185, said that the respondents' appeal to the Appellate Division from the order of the Ontario Railway and Municipal Board, approving plans to provide the necessary switches and turn-outs to the appellants' property in crossing a portion of the sidewalk on the west side of Yonge street, for the purpose of terminal accommodation on a site purchased by them, was on two grounds: (1) that the appellants had no operating franchise in respect of the street and adjoining land proposed to be used; and (2) that in any event the consent of the municipal council was necessary. The question of the jurisdiction of the Corporation of the County of York to revive the agreement of 1894, as affecting the franchise of the appellants, was not properly before the Appellate Division; it was not raised before the Railway and Municipal Board; if it had been raised, it would have been open to the appellants to have called evidence in answer to the case made against them; and the respondents should not be allowed now to rely upon the alleged absence of jurisdiction.

On the first ground of appeal, that the appellants had no operating franchise in respect of the street and adjoining land proposed to be used, the majority of the Court of Appeal did not pronounce a final opinion. The clause of the agreement of 1894 which determined the extent and nature of the appellants' franchise for the purpose of operating their railway—as distinct from its location and construction—was clause 7, and sub-clause 3 thereof conferred a wide authority. The works approved by the Board were within the terms of the franchise vested in the appellants under the statutory agreement, if they were acquired for the purpose of operating the railway of the appellants—and of that there could be no doubt; the finding of the Board would be conclusive on a question of fact. Clause 11 of the agreement also gave a considerable power of constructing turn-outