parent comes to his conclusion on the law of Canada at page 57. The other citations to contradict the conclusion are found on page 17 of the manual and then page 24. I am reading at page A-23. Then there is page 29 and 30, but we still remain with the conclusion on page 57 of the manual which is the final conclusion after taking into account those various matters which the Chairman of the Board now wants to correct and take one only when the law tells him he cannot take one only.

LORD PORTER: The difference between you is simply this. The Board say that you have to find out the real value from a number of elements. You say that that is to discard one step in the argument and the step is this. You do use those factors in order to find out the willing buyer and willing seller, but you do not use them in order to find out the value apart from the willing buyer and the willing seller.

MR. BRAIS: That is right, my Lord. The extraordinary thing is I do not see how the Board could have said that the willing buyer is only one, and then ten lines afterwards on page 22 at line 25 say that the willing buyer is the only solution, and then destroy the very clear statement the Board cites from the manual backwards, to say that Mr. Parent has used these other arguments to destroy the only solution or finding. He cites the manual backwards. If they had cited the manual forward, from pages up to page 57, which is the last of all these pages cited, they would have arrived at exactly the result that the law states and the result which I think should be applied. So that all I want to say on that, my Lords, unless my reading of this is so completely wrong that there must be something wrong in my own mind, is that the Board has completely misdirected itself on page 22.

LORD ASQUITH: There is one point which occurs to me about that. When you get to the bottom of page 22 there is a citation from page 17 of Mr. Parent's book. He cited: "To these factors there must still be added intrinsic value or cost of replacement". I understood you to say that that was an argument which he was really quoting from his opponents and was discarding when he reached the final conclusion.

MR. BRAIS: Yes.

LORD ASQUITH: I should have thought it was more what my Lord was putting to you just now, that his final conclusion is that a willing buyer and a willing seller is the real acid test, but the willing buyer must be taken to be a man who would take into account a number of factors including replacement cost.

MR. BRAIS: Yes.

LORD ASQUITH: The replacement cost does not displace the willing buyer as the test?

MR. BRAIS: No.

LORD ASQUITH: It is only one of the factors the willing buyer would take into account. Is that right?

MR. BRAIS: Yes, my Lord; and as I read the manual it is very clear upon that.

LORD NORMAND: Whether the reason be altogether satisfactory or not, I understood you at least to acquiesce in the conclusion of it, which is the rejection of the contention that the revenue approach should be used exclusively in order to determine real value.

MR. BRAIS: The assessor has to consider all the elements. There is nothing to prevent the assessor from taking the revenue approach solely if in his mind it properly represents the correct value. On that, if I may be permitted, my Lord, it will have been noted in Vernot's evidence that as regards all apartment houses and so forth they take 75 per cent of the revenue value and 25 per cent of the commercial value, and they are perfectly free, or they should be free under the law, to take either one value or the other as they see fit, because we will see from the formulae which have been filed in this case, and which we will come to on certain buildings, they are supposed to be valued on their merits; they take 100 per cent replacement cost and there is nothing in the memorandum to justify it.

LORD NORMAND: I was referring to page 983-A-20 where the Board divided the questions, to be exact, into three main questions: the validity of the theory in virtue of which this property should be assessed on the revenue approach exclusively to establish an imaginary market. I understand you are not contending for that proposition now?

MR. BRAIS: I would like to make myself clear. I am sorry if I have not made myself clear. I am taking the position that the assessor must consider all the elements and once he has done that, if he concludes that the revenue approach gives him the correct answer, he is entitled to take the revenue approach only. That would seem to be a reasonable interpretation of the law. My learned friends have cited a case where replacement was taken solely. In this particular case, I am in agreement with the Board that the two can be considered, and they have been considered by a number of the judges, but it does not display the validity of an assessment which is arrived at on the basis of the revenue approach only.

LORD PORTER: What is said at the moment is: Must you take the revenue approach, and he is saying, No, and you agree with that?

MR. BRAIS: I agree with that.

LORD ASQUITH: Must you take it alone?

MR. BRAIS: Alone. I agree the law does not say, and no authority ever says, you must. I will say, and I think I am within the four corners of all the decisions, that you may take the revenue approach only if the assessor, in the exercise of his proper judgment, thinks that that arrives at the real value. It is not correct to say that you have, and there is no law which says that you must have, the revenue approach only, any more than the common law says that you must take the replacement approach only. The two work together, and when you have in this memorandum an owner-occupied building, and a fully occupied building, must be taken on the replacement approach only, you violate the principle that has just been put to me, that you must or you may.

LORD PORTER: How far do you want to read the repetition of the quotation? Your real criticism of the quotation is that Mr. Parent's words have been reversed, and that they have, first of all, put down his conclusion and then gone back to

the steps leading to the conclusion, which does not give a fair reading of what Mr. Parent says. We have that. I do not know if you want to deal with any of the cases on page 24.

MR. BRAIS: The only word I want to add is that they destroyed the conclusion without pointing to any reason for it. I do not want to refer to anything on page 24.

LORD PORTER: The only other matter I had in mind was you get three separate figures with regard to the capitalised value. Do you want to say anything about that?

MR. BRAIS: I do not think so, because the figure has been arrived at by the Board at 7,200,000 dollars.

LORD PORTER: You accept that?

MR. BRAIS: Yes, it has been accepted by everybody. It is the Board's figure.

LORD PORTER: Do they accept Mr. Lobley?

MR. BRAIS: No, it is worked out on page 830.

LORD PORTER: I am not worrying about how it is worked out, I am asking you about the final result. It is roughly seven and a quarter or a bit more?

MR. BRAIS: Yes.

LORD ASQUITH: It is not quite the same as any of the three figures submitted?

MR. BRAIS: No, because the Board calculated it, page 830, according to the formula of the manual. We will come to that.

LORD PORTER: Then we need not worry about it. Now we come to replacement value.

MR. BRAIS: That is page 24: "The assessor has figured the replacement cost of the buildings in taking as a basic figure the cost price reported by the company". That is a clear statement that our historical cost was used. "Messrs. Perrault and Archambault have used the cube method" and so on. Then this is important. "It is to be noted concerning the method of these two experts: (a) that they have taken as starting point a cubic figure based solely on their experience. Although their cubic prices in this case, give gross figures which are not much at variance with the assessor's, we are of the opinion that, for a building of this importance, the cost price or the quantity survey methods are less arbitrary and more accurate; (b) that in making allowances for 'functional' depreciation and obsolescence, on top of the physical depreciation, they have overstepped the field of the replacement to encroach on the one of the economic value. The deficiencies, if they exist, are reflected in the rental value on which is based the commercial value; so that Messrs. Perrault and Archambault are making double use of the same allowances". So apparently we have no quarrel there.

Then it says: "we are of the opinion that, for a building of this importance, the cost price or the quantity survey methods are less arbitrary and more accurate; (b) that in making allowances for 'functional' depreciation and obsolescence, on top of the physical depreciation, they have overstepped the field of the replacement to encroach on the one

of the economic value. The deficiencies, if they exist, are reflected in the rental value on which is based the commercial value; so that Messrs. Perrault and Archambault are making double use of the same allowances". That I cannot agree with at all.

LORD PORTER: Just take that bit by bit. If they had knocked out "cost price" in line 4 and said "quantity survey methods are less arbitrary and more accurate" you would not quarrel with that?

MR. BRAIS: No.

LORD PORTER: I am not asking whether you accept it or not, you would not quarrel with it?

MR. BRAIS: No, I would not quarrel with it.

LORD PORTER: Then with regard to the next sentence your quarrel with it is: Yes, that would be quite true if you use a proper proportion between revenue and appraisal value, but in fact if you put 10 per cent on one and 90 per cent on the other, you are a long way out.

MR. BRAIS: You are a long way out if you are doing that, and also in considering a replacement cost of the building you must eliminate those things which are a total waste in the building. You have no building in those dark elevator shafts left over and in those corridors which are made to house 10,000, you have no building, you have waste space and you have waste money.

LORD PORTER: I do not follow why you say you waste money if you put in lifts, because I should have thought in any building of that kind it was essential.

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MR. BRAIS: You waste money if you provide for twice the number of lifts that you put in; you have all that waste space which is useless. It is only one example. The wasted space for lifts does not take care of all the discrepancies; but it is the easiest one to refer to. There are a number of other things, of course.

LORD PORTER: The argument which you have to deal with there -- I want to see if you agree with what I have said -- is the observation that that is made up for in the revenue and, if you allow for it in both revenue value and in replacement value, you are allowing for it twice over.

MR. BRAIS: That is what the Board says.

LORD PORTER: I know that it is. I want you to deal with that.

MR. BRAIS: On that point, we have the evidence of Mr. Perrault and Mr. Archambault, who make an assessment of that building, and they approached it solely from the replacement value; they have not considered the revenue value at all. In doing so, they have taken away from the replacement value those things which would not be wasted if the building were replaced. The experience of the Sun Life in the rebuilding that could be made or anybody who is going to use that basis is not on a replacement value going to pay anything for what is wasted, either in the way of decorations or in the way of something else. You have a test of that, I would submit, in the original assessment of 1938 made by the Board.

LORD REID: At the same time I would like you to give me your definition of what you mean by replacement. There seem to me to be three possible views: first of all, replacement means putting back that building with all its existing advantages and faults, just as it is; secondly, putting back that building, but eliminating those features which are not now of value to the owner, but keeping all those features which are of value to the owner, although they would be of no value to anybody else; thirdly, replacing it by a building which is purely a commercial building, in the sense that you would put in nothing that would not be of value for exchange. There may be still a fourth meaning; but I would like you to tell me at the same time which is the meaning that you submit.

MR. BRAIS: I have been trying to explain that, my Lord, and possibly I have not made myself sufficiently clear. I say that the replacement cost means what you would put into that building, eliminating, as a reasonable person would do, faults and waste.

LORD REID: So that you say that replacement is preserving everything which would now be of value to the owner, even although it has no exchange value -- no value to anybody else?

MR. BRAIS: In my submission, if it has no value to anybody else, it should not figure fully in the replacement value.

LORD REID: It must figure one way or the other; you must either leave it out or put it in. Which is it to be?

MR. BRAIS: If it has to be contemplated, having in mind the existing market, those features would have to be eliminated.

LORD REID: So that replacement, in your view, means replacement by a building, every feature of which would be attractive to some other purchaser and eliminating everything which only the owner is interested in, however much the owner may think it worth to him. Is that right?

MR. BRAIS: That is right, my Lord.

LORD NORMAND: If that is so, what becomes of the difference between replacement value and commercial value, because ex hypothesis there is a difference? If you are going to eliminate from consideration under the head of replacement everything which has not a value in commercial exchange, I do not see why you should use the replacement factor at all.

MR. BRAIS: The replacement factor, when it is arrived at on the historical basis, takes in all these features and all the waste, of course.

LORD NORMAND: I will give you on replacement value, for the sake of argument only, that we are engaged in appraisal, to get rid of that element.

MR. BRAIS: If it is appraisal value and if it is arrived at as it was arrived at originally in this case, it seems that it would automatically put aside those things which are useless, such as useless weights of granite and so forth as was done in this case. I am not trying to overstress the point; but, if you are going to blend mechanically, as my friends would have it, you must blend those things which would go into a replacement. I think that I can submit that without improperly stressing the whole doctrine of assessment. If you are going to take this building with its formidable historical cost compared with its much lesser appraisal cost, I would submit that you must in the process eliminate what is waste, because it would never go back into another building. I think that I am entitled to submit that when we are considering assessment. Otherwise, my Lords, there is the other solution, in the light of the picture that we have in this case: when you take your two features of commercial and replacement cost, you then, having in mind all this tremendous extra, have to say to yourself: I take commercial for 75 per cent and I will take the building on its historical value for 25 per cent; but, if you do that, you then have to apply your mind, when you work out the blending, to what you have to blend. I have no objection to replacement cost being taken with all the figures that have gone into this building; but that is where the assessor has to be left free to use his judgment and his mind, in saying: How much of all this tremendous figure which is waste, which I take holus bolus, am I going to put in my final blend? If you proceed like that, I have not the slightest objection.

LORD NORMAND: I quite understand that and I think that that is a logical view to take; but what I do think is illogical is to try to eliminate from replacement every imperfection. For one thing, there is no such thing as the perfect building in the commercial sense or in any other sense. You can only take buildings which have been constructed and try to value them using commercial value, in the sense of current rents and the like, and costs, whether arrived at by the historical method or by some other method, and so on and those factors; but to attempt to reconstruct the building as a perfect building and then value it does not appear to me to have any touch at all with reality.

MR. BRAIS: I do not see any objection at all to taking the total figure, taking even our historical cost, if you want, and then blending it down; but, if you are saying that the assessor would be free to make it 90 per cent one way and 10 per cent the other, instead of 10 per cent one way and 90 per cent the other, in the exercise of his judgment, which he must be allowed to do, that is where I say that this memorandum, applied to a special structure like the Sun Life building, shows the complete fallacy of this rule.

LORD OAKSEY: I think that that is exactly what was put to you by my noble and learned friend, Lord Porter, some time ago: that it is the 90 per cent and the 10 per cent which is wrong.

LORD PORTER: In one view I think that that is right; but I was wondering how far Mr. Brais would accept as a general principle that, when you are trying to calculate what as between a willing buyer and a reasonable seller the willing buyer would give, in considering who the willing buyer was you should take into consideration an important insurance company of the type of the Sun Life as one of the bidders.

MR. BRAIS: Yes, my Lord. The assessor is bound to consider whether there is an important insurance company.

LORD PORTER: Supposing that there is not, is it not possible for him to imagine an important insurance company who want that type of building and then to say: Supposing that it was an important insurance company prepared to give a considerable price for a building of that type. Is not that what is meant when you deal with the proposition that one of the elements that you have to consider is the actual occupier; in other words, what you have to take into consideration is a reasonable occupier of that kind; and I think that it is untrue to say: These people spent this money and therefore you have to take what they spent as an element. An important insurance company of that type should be an element, on your argument, to be taken into consideration?

MR. BRAIS: The assessor would have to apply his mind to that. There is no doubt about that. The evidence in the record is that there is no insurance company in Canada that could make the use; the buyer would be a buyer who might occupy part and he would have to rent the balance. There is evidence of that; but I agree with your Lordship that you must take into consideration as the occupier the Sun Life as a possible bidder and we can bring them up to the last bid, which would be the last bid after the prudent investor and, it may be, all persons who have that interest.

LORD PORTER: I do not myself believe in a last bid at the moment, because you are talking then of a public auction, in which everybody knows what the other person is willing to bid. I should have thought that you can get much nearer if you take what we have in this country: a sealed bid put in, so that you do not know what the man is prepared to sell for and you do not know what other people are prepared to give until you see their secret bids.

MR. BRAIS: I think that I should be prepared to go even broader than that and say that the seller is getting bids and he is not taking it or receiving them on any one day. He is in the market, but trying to find the very best price. That is the doctrine. If to-day he has the sealed tenders and he is not satisfied, the seller is entitled to hold out, within a reasonable limit; that he will not sell until he is satisfied he has the best price that the market will give him. I have to be in that position as the willing seller, because I am not obliged to sell. That is what is called the higgling of the market. He has to act in the position of the bon pere de famille, as we call him in Quebec, as the reasonable man under the common-law system of laws. That is, of course, predicated on all these various considerations that we have here and, of course, predicated on how much of this extra value and waste is wasted dollars and so forth. I trust that my Lord Reid does not feel that I am trying to equivocate on the answer, but it all comes back to the kind of blending that is applied and, if I am properly blended, the two values, the commercial value and the replacement value, are properly weighted to arrive at that real market exchangeable price, it simply means that when you

have a blending like this, with a tremendous amount of money which is wasted -- and, if it is put into the replacement cost, the proportion has almost to be reversed, but possibly not quite ----

LORD ASQUITH: No doubt everything depends on the proportions in which you blend the replacement and revenue?

MR. BRAIS: Yes.

LORD ASQUITH: Subject to that, I should have thought that the uneconomical features were extremely relevant when you are considering the revenue part of the thing, but are irrelevant when you are considering replacement. After all, if you are going to replace a building made of marble or granite, you have to replace it; you are not doing so if you construct another made of limestone or plaster. You can allow for the uneconomical features and so on in the proportion between the things; but, when you are considering the intrinsic elements which you are going to blend, surely the uneconomical features are only relevant on the revenue producing part of it; they are not relevant to what it would cost to replace?

MR. BRAIS: As I have said I am open to take that, as long as the assessor is left free to dispose of that matter. Of course, he would not in a building of this type be free to do justice as an assessor on any of the commercial fifty-fifty or any other formula which we find here; and, if the building were wholly occupied by the Sun Life or if we lost our tenants, then this values table would be applied to us, less physical depreciation, and we would have to pay that. The greater our handicap, the greater we are handicapped by the formula.

LORD PORTER: We had got to page A-25, where I was asking a question as to whether you agreed or disagreed that the deficiencies are reflected in the rental value, on which is based the commercial value, so that Messrs. Perrault and Archambault are making use of the same double allowances. In answer to Lord Asquith you said ~~that~~: If you take the correct proportions, I agree with that criticism.

LORD REID: There is just one point on that. If you say that we have to regard this with the eye of the willing buyer, the willing buyer including the Sun Life, the Sun Life would not be interested in the cost of putting back things which it did not want. The Sun Life, in estimating what it would ~~be~~^{pay} and taking replacement value, would surely say: If I do not get this building, what will it cost me to build a building that I want; and, if there are a lot of things in the existing building which they do not want, why would they consider the cost of those as part of the replacement value?

MR. BRAIS: I was trying to say that in the inception of this argument.

LORD PORTER: Yes; but you gave way on the problem to my Lord Asquith.

MR. BRAIS: I gave way, so long as it works itself down to the willing buyer. I can only say that it is immaterial to me and I think it is immaterial to the respondent how much is put on one side, provided that everything that goes up is weighed down in the proper application of a formula.

LORD PORTER: We have to get to some principle which either supports Mr. Beaulieu or you or differs from both of you. In order to get at the principle, one of the questions is that which my Lord Reid has just been putting to you, namely, that what you are dealing with is replacement value as one of the factors. It ought to be a replacement value which the Sun Life, among other people, would

want and not something which per misadventure they put up at one time, when they thought that they wanted something else.

MR. BRAIS: May I be permitted to say something on that point?

LORD PORTER: I am putting it to you in order that you might.

MR. BRAIS: Your Lordship said that you are being asked to state a principle. I quite appreciate that I must satisfy this Board as much as I can, but I am reminded of the Banbury case, where, in the initial pages of the Judgment of the Board the perplexity of their Lordships is stated in having to lay down any principles for assessment purposes and they say that it is formidable, it is fantastic, and they cannot do it. They have gone through an analysis of all the cases; they have analysed the previous analyses of the cases and they came to the conclusion that it is just not possible; but, if you proceed in a certain way, then you must counterbalance that by another way and, if you use a certain formula, ^{you must} counterbalance that by another formula or other figures, ^{is what} counts and, by whichever means you arrive at that result, if the result appears right and if you have applied your mind to the things which should be considered, the appellants' tribunals will say that the assessor has done his duty. That is why I find myself at this moment in such a difficulty in saying "Here is the principle"; because, in whatever way you ~~pronounce~~ announce it, it has to be modified in its application.

LORD ASQUITH: Which is the case which says that you cannot have any principle?

MR. BRAIS: The Banbury case, my Lord. There are a number of different principles which are analysed and finally they come to the conclusion: Here is the best that can be done about it, and the assessor must apply his mind.

LORD PORTER: The immediate question which is asked you is this. Lord Asquith has said to you: Is it not true that when you are dealing with replacement you ought to take the actual cost, because then, when you come to consider what the real value is, you put that in some proportion to the revenue production of the building. To that my Lord Reid has asked you whether you would not qualify it by saying that you do not take the actual cost of the building, but you take the cost of the building which the Sun Life would put up to-day, if they had to replace the building which they have got. Which of the two do you accept?

MR. BRAIS: My initial statement was that we would take the building which the Sun Life would put up to-day as attractive, without wasted features. I say that, if the assessor wants to look at or has before him the historical costs only, he will then have in his mind's eye to delete all that historical cost in arriving at the proportion that he is going to apply against commercial. I say that he can use one formula or the other, as long as it arrives at the right result, which would be what the buyer would be prepared to put back in the building, if he was building a building of his own, instead of buying the building.

LORD REID: The difficulty about that is this. I have not noticed in the evidence up to date any elimination of those features which are waste to the Sun Life. I noticed the elimination of ornaments and so on, but there is nothing to show that the ornaments are ^{waste} so far as the Sun Life is concerned.

MR. BRAIS: I may not have gone sufficiently into the evidence for that purpose, my Lord.

LORD ASQUITH: I wonder if in the rent which the Sun Life charges itself the unnecessary ornaments are taken into account as an enhancing feature?

MR. BRAIS: The Sun Life charges itself a very high rental in comparison. I am having those figures set forth on a statement so that they may be followed more readily.

LORD ASQUITH: Arising from what my Lord Reid says, is there any case which throws any light on the question as to whether, when you are talking about replacement cost, the question is how much a reasonable owner would think worth replacing and what that would cost, or whether, on the other hand, replacement cost means the cost of reproducing an exact replica of the building as it stands? Do you know of any authority which goes into that question?

MR. BRAIS: I do not know if there is anything that can help on that. I do not think that there is.

LORD NORMAND: The difficulty is that, when you depart from a replica of the building as it stands and eliminate all the waste space, it really requires, does it not, a different construction of the entire building? Nobody would be able to build this same building or anything like it and eliminate from its construction all that you have described as waste spaces. You would have to begin with a plan de novo, from the very beginning. Therefore I would suggest to you that, although the assessor has to take into account a replacement of that which perhaps nobody would wish to replace, he has also to take into account the commercial value of it. I do not see how he could be told to eliminate from his mind the fact that the building was an inconvenient building, with dark spaces instead of light rooms, and over ornamentation, or anything that you like, provided that he does not leave out of his mind anything that is material.

LORD PORTER: Would you like to elaborate that a little, because I was not sure whether you meant that he was to take that off when considering replacement value or when considering commercial value.

LORD NORMAND: I do not believe, following the thought of the prudent buyer, that one should say that he would do other than the prudent buyer. You cannot merely take it on a mathematical formula. You have to make allowances which are arbitrary, in the sense that you cannot formularise them or formulate them; but, if you once begin with such a big assumption as the building of a new building to-day, at to-day's costs, which eliminates everything which the Sun Life would not like or does not want, you are beginning on an entirely new problem. You would never build that building or anything like it again, and you could not.

MR. BRAIS: Not the interior.

LORD NORMAND: What determines the exterior of a building is the desired content of it.

LORD PORTER: I think that one consequence of my Lord's statement would be this, would it not: the Judge of the Superior Court has treated this matter, rightly, not by visualising a new and completely different building, but by making an allowance of some percentage for the awkwardness of the building. Is that right?

LORD NORMAND: Yes, provided that he has not already made that in weighting the two elements. It is really not possible to discuss this problem piecemeal; you have to look at it at some stage of your argument as a whole: What would a prudent buyer give for this building? He is not going to buy any other building. That

is the only building that he can buy. What would he pay for that? In such a calculation there are various ways by which you can give effect in his mind to the disadvantages of the building. The most obvious and simplest one is by weighting the two main elements, the replacement cost and the commercial value, in a ratio which gives more effect to the commercial value than to the other; but you could also do it in many other ways, it seems to me, for example, by making what may appear to be a somewhat arbitrary deduction in the replacement value and then giving a bigger weight to that reduced replacement value. You cannot consider all these elements apart from one another and without consideration of the total problem.

MR. BRAIS: They must be considered together, my Lord, and the more the assessor finds waste the more he has to reduce the proportion given when he uses that waste. If he takes the waste down to complete, as Mr. Perrault and Mr. Archambault did, he just simply takes how much building is there as a building, how much floor space is there as a building, how much useful space is there as a building, by applying these reductions. Then he does not apply the rent at all, except as a test. If the rent is to be brought in and the totality of the building is brought in, even the totality of the cost, the assessor should at least apply the formula which you have had to an ordinary commercial building: 75 per cent commercial and 25 per cent replacement, which might be, and should be, increased in the case of a building like the Sun Life, because it saves the features of waste.

LORD PORTER: You would not object in the least, I take it, if the assessor had applied a quite different ratio in the final weighting for the two ^{features} ~~elements~~? That would have met your views entirely, as I understand it, what you are aiming at is a figure. On the other hand, you would not object to the weighting, if he had radically changed the amount which he gives for replacement value. Whichever method he chooses, the whole purpose of it is to avoid charging the buyer at the present day with the cost of the fantasies of somebody who built a building thirty or forty years ago?

MR. BRAIS: That is the whole position.

LORD OAKSEY: If you are going to take replacement value at all, that is the only reason for bringing in commercial value: to get rid of these elements of fantasy?

MR. BRAIS: Yes.

LORD OAKSEY: If you can look at it as Lord Reid has suggested, you do not need to go to commercial value at all?

MR. BRAIS: No. We have to take something off on a physical basis.

LORD NORMAND: If you argue about each element in isolation from the rest, the argument will never come to an end, because there is no solution by taking one element and ignoring the rest.

MR. BRAIS: There is only one solution, and that is the willing buyer and willing seller and the price that they would agree in the end. There is nothing that I can add to that.

LORD ASQUITH: Where in the evidence is 75 per cent commercial and 25 per cent replacement mentioned? I think that it is in the memorandum.

MR. BRAIS: It is page 25 of Volume 1, line 15. "The assessors at a meeting, I think it was on the instructions of the Board of

Revision, decided that commercial values should be taken into consideration, and at the end of the meeting we decided that in the tenant occupied building, like flats and apartments, the commercial value should be taken as 75 per cent, and the replacement value as 25 per cent; and it was the majority opinion that the capitalisation figure should not be used as one figure in estimating valuation of a property, unless the result of its use given by itself is a fair indication of the real value of the property". That answers my Lord Asquith's question.

LORD ASQUITH: This is in relation to buildings which are not large.

MR. BRAIS: No. These are all flats and apartments, and there are some tremendously large apartment buildings in Montreal.

LORD ASQUITH: That really says 75 per cent and 25 per cent.

MR. BRAIS: This applies to all buildings in Montreal which are used for flats or apartments, and some of the apartment buildings are as large as all the other buildings referred to, with the exception of the Royal Bank, which are office buildings. These large buildings are all applied to the office buildings.

LORD ASQUITH: But this is completely contrary to the memorandum, is it not?

MR. BRAIS: Completely contrary to the memorandum.

LORD ASQUITH: The memorandum dealt with particular types of large buildings.

MR. BRAIS: They segregated certain types of large buildings. There is an apartment building shown at pages 235 and 239 of the manual.

LORD ASQUITH: You see the very next sentence, at line 28: "After that the ones who had to authorise on large buildings had to make up their table, another table, and that is the table: 50 per cent."

MR. BRAIS: That is the table: 50 per cent; but, when we see the run of the buildings which are referred to as coming within the memorandum, they are all buildings such as stores or office buildings. There is not a single apartment building. There is something here which I think must not be overlooked. He says that they decided that in tenant occupied buildings the replacement value should be taken as 25 per cent, and at line 21 he says: "and it was the majority opinion that the capitalisation figure" -- that is, the commercial value -- "should not be used as one figure in estimating valuation of a property unless the result of its use given by itself is a fair indication of the real value of the property". That means, as I read it -- there is a slight clerical error there -- that you can use the capitalisation value as the sole element of valuation if in using it you find that it gives you a fair idea of the value of the property. I do not have to use that.

LORD NORMAND: I agree with that, provided that it gives a fair value to the property; that is to say, no one method will guarantee that.

MR. BRAIS: No; but you are entitled to use that alone, if you think that it gives you the right result.

LORD NORMAND: If the result seems reasonable.

MR. BRAIS: If the result seems reasonable. That is what I was

trying to express earlier today; but I also agree, as I have said previously, that it would not be fair to say that you must take one or the other, but the memorandum says that you must take replacement value.

LORD PORTER: We had got to line 14 or 15.

MR. BRAIS: Yes, my Lord. It then says: "For the replacement as well as for the commercial value there does not seem to be a great difference between the assessors and Messrs. Perrault and Amchambault and, these experts admitting that both factors should be used, the only question is in what proportion must each of the factors be taken into consideration. Mr. Vernot has explained why he gave an importance of 90 per cent to replacement and 10 per cent only to revenue. It may be, as we will explain later, that this proportion is not mathematically adequate, but there has been no proof made against it."

LORD PORTER: I want to get my mind on to that and see if this is what you say that it means. I should say that that meant this. You first of all start with your fifty-fifty in a totally commercial building. Therefore, when you have a partially commercial building, you only value 50 per cent and mathematically you take the proportion which is owner occupied and the proportion which is let and, when you are trying to find what proportion to put on commercial value, you then take the ratio of the one to the other and that gives you the correct result. That in fact is what the Board of Revision did. They took the two figures, $17\frac{1}{2}$ per cent, which is half of 35 per cent, and $67\frac{1}{2}$ per cent, which is 50 per cent plus the other half of 35 per cent, and in that way reached the result. That is what he means by "mathematically adequate", is it not?

MR. BRAIS: That is what he means by "mathematically adequate"; but when he says "there has been no proof made against it", I do not know whether he applies his mind there to the mathematics of 90 per cent and 10 per cent or whether he applies his mind to the formula.

LORD PORTER: I think that he is applying his mind to the mathematics of 90 per cent and 10 per cent.

MR. BRAIS: If I could feel that I am in agreement with the Board on that, it would save me a lot of time, because, if he says that there is no proof against the use of that formula, there is a tremendous amount of evidence by all the witnesses to say that the use of that formula is incomprehensible and one cannot arrive at arpproper result and develop, which I do feel that in safety, as a precaution, I must offer to the Board, and it is, of course, rather important that the evidence of it has gone in.

Mr. Lobley, at page 62 of Volume 1, says at line 9: "Mr. Vernot then proceeded to value the property by a methodical process of capitalising the existing gross rental income at 15 per cent. He has said nothing which indicates that he studied this gross rental income to ascertain whether it was normal or otherwise".

We can then go to the next paragraph: "The capitalised amount of the dependable future income of an office building is regarded by all authorities as the chief instrument for the measurement of value. Mr. Vernot has relegated it to an insignificant place, namely, 10 per cent. He has attributed 90 per cent of the value to his so-called cost of reconstruction less depreciation and 10 per cent to the capitalised amount of the future income.

"Although it is recognised that the experience and judgment of the valuer play an important part in the use and employment of figures and calculations developed in the process of valuing, there should and must be elementary principles as well as theories behind all formulae. I cannot imagine any principle or theory from which the 90/10 formula has been developed.

"I listened most carefully to Mr. Vernot's evidence. He said that it was one of a series of formulae which had been agreed upon by a Committee of assessors, but he gave no information to enlighten us as to the theories, principles or notions that were behind it. Unless or until these theories or principles are disclosed and explained to me, I find myself unable to comment on them, and, to tell the truth, I cannot help feeling that there is nothing behind them."

This whole theory was most severely criticised, my Lords.

Then at page 87 we have Mr. Simpson's evidence. At line 13 he is asked: "What have you to say about a system of arriving at a valuation by two different methods and then weighting your final result 90 per cent at one end and 10 per cent at the other? (A). I can see no advantage in doing that. Buildings have one value, whether they are occupied by the owner or by tenants. This is a commercial building. There is no space there that cannot be rented. It is absolutely a commercial building. It is not a one-purpose building like a church. The space which is occupied by the Sun Life can be used by ~~the Sun Life can be used by others~~ as it is now, or it can be divided up and used for office space. The cafeteria, if they did not want to use it as a cafeteria, could be rented for office space. Nothing makes it necessary to use it as a cafeteria. The banking hall - it might be hard to find a tenant for that.

"The building is a commercial building and there is no reason why there should be a difference in value whether occupied by tenants or the owner. It has a market value. And the system of dividing it up and taking a certain percentage according to whether it is occupied by the owner does not seem to be logical. If you applied that to one kind of building you would apply it to another. If you had a couple of duplexes, one was rented and the other was occupied by an owner, how would it apply there?"

"One other point as regards Mr. Vernot's testimony. He said if he was doing it over again it would reduce his return from 6 per cent to a lower figure. I cannot see any person who is going to buy that building and receive only 3 or $3\frac{1}{2}$ per cent on his investment. I cannot realise anyone taking this for less than 5 per cent. They might want more. That would be the least return."

LORD OAKSEY: He is not saying that the percentage is wrong, but that you ought not to apply a percentage at all.

MR. BRAIS: He says that you ought not to apply a percentage at all.

LORD OAKSEY: That is what he is saying?

MR. BRAIS: You should not be tied to a percentage in any case.

LORD OAKSEY: What he is meaning there is that you should not use replacement cost at all?

MR. BRAIS: He is not proceeding with any particular precision. He is thinking of the market value and he is not applying himself to all the methods which would be necessary to arrive at the market value; but he does say that, if there are two buildings side by side, or duplexes, because one of them is owner occupied, it should not be assessed exclusively on the replacement cost. I do not know whether your Lordships know about duplexes. A duplex is a detached building with two floors; the one above usually occupied by the owner and the one below rented to a tenant. You have separate entrances. These are two tenant buildings which are very common in our part of the world, because they are easy to heat. If the owner occupied one floor in one but did not occupy any floor at all in the other, you would have to apply on this system, he says, two systems of valuation.

LORD PORTER: What my Lord was saying to you was that Mr. Simpson was not concerning himself with replacement value at all, but merely with commercial value. If you look at page 88, you will see that he says so in plain terms.

MR. BRAIS: Yes, my Lord. He proceeds on the same basis as Mr. Lobley.

LORD PORTER: "(Q). In fact you did not consider that figure at all?". That is, replacement. "(A). No. (Q). And you have arrived at your total by only considering the factor of gross rentals and net revenue? (A). The potential revenue from the property."

LORD ASQUITH: He is saying that there is no part of the building which can be let. He is taking neither actual nor potential as his sole return.

MR. BRAIS: Yes. What it means is that they consider the position and they use it to see that they get to the right result. That is all that Lobley has done and all that Simpson has done.

LORD ASQUITH: The point that you are on at the moment is as to whether the Board of Revision were right in saying as a proposition: "Mr. Vernot has explained why he gave an importance of 90 per cent to replacement and 10 per cent only to revenue. It may be, as we will explain later, that this proportion of not mathematically adequate, but there has been no proof made against it." What you were dealing with was whether there was any proof against that proportion. I understand that Mr. Lobley says so in plain terms, but I do not think that Mr. Simpson does.

MR. BRAIS: When I come to Mr. Simpson, I am explaining the meaning of that, as I read it, as proof of the use of the formula. If it applies in relation to the 90 per cent and 10 per cent, the approval of the formula is another matter; but there is the most consistent use of the formula.

LORD ASQUITH: Taking that for replacement value as being an immovable minimum?

MR. BRAIS: As being an immovable minimum. Everybody has criticised the fact that there is a hard and set rule.

LORD OAKSEY: The proper way to have criticised the 90 per cent and 10 per cent division would have been to show, would it not, that the Sun Life ~~building~~ considered that (a), (b), (c) and (d) were all circumstances in the building which were useless to them and that, if they were going to replace it, they would have made it a different shape, made more light at the bottom and a less large banking hall and all those sorts of things which might

have been shown, which would then have shown that these were real elements of a white elephant nature.

MR. BRAIS: That evidence is very fully in the record, of course. We have it from Perrault, Archambault, Lobley and Simpson.

LORD PORTER: Do you mean that you have evidence not only by experts, but from the Sun Life itself?

MR. BRAIS: My Lord, at that time it would have taken a miracle to have any Sun Life man to say that their favoured child was bad. It was an insurance company. It cannot admit mistakes like that. It was not necessary to have the President's decision or anybody's. They did explain that they had thought that they would have 10,000 people.

LORD PORTER: What do you mean by "at that time"? I am talking of the time at which the assessment was made.

MR. BRAIS: I was not, my Lord. I was speaking of the time of the hearing. If the company's manager had gone in and said: I have made a terrible mistake and built a white elephant and made that statement in so many words, it would have been all over the world, and the company operates all over the world; and it is just one of those things that one cannot do. If we have to suffer for that today, it costs less to suffer for it today than to have to meet that price.

LORD OAKSEY: It would at any rate have written down the value

in your balance sheet from 16,000,000 dollars.

MR. BRAIS: I shall be coming to that at some time. May I say that a very great deal of the same reasons applied. I will come to that. It does play a role, but it is not the point that really worries me the most.

May I return to page 108, where Mr. MacRossie says: "And now, having arrived at his estimate" - Mr. MacRossie is referring to Mr. Vernot's estimate - "of the capitalising value of this property, he approaches probably the most difficult part of his work, and that is his actual valuation. And throughout he has used percentages and ratios. And he uses then a ratio of nine to one. Why that ratio, I personally do not understand. Possibly he used just enough to admit an obvious fact, that cost does not necessarily equal value." Then Mr. MacRossie continues. There are other references to that, but I do not want to elaborate.

We find Mr. Perrault at volume 1, page 124. At line 24 Mr. Seguin says: "Have you also considered the feature involved in Mr. Vernot's appraisal, having arrived at this so-called commercial value and a replacement value, he puts the two cut on a basis of 90 per cent. and 10 per cent.?" (A.) Yes. (Q.) What have you to say about that? (A.) These two methods of approach should be considered. I would hardly conceive of any case where the revenue producing angle should only be considered for 10 per cent. In this particular case I cannot conceive of it. In this case and in smaller buildings the revenue angle is more important than the replacement value angle. It is not a question of taking a percentage of one and a percentage of the other. One must add the two in relation to the buildings themselves. If the revenue for the year under consideration is abnormally high or abnormally low due to special conditions or circumstances, it is unfair to take 90 per cent. or 10 per cent. to arrive at the final figure. It is based on whether the revenue is a fair, normal revenue."

Mr. Perrault was recalled. He did not value the building on a revenue approach at all; he valued the building on the replacement approach of properly usable building.

LORD ASQUITH: I suppose that you would agree, would you not, that, if you had a church, replacement value would probably be the only basis, in some sense of the term?

MR. BRAIS: Yes, my Lord - in some sense of the term.

LORD ASQUITH: They have something here every cubic inch of which is lettable, and the commercial is something which ought to preponderate?

MR. BRAIS: The question was put: How can you consider willing buyer and willing seller in this property? You could not sell Notre Dame Church. You could not sell Windsor Station and you could not sell the City Hall. Windsor Station is the railroad station. It is a one-purpose building. The City Hall in Montreal is a one-purpose building. Some city halls are not one-purpose buildings, but in the City of Montreal it is a vast building with offices on the side.

LORD PORTER: At the moment what you were on was the question whether the Board of Revenue was justified in saying that there was no quarrel with the figures of proportion. Quite what they meant by that I do not know, but, in so far as they meant that there was no dispute on the proportion, or indeed that there had been no dispute of the use of replacement value at all, I think you might take it that you have given examples of that, and if

anything turns up you can deal with it afterwards.

MR. BRAIS: Yes, my Lord; and the witnesses took up a very severe position. Archambault dealt with it at page 173, line 46, which I will not trouble to read, and at page 174, line 12, he said that you impose a penalty on the property. You are penalised for occupying your own building. If you do not occupy your own building you are paying lower taxes and if you occupy your own building you are paying higher taxes. Then he says that there is one solution. There are two values to be looked into, one the commercial value and the other the replacement value.

May I now go to Mr. Surveyer, at page 202 in volume 2. He says at line 29: "I have read the evidence, and I must say fairly quickly. Two things struck me, and that was the capitalising of the gross earnings at 15 per cent. and his allowing in the original calculation of six per cent. for the rate of return on the money; and the second was the adoption in his final calculation of 90 per cent. for the replacement cost and 10 per cent. for the commercial value in making his final decision. I cannot agree on that because I think the commercial value is the dominating factor in making a valuation." It is for everybody else except for these few ~~xxx~~ predestined buildings.

I will spare your Lordships further discussion of these extracts. Nobody went so far as to say that it should be the other way round, but some came pretty close to it.

Then, if I may return to the judgment, your Lordships will see, at line 24 on page A-25, "This property, a 'large and exceptional' one" -----

LORD PORTER: We are now coming to (3), are we not?

MR. BRAIS: Yes, my Lord.

LORD PORTER: This is discrimination?

MR. BRAIS: "This property, a 'large and exceptional' one, as the learned counsel for the complainant puts it, cannot suffer any just comparison with other properties in the cite. But it falls in one of the categories mentioned in the memorandum filed as D.5 and has been accordingly assessed, as all the other large properties falling in the same category. What would clearly constitute discrimination but in favour of the complainant would be to assess this property on the revenue approach only and thus arrive to a cubic foot price of 29 cents, which would be ridiculous. A former assessment does not constitute res judicata; neither can the increase from the previous roll be invoked as discrimination, nor the fact that other large buildings were not increased in proportion."

On that question of discrimination, the Board later refers to certain exhibits which have been filed. I will take up the point immediately, because the Board refers to that subsequently.

LORD NORMAND: Before you open upon this point of discrimination, has any judge decided that point on your favour and held that there has been discrimination against you?

MR. BRAIS: Mr. Justice St.-Jacques.

LORD PORTER: Let us take it in two pieces. What judges have found that there has not been discrimination?

MR. BRAIS: The Board says that there has not been discrimination. The other judges do not use the word "discrimination" either to say that there has been discrimination or there has not been discrimination, with the sole exception of Mr. Justice St.-Jacques.

LORD PORTER: May I put this down as my note: "There is no finding that there has been no discrimination, and the only finding is by Mr. Justice St.-Jacques, who says that there has been"?

MR. BRAIS: There is a little ambiguity. He says that there has been discrimination, but there is a little ambiguity in the phrase as to whether it applies to the assessment of the boiler house alone or whether it applies to the whole.

LORD PORTER: I am not at the moment considering what Mr. Justice St.-Jacques said; I am considering the rest of the judgments. I am asking you this question: Has any of them said that there has been no discrimination?

MR. BRAIS: I am sure that the majority decision of the Court of Appeal says that there has been no discrimination. I ought to say that.

LORD ASQUITH: Is that the Supreme Court?

MR. BRAIS: No, my Lord, not the Supreme Court, but the Court of King's Bench. The Supreme Court does not use the word "discrimination."

LORD ASQUITH: Mr. Justice St.-Jacques is in the minority?

MR. BRAIS: He is in the minority.

LORD NORMAND: I quite appreciate that there may be technically open to you an argument that there is discrimination, but it can only succeed if you are right upon the first argument, that there has been a wrong assessment?

MR. BRAIS: Yes, my Lord. The Board uses the expression that the other buildings -----

LORD NORMAND: If there has been a wrong assessment on you and other buildings have been correctly assessed, (assuming that) then there is a resulting discrimination. That is the inevitable result of the single erroneous assessment.

LORD ASQUITH: I suppose that in the converse case there is also discrimination, but not discrimination of which you can complain. If you have been assessed rightly and everybody else wrongly, what is the position?

MR. BRAIS: If I have been assessed rightly I cannot complain if all the other buildings in Montreal have benefitted and have been let off too cheaply; but, when the Board mentions the comparison to bolster its judgment, I am entitled to draw to the attention of the Board what the figures were in the other case on that basis.

LORD OAKSEY: That is the only discrimination of which you do complain in your case, is it not, because you say in your reason 9: "Because the assessment under appeal discriminated against the respondent in that the assessment of none of the other large office buildings in Montreal was increased in proportion." That means as between 1941 and the previous assessment?

MR. BRAIS: And the previous assessment, 1937 or 1931, which is the big jump we have taken. The only reason I can bring that up is that it is used by the Board to bolster up its finding. I have to eliminate that, but I cannot possibly derive any benefit or suggest to this Board that, because I am increased and the others are not increased, that de facto shows that my assessment is wrongly arrived at. I cannot do that. I am not allowed to do that. It would be improper. They may have treated other owners in any way they want to, but I still have to show that I have got a bad assessment.

My Lords, may I read from Mr. Justice St.-Jacques's judgment at page 1091, in volume 5, on the question of discrimination. He says: "A partir de cette date jusqu'en 1941, c'est ce chiffre qui a été maintenu", etc. (Reading to the words, at line 19 on page 1092) "Je ne trouve absolument rien au dossier qui puisse justifier cette augmentation et elle me paraît même discriminatoire." As I have said, that last sentence, which applies to the whole paragraph and which takes the two buildings, can be held to refer only to the boiler house or to refer to both, and I cannot go beyond that which is said.

LORD PORTER: I am not sure what he means. His only argument up till then is that the Sun Life have been vastly increased since 1931 or 1937 and the others have not, but he does not give any principle at all for it?

MR. BRAIS: I am applying myself solely to the question of my Lord Porter. If one looks at Schedule "H" on page XXI of volume 1 (I shall be very brief on this, because I do not intend to take up much time on it) you have there a series of buildings. You have first of all the Aldred Building. In the fourth column you have the total since 1932. The building was not built in 1930 and 1931; it was being constructed at the time.

LORD ASQUITH: It is not altered at all?

MR. BRAIS: It is not altered at all; but, if your Lordships will look at the second and third columns, your Lordships will see that there is a slight decrease in the value of the land and a compensating slight increase in the value of the building. In round figures you arrive at 1,800,000 dollars - exactly the same figure.

Then below that your Lordships will see the Architects Building. We find that they have been increased by 10,000 dollars. There is a slight decrease in the value of the land and an increase, in round figures, in the value of the building, and it comes to 650,000 dollars.

Then, if we go to the Bell Telephone Building on the next page -----

LORD PORTER: I do not think you need elaborate this. As far as I can make out the dispute is not as to whether there has been an increase or decrease in the others, but, as I understand it, the only dispute which you can have is whether a different principle is adopted. The mere fact that other people remain the same does not show that you have been wrongly assessed. If you are going to say that you will have to go into the reasons why they were kept at their value; and we have not got those reasons.

MR. BRAIS: I am in full agreement with your Lordship there; but the Board say that there is no proof that the other buildings

were not treated in the same way. We have, for example, the Bell Telephone, 3,000,000 dollars. Then you have a ~~sixgixx~~ slight decrease in the value of the land and an equivalent increase of the building. Then, if you take Dominion Square Building, there is a slight decrease in the value of the land and an equivalent increase exactly in the value of the building, and you come to the same value as the year before. You do that again with Drummond Building, with an almost similar figure. Then you do it again with Read Building, and you find that there is a decrease in the value of the land and an equivalent increase in the value of the building, to give you an almost identical figure; and you have the same thing for the Royal Bank of Canada, where the figure has gone down. There you arrive at a figure of 4,500,000. Then you come to the Transportation Building, where, again, you have a slight decrease in the value of the land and a slight compensating increase in the value of the building, to give you 1,150,000 dollars. With University Tower Building it comes to exactly the same amount, 1,500,000 dollars. There you have an increase in the value of the land and a compensating decrease in the value of the building, to give you exactly the same total.

Then you come to the Sun Life Building, which is increased after that to 40 per cent., and which would be increased to 51.51 per cent. I submit that that does not prove anything, but, if it does, it proves that, when the Board said to itself that there was no proof that the other buildings were not treated in the same way as the Sun Life, the Board was misdirecting itself on the facts of the case.

LORD NORMAND: Even if they had been treated in the same way and all the proportions of any rise of the assessments from 1937 to 1942 had been in exactly the same ratio, your argument about the invalidity of the assessment would have been precisely the same?

MR. ERAIS: Precisely the same, my Lord. I cannot, as regards the findings of this Board, get anything from that; but I do submit that, when the Board try to sanctify the work of the assessor by saying what is not true, that is a different matter. No assessor was made to apply the memorandum to any other building. All they did was to take a little off the land and put a little on the building, and in half the cases they came to identical figures. Why the Board goes out of its way to tell all interested persons that the Sun Life has been treated in the same way as the others, I do not know. That is not correct in fact and has no bearing on this case in law. I am entitled to show to what extent this Board was completely disregarding the fundamental principles of its own memorandum when they were applying it to the Sun Life.

LORD PORTER: I think you are entitled to say that the Board of Revision say that there is no evidence to show that the other properties were treated differently. I think you are entitled to say that there is no evidence one way or the other; and the Board cannot get any assistance from the assessments upon other buildings unless they show that they have been assessed in the same way as the Sun Life. You can deal with that if I am wrong about it, but that at the moment seems to me as far as you can go.

MR. ERAIS: All I can say (and I shall be very brief) is this. When the Board says that a new system is being evoked and a new system of valuation is to be applied to this building, when you apply that and in the process all you do is to take so many dollars off the land and put so many on the building in each

case to arrive at the identical amount, I submit that I am entitled to take up this position and to say that it is clear beyond doubt that nobody went to the Royal Bank to apply the new system and nobody went to the other buildings. They took off 10,000 dollars on one side and put it back on the building, and in half the cases they come out to an identical figure. I frankly admit that I was a little indignant when I say it, but I should not bring it forward here in a feeling of indignation. When the Board says that there is no proof that the other buildings were not treated in the same way, I ask the Board to look at the figures in these exhibits. It is not possible that all these buildings could come out like that, or, at any rate, I do not think it is possible. I do not want to stress that further.

My Lords, there is another very little but interesting exhibit, which may be of some interest to the Board. That is schedule "B", on page 876, in volume five. You have there a series of figures which purport to represent the buildings which received the treatment of the memorandum. All this shows that somebody was interested in the statement that everybody was receiving the same treatment on this new principle of replacement and so forth. I am subject to correction, but I think that you have 41 buildings.

LORD PORTER: One has been increased and the rest have been decreased, except some which have been left alone?

MR. BRAIS: Yes, my Lord. Three of them have been increased, the highest one by 14 per cent. The Sun Life has gone up by 41 per cent., and would be up 50 per cent. if the Board's final figure were taken. It goes to the same point. It has less weight than schedule "H", but it shows that the Board was entirely wrong in taking up the position that it did take, and which was an illegal position for it to take.

LORD PORTER: Theoretically, as far as one knows it may be that all these buildings were calculated upon a new basis and happened to come out at the same result. Your argument is that in practice that is not at any rate a probable result?

MR. BRAIS: I do not want to stress that further. I should not be entitled to bring it up if it had not been for what the Board tell us. It is a peculiar thing to put in a finding. The Supreme Court told us that we could not talk about it. We said that we must.

My Lords, I had reached the bottom of page A-25: "The wide margin between the commercial value and the replacement cost is not a proof of discrimination. It is due to the fact that the Sun Life property is a very exceptional one, not built to be rented to tenants but for the use of the company itself, with special amenities and facilities; it is also due to the fact that the commercial value has been arrived at in accepting the actual rentals as declared by the company based on the tenants' rental, which are not a just yardstick to fix the value of the space occupied by the Sun Life itself. It is also to be noted" - this is the question which was put yesterday - "that the service space, the vacant space are not accounted for in the revenue." Here we come to the revenue which is arrived at by the Board; the Board uses revenue and not space.

With the permission of your Lordships, after the adjournment I will have these figures in the form of a tableau, so that they can go before your Lordships on that question which was put to me.

Then the Board says: "We are convinced that the complainant does not suffer from any discrimination with the present assessment." Then the method of the Board is dealt with, and at line 21 they say: "The cost of the head office building up to April 30th, 1941, was 20,627,873.92 dollars. The amount spent on construction of the said head office building from April 30th to December 1st, 1941, was 58,713.70 dollars. (See joint admissions 1 and 4). The total cost of the head office building was 20,686,587.62 dollars", which is clearly historical cost.

LORD PORTER: I do not think, unless you want it, that you need read the next passage, because it is merely history, which we have in mind. They go on to their consideration of what ought to be done at line 18 on page 27. That is 14 per cent. for depreciation. They say that they accept that, and they deduct it.

MR. ERAIS: Yes, my Lord. That question of depreciation is quite important. The Board has modified Vernot's depreciation and has modified the depreciation found by Perrault and the depreciation found by the Technical Department, which had spent three months on the building.

LORD PORTER: What were they?

MR. ERAIS: With regard to the Technical Department, in Exhibit P.36, page 737, in volume four, we find at page 2-A 28 per cent. at the bottom. Whilst the value of the building was increasing the depreciation was going down. At page 28 we see that the depreciation which is applied is 30 per cent., 28 per cent., 19 per cent. and 13 per cent.

LORD PORTER: Has anybody worked out appropriately what that would give over the whole range?

MR. ERAIS: Yes, my Lord; that was worked out this morning. I have before me the typewritten figures which I want your Lordships to look at. It will come in after this.

LORD PORTER: Tell us what the result is. They say 14 here. What would it be in point of fact? It is about 14 per cent. against 14 per cent., is it not?

MR. ERAIS: On page 28 of the exhibit there is a figure of 2,262,000 dollars depreciation, based, of course, on a far lesser figure, but I have these worked out, and I will put them before your Lordships, but I want to look at them, because they have just come in and I have not been able to check them. Mr. Perrault also gives certain figures, but the Board says that the majority of the experts have allowed 14 per cent. for depreciation. We accept this rate of 14 per cent. and we deduct the amount of 2,500,000 dollars. It makes a big difference on what amount you are calculating your depreciation, whether you are calculating on the lower figure found in the original appraisal or whether you are calculating upon this higher amount. I have the figure worked out on this higher amount, and I will have that available.

Then the heating plant is out of the question. I need not worry about that.

Then we come to schedule E, the gross rentals. That has been disposed of, because everybody is in agreement on that.

LORD PORTER: That is 752,062.66 dollars net revenue. Then he gets a figure of 7,028,623 dollars?

MR. BRAIS: Yes, my Lord.

Your Lordships will see, at the top of page A-28: "This is not taken into account nor the fact that there is unoccupied space and unfinished space. All the rentable space has been very carefully estimated by Messrs. Desaulniers and Mills and it would be interesting to compare their figures with these. But, as we said at the beginning, we are making our computation in accepting the figures of the joint admission, though we are not ready to approve them."

Then we come to the important question of the memorandum.

LORD PORTER: You had better deal with this after the adjournment, because you get the percentages of 64.61 and 35.39, which they acted upon as actual figures, and after dividing the property into two halves of 50-50 they distributed under the correct ratio of 64.61 to 35.39. That is right, is it not?

(Adjourned for a short time)

LORD PORTER: We had got to A28 and we were reading the ratios.

Mr. BRAIS: Would it be useful if I handed in these figures which come from the evidence.

LORD PORTER: Yes. Sun Life paid 1.95 per square foot, and the other is 1.51. Does anybody give any explanation of what is meant by "vacant space" ?

Mr. BRAIS: Yes, that is broken down. Vacant space comprises two things. Would your Lordships turn to page XI volume 1. Vacant space comprises some space which is finished and space which is unfinished, the finished being unoccupied. You will see the additions of those figures on page XII, which is the second sheet of schedule B.

LORD PORTER: What is the first sheet ?

Mr. BRAIS: The first sheet proceeds to indicate it floor by floor. Page XI starts at the top of the building and it works down to the ground floor on page XII.

LORD PORTER: Take the items. First of all, occupied by the Company; that is actual occupation ?

Mr. BRAIS: Yes, my Lord.

LORD PORTER: Then tenants, and then "use in common". What does that mean ? Does that mean passages, lifts and things ?

Mr. BRAIS: Yes, my Lord, and lavatories.

LORD PORTER: Then "finished".

Mr. BRAIS: That is the space which is completed but unoccupied. There are two bracketed together.

LORD PORTER: One is unoccupied though it is finished, and the other is presumably unoccupied because it is unfinished.

Mr. BRAIS: It is the other way round; it is unfinished because there is no occupancy for it. As soon as there is a tenant they are finished.

LORD PORTER: We need not worry about the difference in physical measurements. You see the heading: "Space considered rentable by Mr. Mills and Mr Desaulniers but not conceded by Sun Life". What about that ?

Mr. BRAIS: That does not amount to very much. It is the upper part of the assembly floor treated by Mr Desaulnier as a full floor and considered by the Sun Life as rentable to the extent of the balcony. There is some discussion about the upper part of the banking hall, treated by Mr Desaulnier and Mr Mills as a full floor, which is not conceded by the Sun Life. The same thing for the gymnasium.

LORD PORTER: What is the 9,328 at the top of page XI ?

Mr. BRAIS: The 24th floor.

LORD OAKSEY: It says "Space considered rentable".

Mr. BRAIS: This would appear from certain photographs. That floor is totally unoccupied, or almost totally occupied by ventilating machinery - ducts. There are photographs in the record which show that to get into it you have to stoop down under these ducts, and then you can get into a very small area, so small that it has been eliminated by the Sun Life as being

useless, except for other machinery of a similar type.

LORD PORTER: Then XII is getting further down.

LORD ASQUITH: This is all cumulative; for instance, the finished and unfinished part is 27,831 square feet; that is adding XI and XII together.

Mr. BRAIS: That is adding the finished.

LORD ASQUITH: That is adding together all the unoccupied finished space ?

Mr. BRAIS: The unfinished space is 77,708.

LORD ASQUITH: I do not follow what you mean by finished unoccupied space ? It is unoccupied because it is unfinished.

Mr. BRAIS: The evidence is that the floors are unfinished because there is no occupancy for them.

LORD ASQUITH: What is the distinction between unoccupied finished and unoccupied unfinished ?

Mr. BRAIS: Some of those floors are finished and unoccupied. ²⁰the ~~There~~ are vacant completely, open spaces, and they have not been finished, because tenants are not available. As soon as a tenant is available they finish the floor, they divide it in conformity with the tastes of the tenant. The finished ones may have been occupied and become vacant again, that is possible, but it does not play a very large role. As tenants are found for the Sun Life building, the building management finish the space.

LORD ASQUITH. Would you not put them first in the finished space that was not occupied ?

Mr. BRAIS: Not always.

LORD ASQUITH: It might not be suitable ?

Mr. BRAIS: A company would come in and want a whole floor. The Sun Life would be much more anxious to obtain tenants from large industrial establishments in a building of this nature, or any building, than renting piecemeal, especially on account of the depth of the suites. It is much better to have a large tenant, as large a tenant as possible, to rent a whole floor.

LORD PORTER: Applying these figures, the total available space of the Sun Life occupancy 393,233, is the completion of the column called "Company" at XII. The tenants occupancy is the next item. What is the next one 108,447 ?

MR. BRAIS: That is the 27,000 and the 77,000, I would say, added together.

LORD REID: And the third column too.

Mr. BRAIS: While the 2,908 is a small amount, it is space which is not occupied on a rental basis, I presume. However, there might be some slight doubt as to whether that should be in there. I am not prepared to discuss that item. It comes out roughly to the figures which are indicated.

LORD PORTER: Your complaint on this table is that the Board of Revision have taken 64, it may be 65, instead of 50 ?

Mr. BRAIS: I am complaining that they have taken any percentage on occupancy. I do not want any misapprehension there as to the position the company takes. I am complaining that they are taking any percentage or any ratio.

LORD PORTER: I follow that, but you are complaining altogether of the 50 - 50 and then the division of the 50 - 50 ?

Mr. BRAIS: Yes.

LORD PORTER: Merely on this table, so far as the figure is concerned, not for any subsequent deduction but on the mere question of figure, you say that the occupancy should be 50.37, and not 65 ?

Mr. BRAIS: I think I am entitled to submit that, and I do submit it otherwise the more I lose tenants -- and if these ratios by any chance should apply unless I have tenants the more I am handicapped -- the greater becomes the value of my building.

LORD REID: Do you say the 13 per cent ought to be left out of account altogether ? It does not seem to have come into the commercial value of the building at all. Is it not either to come into the ratio that you are now dealing with ?

Mr. BRAIS: That is the difficulty when you start working on ratios such as these. My submission is we have this 13 per cent loss and we do not know where to apply it because we lose that money. We lose a lot of money, and because it is not in my favour I am handicapped. Where can I put it. How can I make it work on this memorandum ? It does not. It is demonstrative of the whole fallacy of the memorandum. It happens to be 13. something per cent, it may be 35 per cent.

LORD REID: Suppose you leave the 13 per cent out, you are left with 85 per cent rentable space, and the figures 65 and 35 I suppose are the percentages applied to the 85 per cent. rentable space, are they not ? It is the rentals.

LORD PORTER: The Board of Revision have added 13.89 to the 50.37 and called that "self-occupied". As against that, they have contrasted 35.74 rentals, and therefore they have the proportion of 64, roughly 65, to 35, as being the proportion of self occupancy to rental space. I think that is right.

Mr. BRAIS: I think that is what has been done.

LORD OAKSEY: Do they not say at line 11 on A 29 that it is the revenue which gives them the percentage.

LORD PORTER: Actually it comes to almost the same thing.

Mr. BRAIS: It comes to almost the same thing.

LORD REID: If you take the ratio, including the 13 per cent, and take the ratio between what you occupy and what your tenants occupy, it comes out as near as possible 60 - 40.

Mr. BRAIS: 65 - 35.

LORD REID: I am taking your figures here. If you take your occupancy in square feet and your tenants occupancy in square feet, and include the vacant space, you then get a ratio of something like 60 to 40.

Mr. BRAIS: I would say approximately.

LORD REID: Do you accept that in so far as occupancy by square feet means anything, it would be a ratio of 60 to 40 that

you would want us to take ?

LORD PORTER: I think he wants us to take just under 50; he says that his vacant space is really tenant space.

LORD REID: If he is going to count that as tenants space, that is all right.

Mr. BRAIS: It can only be tenants space, because the evidence is clear in the record that this space will not be occupied by the Sun Life in the foreseeable future by anybody. There is an exhibit which shows that we are going down hill all the time. That is found in exhibit 25, volume 4, page 705, which is interesting. It shows what is happening. In 1938 The company occupied 57 per cent of the rentable area; in 1939 52.48; in 1940 51.80; in 1941 50.29; in 1942 49.80 and in 1943 48.25. The purpose of that was to test the evidence that through decentralisation the Company was sending more and more of its staff out of the building, and that it was going downhill all the time. It confirms the statement that in the foreseeable future there was no indication of the Sun Life occupancy ever increasing.

LORD ASQUITH: I am sorry to be so persistent about these figures, but I took this down yesterday and perhaps you will confirm if it is right. First of all, the Sun Life occupies about 50 per cent of the rentable space in the building, and 35 per cent of the rentable space is let to tenants. That means that 14 per cent, or 13.9, is empty. So far so good. The second thing I took down yesterday was in relation to the figures 65 : 35 as the figures of the Board of Revision. What I have against that is: It is the ratio of the rentals of the occupied space payable by the Sun Life to itself and by the tenants to the Sun respectively.

Mr. BRAIS: Yes.

LORD ASQUITH: That is still true ?

Mr. BRAIS: That is correct.

LORD ASQUITH: Then as regards 60 to 40 I have down that ~~was~~ was ratio of the area occupied by the Sun Life and by tenants respectively.

Mr. BRAIS: I think that is correct.

LORD ASQUITH: Is that right ? That survives the examination you have given of this paper ?

Mr. BRAIS: Yes.

LORD PORTER: 60 is the ratio of the 50.37 to 35.74.

Mr. BRAIS: 60 to 40 floor area.

LORD PORTER: 65 to 35 rentals.

LORD ASQUITH: Would you say once more what you say about the way in which vacant space has been treated by the various Tribunals. Do you say that they have brought it in with the part occupied or space to be occupied by the Sun Life ?

Mr. BRAIS: The vacant space so far as the Board is concerned is not taken into account.

LORD ASQUITH: Vacant space is ignored ?

Mr. BRAIS: Vacant space is ignored.

LORD ASQUITH: Does anybody else not ignore it ?

Mr. BRAIS: Mr Vernot, as we have seen, but that is of secondary importance because we are not following him any more. He considered the potential revenue of the vacant space, but does not use it in his percentages. He considers there a potential revenue from vacant space, and he charges that to the Sun Life, to come to his proportions.

LORD ASQUITH: I suppose his 10 per cent commercial would include the lettable space which is vacant ?

Mr. BRAIS: His 10 per cent commercial is one-half of the operation of the 50 per cent.

LORD ASQUITH: It is one-half of 20 per cent.

Mr. BRAIS: The one-half of 20 per cent, giving his 10 per cent, is just a finding on his part on the basis that the Sun Life occupies the better space. It does not proceed from any mathematical computation.

LORD OAKSEY: It is 10 per cent of the total rent received ?

Mr. BRAIS: Of the total rent received, yes. To pass from the 20 per cent which is applying to commercial value to 10 per cent which he ultimately applies to commercial value, he goes not on any computation of space or apportionment of space, he does that simply by saying: the Sun Life occupy the better space, so I will cut down by one-half again the amount which will be ascribed to the proportion of commercial value.

LORD PORTER: That proportion of commercial value to the other, is based, is it not, in the one case upon the replacement value, and in the other case the lettable value when you have capitalised it ?

Mr. BRAIS: Only by capitalising the rent does Vernot give value to the unoccupied space, for the dollars, but he does not give value to the Sun Life for the unoccupied space which it has not got and for the dollars which it is losing. There is no doubt that that part of Vernot's theory is ill-conceived, but I do not want to stress it here, my Lords, because it has been otherwise disposed of by the Board. Vernot's conception is entirely wrong from every possible angle. Why saddle the Sun Life with rental value which you have not got, and then, on the otherhand, charge you only with a proportion of the space that you are occupying against the proportion of space that the other chap is occupying. Again I say that Vernot's doctrine has been deleted by the Board, so I do not have to stress that.

LORD ASQUITH: The Board ignores vacant space ?

Mr. BRAIS: The Board ignores vacant space in dollars and in space; they are atleast equitable to that extent.

LORD ASQUITH: What else could they ignore it in ?

Mr. BRAIS: Vernot did the contrary.

LORD ASQUITH: Once the Board has ignored it, there is no room for ignoring it in any third way ?

Mr. BRAIS: I do not think so.

LORD ASQUITH: It is ignoring it completely for all purposes?

MR. BRAIS: Yes. I have expressed myself wrongly. The occupied space was considered on the same basis, it was given the same treatment. Your Lordship is perfectly right, you cannot ignore vacant space in dollars, but the occupied space was treated alone both as regards dollars and as regards occupancy. It was treated on the same basis, but we say that that is something which, by the very fact that it is plain, shows the fallacy of the whole system, because the greater you are handicapped by losing tenants or not having tenants the greater your vacancy of that building, the more you will have to pay tax and the more valuable becomes your building for assessment purposes. So that obviously that is completely erroneous.

On the question of space Simpson, at volume 5, page 875, line 46, gives the Sun Life occupancy at 50.4 per cent, tenants 35.7 per cent and then unoccupied space. That is the origin of that. Then Lobley, in volume 1, page 51, line 30, gives the Sun Life occupancy as 48.7 per cent.

LORD PORTER: At the moment, until they are challenged, I think we might take your figures.

MR. BRAIS: The only one I would want to add is the computation of the figure of Mr. Mills which is schedule B, volume 1, pages XI and XII. I have had computed that if we take all the available space that Mr. Mills says the building should make available for rental, there is some dispute as to what is or is not rentable in the building, but if we take the figures of Mr. Mills and apply all that space as rentable, then the proportion occupied by the Sun Life would be 47.7 per cent.

LORD PORTER: We cannot go into too much detail. On your argument 50-50 is about what it comes to?

MR. BRAIS: Yes. There is one other item I would like to add. Your Lordships will note that the Sun Life is charged 1 dollar 95 cents per square foot to itself, and Mr. Lobley, in volume 4, page 744, at line 38, ascribes to the Sun Life 1 dollar 62 cents and to the tenants 1 dollar 57 cents. Then on the following page at line 1, referring to the special rates for tenancy of basement, banking hall, ground floor, club and hall and other space, he says: "These rates are in line with the rates which are being paid by other tenants for substantial quantities of equivalent space in the building; they are also the highest rates which I believe the space would command in the open market at this present time or as far into the future as I can foresee". Those rates are about 30 cents below what the Sun Life should charge itself.

LORD REID: I thought you said you were not in dispute.

MR. BRAIS: I am not disputing it. I want to say we are charging ourselves properly. It is suggested that we are charging ourselves improperly. It is only applying myself to that point, my Lord.

LORD ASQUITH: If you take page 744, table 3, the Sun Life is 55.5 per cent and the tenants 44. How does that compare with 65 to 35 of the Board of Revision? Do they disagree or is it a different basis?

MR. BRAIS: The difference there is that Mr. Lobley, as a rental expert, is fixing what he thinks are proper rents throughout the building.

LORD ASQUITH: Not rents actually paid?

MR. BRAIS: No. He is proceeding on a completely independent

basis and valuing the rental values of the building, because

Mills and Desaulniers had taken the most extraordinary view,

not only the value of the land and the building which they

saw -----

LORD ASQUITH: This had nothing to do with the facts?

MR. BRAIS: No.

LORD ASQUITH: The table on page 744?

MR. BRAIS: No, because the City experts were also indicating what they thought ought to be paid. The City experts were indicating what they thought ought to be paid in rents.

LORD ASQUITH: 65 per cent and 35 per cent is not what out to be paid, but what was paid?

MR. BRAIS: That is what was paid; charged in the books of the company to itself, on the one hand.

LORD NORMAND: I suppose that this was an answer that would suit at the time when the amount of rent attributed by the company to itself was controversial?

MR. BRAIS: Yes, my Lord; and, of course, I think that the company would be called upon to make some evidence of the value of its holdings and what it was charging itself.

LORD ASQUITH: It could only be relevant to what the company ought to charge itself, could it not?

MR. BRAIS: Yes.

LORD ASQUITH: It cannot be relevant to anything else.

MR. BRAIS: It cannot be relevant to the issues as we have them at the present moment. The Board does indicate that the company has been very generous to itself. The evidence is only relevant to that, but it is not relevant to the issues, because the Board has accepted the company's figures, with an intimation all through that the company has been very generous to itself.

I have two items of evidence, my Lords, that I will have to take up with this Board before I complete the evidence and I have only two. It might be useful if I took them up immediately.

The first is the doctrine propounded by the Board and, not by the majority of the Court of Appeal, but by Mr. Justice Galipeault in the Court of Appeal, that there is no evidence that there could be a willing buyer or willing seller in this instance. Mr. Justice Galipeault says that there is no proof that this oiseau rare or rara avis has been found. I was rather interested in the translation which came before this Board, which is a little toned down to this "rare specimen". The expression used is that well known French expression "oiseau rare" and in English always called, I think, a rara avis and which has a particular connotation of its own.

First of all, there is the evidence of Lobley, in Volume 1, page 73, line 14: "(Q). We can generally say, I presume, that there is no market for such a building? (A). I will not answer that in the affirmative. I can imagine a market for such a building. (Q). As a matter of fact, there was none sold for many years in Montreal? (A). The Sun Life building has not been sold. (Q). And any similar buildings? (A). I do not think there is any duplicate building. (Q). Is it impossible to imagine a market for such a building? (A). No. (Q). But the market is not existent? (A). I can imagine a market. (Q). In fact? (A). I can imagine people. I can imagine people coming from New York at this time with the idea of investing money in properties. I can imagine a market. (Q). Do you always apply the same principle, that is, the willing seller and the willing buyer principle? Is it the only approach you had to use on the properties given to you? (A). Whenever it is possible I endeavour to create a willing and a willing seller approach, because it is the most satisfactory and most reasonable approach. In the case in point I can very easily do so. (Q). There are lots of cases that it is impossible to do that? (A). There are cases it is impossible to take that approach? (Q). Supposing you are called upon as an expert", etc. I do not think that I need go further there.

Then at page 72, line 28, The President asked: "With your theory, a valuation of such an immovable as the Sun Life cannot be arrived at without imagining a change of proprietor? (A). Definitely, sir. And I am capable of imagining it. (Q). And you consider only the commercial value? (A). I valued it by this method."

Then page 70, line 1. I am sorry, my Lords, but these references are going backwards. We have, again, the same story, which I will not read at length. It is the same witness. At line 18, for example: "You cannot give us the name of the willing buyer today? (A). I can imagine one."

Then I will not read it, but there is the same thing at Volume 1, pages 56, 59 and 63. This witness explains this theory.

LORD OAKSEY: This evidences shows, does it not, that the Sun Life are not the only possible buyers in the imaginary market?

MR. BRAIS: Yes; it does.

LORD OAKSEY: It does show that?

MR. BRAIS: Yes; it does show that.

Then we have Simpson, at Volume 1, page 91, lines 47 to 50.

LORD PORTER: He distinguishes between sales and a market?

MR. BRAIS: Yes. There is no sale to go by. At line 47 he says: "There is no sale you can go by." We are on completely common ground there. As long as the Sun Life owns that building, there will be no sales to go by. "I can imagine someone buying it; but there is no sale to go by."

Then at page 92 he was asked: "You can imagine a sale through an expropriation or bankruptcy? (A). No. Someone might buy as an investment. But they would buy on a revenue basis."

Then MacRossie, at page 110, line 33: "(Q). You have heard something about a banking hall, cafeteria and gymnasium as being in that building. What have you to say to that? (A). Why, that is quite customary in large buildings. It is not unusual. (Q). Would you say that there is no market for the Sun Life Building or a building of that type? (A). Well, I have heard that testimony given and I cannot subscribe to it. As a matter of fact there have been in the States a number of sales of large properties. We have today in the United States a large number of refugees who have come to this Continent somehow or other with a lot of money and who are in the market for good real estate, not cats" -- I do not know if that is a misprint or whether it is what is meant; this is an American gentleman, from New York, a real estate expert -- "and will pay a fair return provided the taxes are not excessive. I can tell you, I know of sales of large properties. As a matter of fact when I was coming up here, in the Tribune there appeared a premature announcement of the sale of a very large building."

Then Mr. Archambault, in Volume 1, page 164, line 15, says: "Then there is the question of marketability. Someone was talking of bonds yesterday. You buy them and get a low rate, but you can sell them tomorrow. But, if you buy this building, it will be very difficult to liquidate. (By the President): It is very difficult to imagine a buyer. Since the beginning of

this case I cannot be convinced that this would be a sound way of assessing the property - to imagine a possible buyer. It is practically impossible. (A). Improbable, but not impossible."

LORD ASQUITH: It seems to have been assumed throughout a good deal of the argument that the possible buyer would be a person like the Sun Life, who wanted most of the building for itself; but one can quite well imagine a syndicate of investors who get together and pool their resources and who want to acquire the thing and let it out floor by floor.

MR. BRAIS: Getting all the benefit that the Sun Life is getting.

LORD ASQUITH: I cannot see the difficulty about a possible buyer.

MR. BRAIS: The only reason that I am stressing this is because the Board seems to me to consider that it is not possible to conceive of the building being sold. Buildings are being sold everyday. We see in the Newspapers of the Royal Bank, the Waldorf Astoria, the Commercial Building in Chicago, which was sold for 45,000,000 dollars. It is well known that the Waldorf Astoria, on the waterfront in Chicago, which everybody knows, was sold as a complete white elephant. Half the buildings in Montreal have been sold half a dozen times; but no evidence is brought in, because market value plays no role in this matter. It is quite outside the record; but it is easy to contemplate a sale. The President of the Board then said: "This is a monument. Who would buy the Notre Dame Church, or the Windsor Station, or the City Hall?", and Mr. Hansard says: "Even the Windsor Station - there are offices in there." It shows how the Board takes a completely erroneous view, I submit, from what you have. Then the President intervenes at the end of the page and says: "I am discussing with an expert and a good one at that, and I am not putting my questions as argument."

That brings us on -- I will not repeat it -- to what Mr. Perrault says in his report as to the testing of the figures that he has arrived at on the willing buyer and willing seller theory, who will apply to that, further, the question of his return on the rental basis. Throughout this cases witnesses refer to that. The City witnesses say that they cannot see how it could be sold, because it has not been sold, because the Sun Life would not sell. I am prepared to concede without equivocation that the Sun Life probably would not sell, but that would not be the test, my Lords.

LORD ASQUITH: We are concerned with what a hypothetical person would do, if he existed, and not with the Sun Life.

MR. BRAIS: The very doctrine is to eliminate from the picture the present owner, in order that you may arrive at a value. That is the very purpose of the doctrine - on the market value.

The other point that I would like to refer to, and it has been referred to considerably throughout and stressed by the judges, is this report which the company makes to the Superintendent every year.

LORD PORTER: This is the 16,000,000 dollars?

MR. BRAIS: The 16,000,000 dollars.

LORD PORTER: The evidence is this, is it not: We took the original cost; we wrote that down by 2 per cent a year, which is the usual

way of doing these things in Canada; it has no relation to any particular, accurate calculation; it is just a rule of thumb. Where that comes I do not know.

MR. BRAIS: It is in the evidence of Mr. MacAuslane, Volume 2, page 227.

LORD PORTER: It begins at the bottom of page 228.

MR. BRAIS: It begins at the bottom of page 225, my Lord. "(Q). Before leaving the Joint Admission, do you happen to know, Mr. MacAuslane, how the figures of book value and market value on Schedule F. are made up? What they comprise? (A). Book value and market value have been calculated on cost less 2 per cent. That is only a mathematical calculation."

Then at page 228 he was asked: "On the first column it is marked 'Book Value', and on the second it is 'Market Value'? (A). Yes. (Q). You have told this Board that the policy of the company was to take two per cent less - take the money spent less 2 per cent a year? (A). Yes. (Q). And I presume also adding what is spent on capital? ~~(A)~~. Capital improvement every year? (A). Yes. (Q). Does this refer to the book value or the market? (A). Both. They are the same. It refers to both. I can probably save you some time. You will notice here that we have the two running side by side. During these years, and I was not there at the time, but I can give the answer, the answer is that the book value remained constant and the market value was reduced by a reserve set aside in the liabilities in respect to the assets. The effect was the same, of course. The difference between the two was set up as a liability. (Q). This has existed like that since 1936? (A). Yes. (Q). Before 1936 you were carrying a book value of 21,676,000 dollars, while the market value was 17,676,000 and a few odd dollars? (A). Yes. (Q). So you made a change in that year between the book value and the market value? (A). I have already told you what we did. We have a book value and a reserve on the other hand. In the scheme of things it makes no difference whether you have a net asset or a gross asset and liability. You have 21,000,000 book value, and a liability of 4,000,000 on the other side. Then the difference between the two, being the market value, is 17,000,000. It is simple arithmetic. What we did instead of seeping a reserve as a vague thing, we applied it specifically against the building and wrote it down on the basis I have outlined."; that is, the 2 per cent a year. "(Q). So if you took the money you have spent and reduced 2 per cent per year, the money so spent, you will come to 16,258,000 dollars? - the same result? (A). Exactly, and positively. That is the way we do it. (Q). And you have the exact picture of the figure we have, but add every year the money spent every year? (A). Oh, yes. (Q). To have the book value or market value you have to add every year the amount which you show as being spent by the company from year to year in Schedule A? (A). Yes, that is right. To quote a hypothetical case, if the book value is 10,000,000 dollars, 2 per cent depreciation would be 200,000 dollars. (Q). Will you compare Schedule A. and Schedule F. and make your own figure for the year 1938, to see if it checks. (A). There is one thing which I should mention, which is the customary way of figuring these things, and that is you assume that the money spent this year was all spent on the 30th June. The money spent that year bears 1 per cent depreciation, because it is half of one year. I do not know if it comes to the exact figure. I see nothing to get excited about. 1937 is your previous year, to which you add your disbursements during that year and you apply one per cent to the disbursements of that year and you take off 2 per cent of your balance, and it comes

to very nearly the same figure. (Q). What is it? (A). 17,800. I have 17,100, I think. (Q). Overnight will you check for the last six years and bring it tomorrow? (A). Yes.". Then it passes to something else.

LORD ASQUITH: It comes to this, does it not: It is cost minus a conventional figure of depreciation and, if cost is not the sole test or not a major test perhaps to consider in this case, the point loses its gravamen?

MR. BRAIS: It was very seriously stressed against us, of course.

LORD ASQUITH: It is a very nice cross-examining point; but when analysed it is surely a bookkeeping figure.

MR. BRAIS: It is a bookkeeping entry, taking 2 per cent year by year and going down hill on that basis, and avoiding an appraiser coming in. The President in this case, I think, would find it exceedingly difficult.

LORD OAKSEY: Does not the company have a balance sheet?

MR. BRAIS: Yes.

LORD OAKSEY: They show this figure as an asset - the figure of 16,000,000 dollars which you are saying is worth 8,000,000 dollars?

MR. BRAIS: Yes. Thousands of buildings -----

LORD OAKSEY: -- show as a market value a figure above what the market value is?

MR. BRAIS: Quite right; and it is public property. It is turned in to the Superintendent of Insurance. It was never considered by the Tax Department of the City of Montreal before. Nobody ever considers that the company which proceeds on an arbitrary depreciation basis in making the indications on its books -----

LORD OAKSEY: You have generally cost or market value, whichever is the lower, do you not? If you are putting it as market value, it is in the nature of a valuation.

MR. BRAIS: I do not think that I can agree that, my Lord.

LORD ASQUITH: Is it put as market value in the balance sheet?

MR. BRAIS: Book value and market value in the balance sheet.

LORD ASQUITH: In the balance sheet the assets generally figure at cost.

MR. BRAIS: I could not say what it was indicated at in the balance sheet. There is no evidence on that point. This is a document that the City has never asked for before and has never considered before. In this particular instance they asked for it. There was a very particular situation about insurance companies in those years. There is legislation at that time in the United States, which is quite interesting, which never existed here, I am glad to say: that all values, except real estate value - all bond values and stock values - were frozen as of the date of the depression, and a law was passed obliging insurance companies to state a market value for all their holdings, save real estate amounts, which were entirely out of line with the actual value. It did not apply to immovables; but the purpose of that was the anxiety of the Superintendents of Insurance

throughout the States of the United States of America and was not to oblige a company to declare its position. That is the way that the insurance companies were safe.

It is drawn now to my attention, and I must call attention to it immediately, that in Volume 1, at page IX, line 14, there is a reference to it in the Admissions. In paragraph 16 it says: "The amounts shown under the respective headings of Book Value and Market Value in the company's annual general statements and in the company's returns to the Superintendent of Insurance" -- they were in both. That corrects the statement that I made that there is no reference to the company's annual general statement.

LORD ASQUITH: What does it mean when it refers to "under the respective headings of Book Value and Market Value" in Schedule F?

MR. BRAIS: The Schedule follows, my Lord.

LORD PORTER: What is meant by annual general statements? Is that the figures issued to shareholders?

MR. BRAIS: That would be the statement to shareholders, my Lord.

LORD ASQUITH: They there appear at 16,000,000 dollars?

MR. BRAIS: 16,258,000 dollars, and right up for some years previously, as he explained, there was a book entry against the difference and from 1937 on that is correct.

That is a statement which goes to the Superintendent of Insurance and is public property. It is one of the requirements under the law, which is quoted elsewhere. The bookkeeping department depreciated this building 2 per cent every year and kept on doing that. So far as I am informed, it is still doing that today and, if one sees how this works out, there will come a time in the very near future, if it is not now, where the book value on a 2 per cent per annum depreciation basis and the market value on the same basis will be very much below the real value as assessed and the company will have to accept it, because this, of course, is referable solely to the sums spent by the insurance company. This is based on cost. I do not know of any company, unless it has to do it for any particular purpose, which has an appraisal made of its immovables. It proceeds on an arbitrary basis, as Mr. McAuslane says was done in this case. If that is sinful, if it is something which should not have been done, it does not per se constitute a valuation of the real value of the building.

LORD PORTER: You have Mr. McAuslane's evidence. I have not yet seen a challenge which says to Mr. McAuslane that that is not the ordinary practice. Does that appear?

MR. BRAIS: No, my Lord; that does not appear. The statement was made.

LORD PORTER: Does anybody say that the ordinary practice is to reduce it to a valuation which you would put in for taxation purposes or the real value as opposed to a conventional figure?

MR. BRAIS: I think that I may say that I do not think that there is any further discussion in the evidence. I am told that it is dealt with again at page 237.

LORD PORTER: I do not think that there is anything there.

MR. BRAIS: I will just look at that to see if there is anything. That is, again, from Mr. McAuslane. I am told that it is not

contradicted anywhere. The matter begins and ends there.

Then at page 237 -- it may be rather useful that I complete this -- Mr. McAuslane is asked: "You do not know what reserve is put aside on the assets of the company for depreciation of the building? (A). It would be in the liabilities. (Q). Of 2 per cent a year? (A). Well, no. Depreciation is not a liability if you write your asset down. We start out with 10,000,000 dollars and to write off 2 per cent" and he explains as he goes along. "(Q). On the books of the company you carry the main building and the heating plant at a figure of 16,000,000 dollars and a few odd thousand dollars, but can that be made somewhere else on the books of the company a reserve to take care of this amount - of the market value of the building? (A). We have never had any particular need to think of it, because in the scheme of things real estate in our company forms a very small part of our company. I think it is probably 2 per cent or thereabouts. And we are not tremendously aware of the need annually to fix the head office value of the building. Therefore, as I told you yesterday, we arbitrarily start off with cost and write that down, so that over a period of years it will be completely written off; at 2 per cent it will take fifty years to write it off." Under the system which is given to us for assessing purposes, after seventy five years we will be down to 25 per cent and then continue at 25 per cent in perpetuity. We can never depreciate below 25 per cent; but on this system we will be totally depreciated in fifty years.

There is a small mention also at page 233, line 10. I want to have placed all this evidence before the Board. Mr. McAuslane is asked: "Now, Mr. McAuslane, I also asked you to check some figures on the market value and the book value of the building of the company. (A). I have that for you here. (Q). And you told this Board that the market value or book value represented only the cost of the property to the company less 2 per cent? (A). Yes. I should have amplified that a little. We have the power house and the head office building shown together with the land - the whole project. We have elected not to depreciate the land so as to take it out and set it aside. And the head office building we depreciate the cost right through. The total of this depreciation here from this total cost column is the book value and market value. The power house is depreciated at 5 per cent" and so forth.

That, I think, is all that there is in the evidence on the matter. It seems to have not been discussed or taken up one way or the other, except when we come to the judgments.

LORD ASQUITH: Can you tell me this as a matter of insurance practice? Supposing that you insure a thing for what it has cost you and it then depreciates in market value and it is destroyed and you make a claim, can you be told that it is grossly improper for you to continue to have insured it at cost? I suppose that you may be told that you are over-insured; it has dropped half in value; but can anything worse happen to you than that?

MR. BRAIS: Except this: that, supposing that your building has gone down for some reason or another and you do not want it any more, you only get your money if you rebuild. If you do not rebuild the building which is lost but which might have been rebuilt, you get exactly what it is worth.

LORD ASQUITH: If you do rebuild, you get 100 per cent of the cost?

MR. BRAIS: 100 per cent of the cost.

LORD ASQUITH: The cost of the original building?

MR. BRAIS: That is because the company taking that policy is well warned before hand of the situation and is protected, of course, because, if the value of the building has decreased and there is no longer any interest on the part of the owner to put his money, plus the insurance company's money -- his portion is the amount that he would get anyway out of his insurance -- back into the building, he will not do it.

LORD ASQUITH: There is nothing dishonest in saying to the insurance company: The value of this is so much, naming the figure of cost, even ithubough it has depreciated since?

MR. BRAIS: No; he cannot do that, because he cannot rebuild. He will not get what it cost.

LORD ASQUITH: But, before you know whether he is going to rebuild. or not, supposing that he continues to enter as the value of the thing to be insured what it cost, notwithstanding that it has depreciated in value since, there is nothing dishonest about that?

MR. BRAIS: It is not sensible for the insurer to do it, because once he was on a cost basis.

LORD ASQUITH: And then he rebuilds?

LORD PORTER: I am not sure about that. It may cost him the same or it may cost him more, because he may want to rebuild.

MR. BRAIS: Yes.

LORD PORTER: If the original cost was so much, it is not dishonest for him to say: That is what the building cost me; that is what I insure for. It may be that in the nature of things, as a fire insurance is compensation, if he does not want to rebuild, he only gets his compensation; but I think that you could, if you like, insure with your insurance company for so much, they agreeing that that was the value.

LORD ASQUITH: You could have a value policy, I suppose.

MR. BRAIS: I do not know if the value policy still exists in this country.

LORD PORTER: I think so. In marine insurance, surely.

MR. BRAIS: In marine insurance it does.

LORD PORTER: I think that it exists in ordinary fire policies. At any rate, I hope that it does, because I have a property on that basis.

MR. BRAIS: In our part of the world -- I feel a little more at ease in discussing this matter, because fire insurance is a matter about which I know a little -- when on the replacement policy or the old for new policy the insured goes to collect on his policy, we have gone out and rebuild that building and he will be paid under that special policy what it will cost then to rebuild that building. The historical cost will have nothing to do with it in any manner, shape or form, because the historical cost may be to his detriment or the historical cost may be such that he may be making more money, because he would be spending less than the amount that he is asking to be repaid, and he would not have any possibility of collecting the other dollars and cents actually placed into the new building.

LORD PORTER: What are you assuming him to insure? Are you assuming

him to insure for a certain value or are you assuming him

simply to insure the building?

MR. BRAIS: He insures the building at its replacement cost and

there is an upset figure put in the policy beyond which he will

not be able to collect.

LORD PORTER: Supposing that he insured it for the original value

that it cost him, he would get that amount, provided that it had

cost that amount to rebuild, but he would not get anything

more than that?

MR. BRAIS: He would not get any more. It is possible that the figure in the policy might be this historical cost. What is done on these new-for-old policies is that the insured gets an appraisal, and he puts that figure on the policy. That is the upset price. He cannot go beyond that. The reason why he is taking a new-for-old policy is because the value of his building is now quite clearly out of line with the historical cost. That is why today people are taking these new-for-old policies, because they have bought houses which cost 12,000 dollars, or they own houses which cost them 12,000 dollars, and it would cost them 28,000 dollars to rebuild them. They do not want to take the tremendous depreciation which would be applicable to the 28,000 dollars, which would probably be as much as they paid for the building. It is because of that that the new-for-old policy is becoming so popular.

LORD PORTER: I think in our case what mostly happens is that you get an appraisal, and the appraisal value is put in. I think an insurance company here would pay the appraisal value.

MR. BRAIS: Before leaving I asked for an appraisal of the property to be made. I have left instructions to have the property revalued. It is entirely out of proportion to its historical cost, but if I have a loss that is the figure I have put on, because I do not want to pay rates at a higher amount than it is going to cost me to rebuild; but, if I spend less than that, I shall only get what I spend, and that will have nothing to do with the amount fixed on the policy. The amount on the policy is the top amount that I can get back, and that settles my premium. I do not want to put too large an amount on that policy, because I pay more premium. I feel a little more at ease in discussing that point rather than any other point, because our association and our office have had to work it out in due course, and I trust that I have not given them any wrong advice on that point.

LORD PORTER: At the moment you have been defending the practice of putting 16,000,000 dollars as the market value on the ground that the depreciation is a rule of thumb, and, though it works out at double the value which, according to the evidence, is put upon the property, nevertheless you say that it is really no indication of anything except a conventional treatment?

MR. BRAIS: Yes, my Lord. In this matter it is indicated as a practice, with the obvious result that in due course my depreciated building will be going on below my assessment value. Obviously when that happens the City of Montreal will not be heard to say that that will be the basis or the measure upon which they will assess me.

LORD PORTER: When after 50 years you get down to nought they will not say that you are free from rating.

MR. BRAIS: May I say this at the present moment, and I hope that the City will not contradict me. Supposing the final judgment of Mr. Justice Mackinnon, with the increasing value in real estate, is upheld, my learned friends will content at the next assessment, or on the 1949 assessment, that, the valuation having increased, I am now far ahead of my depreciated valuation in my books. I have not the slightest doubt about that. It is mechanical. I cannot add to what I have said about it. That is what was done.

May I again direct the attention of this board to line 15 on page A-28, "The building being partly occupied by the proprietor" -----

LORD PORTER: They are relying upon an instruction?

MR. BRAIS: Yes, my Lord. I am sure they felt directed.

Then we come to the depreciation, 14 per cent., and the recapitulation.

LORD PORTER: Do you complain of the recapitulation? It is 10.7 per cent. You do not complain of that, do you?

MR. BRAIS: No, my Lord. In regard to the recapitulation, it is interesting to compare it with Vernot's figures, which appear on page A-9. We have on page A-9 the total cost as reported by the company as at April 30th, 1941, 22,000,000 dollars. Then the various items are taken off and we arrive at a reported cost of head office, without land, of 19,108,000 dollars.

I mention that because this is the first point reached by the board and by the assessor; but from then on they go different paths, and the Board and the assessor are in disagreement throughout. First of all, Vernot gives the 7.7 and the Board re-sets those figures at page 29, line 21, to the amount of 181,503 dollars.

LORD PORTER: That is on the actual difference between the index and the particular years?

MR. BRAIS: Yes, my Lord.

LORD PORTER: That is about one per cent.?

MR. BRAIS: The Board gives 1.2 per cent., or something like that - roughly one per cent.

LORD PORTER: As opposed to 7.7 per cent.?

MR. BRAIS: Yes, my Lord. Then the second item comes in at line 48 on page A-9, "Less 5 per cent. allowance for presumed extra cost as building, 881,851 dollars." Mr. Vernot in his evidence (and the Board repeats it) says that, if he had to re-assess this building, he would not grant that 5 per cent.

LORD PORTER: It differs owing to the ~~same~~ different figures, but it is 5 per cent. in each case?

MR. BRAIS: Yes, my Lord. Vernot says that he would not have given it, but the Board says that it should be granted. Therefore, although they arrive at the same figure, the method is different.

The third item, with the resultant total at line 19 on page A-10 in Vernot's figures, is "Net cost 1941 of building after depreciation, 13,000,000 dollars." He arrives at that in this way. He puts the assessed value of the first two corner buildings, and at line 11 he gives 25 per cent. depreciation on the basis that that building was being erected for 16 years. Then he reduces that amount from the total. Then at line 26 he takes off 18 per cent. depreciation on the balance on the basis of 15 years, which gives him 2,840,952 dollars, against the depreciation found by the board of 2,525,000 dollars.

LORD PORTER: The Board give 14 per cent. and he gives 18 per cent.?

MR. BRAIS: Vernot gave 18 per cent. and 25 per cent. 25 per cent. was only on the remnant of the smaller buildings.

LORD ASQUITH: I still do not quite understand the 15 years upon the major portion. The main building had not been standing for

15 years in 1941, had it?

MR. BRAIS: No, my Lord, it had not been standing for 15 years, but it would appear that Vernot was applying a rule of thumb. He knew when the major buildings were erected. He worked on the foundations of the major buildings for about two months.

LORD ASQUITH: In 1928?

MR. BRAIS: In 1928.

LORD ASQUITH: It was built between 1928 and 1930, was it not?

MR. BRAIS: Between 1928 and 1930. I think I can say this with reference to Vernot's work, that, when he saw himself compelled to take the historical cost, he saw fit to do his figuring in a way which might compensate in his mind, or might be his process of compensating to some extent, for the fact that he had to take into account historical cost, which I submit he knew at that time to be entirely at variance with the practice of the City of Montreal and the practice of the Assessors' Department, because he had then before him the original figures at page 28, which had been prepared by Mr. Haquette and Mr. Hulle in 1938.

I place myself there, and I think I am entitled to place myself in the position of this assessor, who finds himself with historical cost, which he must have followed, even with the very slightest knowledge of the building, he could have had, which he knew or must have known was entirely out of line with the value of that building. I do not take him to be a particularly brilliant chap. I take him to be a chap who, however, is trying as an assessor to do something within his line of duty. He finds himself saddled with a memorandum which tells him to do certain things. If he is any kind of assessor at all he knows that that is going to lead him into absurdities. The assessor does not have to put in his statement that he took off 7.7 per cent. or that he considered the building ~~as~~ as having been built between 1928 and 1931, and he has not to put into his report how he arrives at these things. He has formulae, if you will, but, so far as the law is concerned, these comments are not required. All the assessor would have to do would be to put in a report saying, "I have ascertained the market value, I have ascertained the value of this building on a commercial basis and I have ascertained the value of this building on an appraisal basis or replacement basis, and, having done that, I have come to the conclusion that the building is entitled to such an amount off."

That was what was done in the Cedar Rapids case, when this Board sent the case back for re-assessment by the arbitrators. It came back, and the arbitrators said, "We have considered "A" as indicated to us by the Judicial Committee, "B" as indicated to us by the Judicial Committee and "C" as indicated to us by the Judicial Committee, and we have finally taken into account this other item, "D", which has been given to us, and we have arrived at a figure of (blank) dollars." That is what they said in that case.

LORD ASQUITH: Is your point that in this case he substituted 15 years depreciation for 11 or 12, which would have been proper, because he felt that in other respects the assessment was excessive?

MR. BRAIS: Yes, my Lord - that he felt that he had to start with historical cost, he was starting on a basis which to him was so completely out of line with the normal valuation basis that he saw fit to apply figures which to a certain extent, and a not very great extent, offered some palliative or compensation, and

he would not have put those figures down if it had not been for the printed forms supplied to him, which he is supposed to fill in; but that is not necessary, according to law, in any valuation.

LORD PORTER: Let us get back to what you are calling realities and what I, too, call realities. Here is a valuation by a particular process. He gives 18 per cent., and it may be, I think you are entitled to say, because he realises the disadvantages of this building. He took 7.7 per cent. instead of one per cent., which was the actual figure, again you say because he realised the disadvantages of this building and perhaps because he did not believe in the historical basis but believed in the appraisal basis. That is rather what you are saying. Is there a halfpennyworth of evidence of that anywhere in his evidence?

MR. BRAIS: There is to this extent, that he knew as well as anyone exactly when that building was built. He worked in the foundations.

LORD PORTER: You are entitled to say that he thought that on that building 18 per cent. was a correct valuation. I do not know on what basis you can defend 7.7 per cent. for that reason. I can see no evidence that he took that into consideration when getting his 7.7 per cent. His 7.7 per cent. simply seems to have been the figure he took for the principal years instead of taking the whole. Are we entitled to apply our imagination to find out what may have been his reason, when he has never admitted it?

MR. BRAIS: I am not called upon and I am not here to defend Mr. Vernot; it is not my duty; but I think I am entitled to say (in any event, I offer to this Board this submission) that Vernot, finding himself saddled with the figures left him by Mr. Munns (Mr. Munns had done all the work on the building; all Vernot had to do was to come down to a figure) was giving the facts as he knew them. He knew the facts; there is not the slightest doubt about that. He knew perfectly well that the majority of the building did not go up at that date, and, finding himself saddled with the actual condition of the building as he knew it, and finding, on the other hand, the manual, which told him to take $1\frac{1}{2}$ per cent. per year, ~~and~~ he did all he could within his power and within his conscience as an assessor to set out figures which ~~for~~ him would to a certain extent relieve his mind when he put down the value of that building, as a net cost for 1941 after depreciation, at 13,693,000 dollars, because he already had before him the work done by his own associates and predecessors in office, who had come to the conclusion that that building in 1937 was not worth more on an assessment basis than 9,000,000 dollars and some odd thousand.

Am I not in those circumstances entitled to advance the submission that the assessor, having a duty to perform, was trying to perform that duty, which was his own duty, and to arrive at some figure within striking distance, in spite of his wrong start, and in so doing he put down these figures which he knew were not in conformity with the dates of the construction of this building? I think I am entitled to submit that.

LORD PORTER: I follow the submission quite easily in the case of the 18 per cent., but I find it very difficult in the case of the 7.7 per cent.

MR. BRAIS: It would be the same thing. He put on something for the depreciation and something for the formulas of the 7.7 per cent. to try to come within striking distance.

LORD PORTER: Everybody judges by his own activities when he comes to judge what another person would do. If you were to ask me to make this estimation I can imagine myself putting 18 per cent instead of 15 per cent, but I have very great difficulty in imagining myself putting 7.7 per cent instead of 1 per cent if I knew what the facts were. That is, of course, purely a personal reaction.

LORD ASQUITH: I am not quite clear what the 1 per cent is.

LORD PORTER: It is the year by year basis.

LORD ASQUITH: On that basis how different would the cash figure be? How much better would it work out and for whom? On a year by year basis it would be only 1 per cent and not 7.7 per cent?

MR. BRAIS: Yes. I was so sure that I should be asked that that I have had those figures computed, and I will hand copies to your Lordships. (Documents handed to their Lordships).

LORD OAKSEY: Is it not the difference between 1,471,341 dollars and 181,503 dollars?

MR. BRAIS: No, my Lord. If your Lordship will permit me to explain, I am sure that you will readily follow. It is the difference of that figure after application of depreciation, after application of the other deductions and after the formula, whatever it is which is applied, 50-50 or 87.

LORD OAKSEY: Of course, you have got to do those things, but the difference between Mr. Vernot and the Board of Review is the difference between 1,471,000 dollars odd and 181,503 dollars, is it not?

MR. BRAIS: Yes, my Lord, quite. Page A-9 shows what the 7.7 per cent comes to.

LORD OAKSEY: It is 1,471,344.

LORD PORTER: I did not know about the 181,000 dollars. Is that the index figure?

MR. BRAIS: Yes, my Lord; that is right.

LORD PORTER: Then the difference is roughly 1,290,000 dollars?

MR. BRAIS: It is found at line 21 on page A-29, "Adjuster cost to index number 1939/40, 181,503 dollars".

LORD PORTER: No. What my Lord was asking was: What is the difference between their giving the 7.7 per cent and the 1 per cent? It is the difference between 1,471,344 dollars and 181,503 dollars. If you deduct one from the other it comes, I think, to 1,290,000 dollars, roughly.

MR. BRAIS: Yes.

LORD REID: That is the difference in the cost of the two buildings in 1941; but, if you want to get the replacement cost after taking off the 5 per cent and the 14 per cent depreciation, it would be less than that, would it not?

MR. BRAIS: Yes, my Lord. On the sheet which your Lordships have before you we have at the top the total historical cost. Mr. Justice MacKinnon, if he made an error, made the error of taking Mr. Vernot's figure. I have, therefore,

taken the total historical cost of 19 million dollars and the adjusted cost at 1939/40 as 181,503 dollars, which comes from the proper application, if it is the proper application.

Then we have the cost of building in the year in question. Then it is less 5 per cent allowance, which Mr. Justice MacKinnon maintained in due course, less the 14 per cent depreciation, less his own 14 per cent depreciation for extra unnecessary cost. Then you get a replacement value of so much. In the last three lines on the right hand side, when you take 50 per cent of the replacement value arrived at on that basis with the correct computation of the index and 50 per cent of the commercial value, that gives you 10,640,000 dollars, and Mr. Justice MacKinnon found 10,207,000 dollars. So the cut out, if the judgment of Mr. Justice MacKinnon is otherwise correct, is 432,672 dollars.

LORD PORTER: That is because you have reduced the amount on which you make your allowance of 7.7 per cent or 1.2 per cent?

MR. BRAIS: Yes; it is reduced, as all amounts are. I am not treating that in any other way than it is treated. I do not vouch for the figures, but they have been prepared by somebody far more competent than I am. I think that they would be correct, although errors may crop up.

Then I have had prepared a similar formula which would apply the corrected formulae in this fashion, but applying Mr. Vernot's depreciation on the building. That produces a figure so close to that found by Mr. Justice MacKinnon that I feel free to state that you are so close to that amount that, unless the figure is erroneous (it may be necessary to correct the formula, but it will be de minimis non) it comes to a difference of only about 90,000 dollars. I will have those figures made available for your Lordships tomorrow morning. I prefer to have them in that form, because they are easier to follow. I hope that your Lordships and my learned friends will also find them easier in that way.

LORD OAKSEY: When you compare this statement with page A-29, which is the Board's reiteration, you say that the only difference is that you have struck out the second 14 per cent depreciation, which is 2,525,082 dollars.

MR. BRAIS: This is based on Mr. Justice MacKinnon's figures on page 1021.

LORD OAKSEY: If you compare that figure with the figures of the Board of Review the same figures are given, but the Board of Review only charge one depreciation of 14 per cent. Therefore, these two figures differ by the amount of 2,525,000 dollars.

MR. BRAIS: It would be the other 14 per cent for extra unnecessary costs. That is quite correct. I cannot deal with the mathematics of the Board of Review with regard to the 7.7 per cent, but I totally disagree with the findings arrived at on the historical cost. I do not want to go back on the reasons why I submit that Mr. Justice MacKinnon was not at all generous when he granted only an extra 14 per cent and limited his weight to 50-50.

Then there are these other matters which have been gone through. Commercial value is arrived at on the basis found in the manual.

LORD PORTER: I should not bother about that. You get your net

revenue of 752,000 dollars. At a ten year capitalisation you get 7,028,000 dollars. There is no need to worry about that. You have got something rather better than you asked.

MR. BRAIS: Yes. I referred to that because my learned friend had said earlier that, if you had a building of long life and you got 100,000 dollars revenue from it, and if you had a building of short life and you get 100,000 dollars revenue from that, you would have to proceed on another basis. Depreciation is taken into account, because the building has a short life. There you are left with a very small net revenue, and your capital value is much lower than if you have a long lived building, where depreciation is very small, and you have more ~~more~~ net revenue left after taking off your annual depreciation to amortize your building.

LORD PORTER: You say in answer to that that this is an allowance for operating expenses, and therefore is an indication of what actual revenue you get from this building?

MR. BRAIS: There are two things. You first of all take off your operating expenses. Then you must take off from your resultant revenue an amount sufficient to amortize your capital.

LORD PORTER: Then that is taken on 10.7 per cent here?

MR. BRAIS: Yes.

LORD PORTER: Do you complain of 10.7 per cent?

MR. BRAIS: No, my Lord; I am not complaining of it at all. If we had a cheap building of short life with the same revenue then, instead of 10.7 per cent being taken off, there might be 25 per cent, and that, of course, would reduce the net revenue, and in the capitalisation it would reduce the capitalised value. The 10.7 per cent is after the allowance for amortization of the building, and very little is allowed for amortization purposes, because we have a building which is going to last a ^{long} ~~long~~ time.

Then on page A-30 the Board refers to the amount and makes a comparison with the Superintendent of Insurances amount, but does not set forth the discrepancies between that finding and the assessments previously made, which are criticised by no-one.

(Adjourned till Monday morning next).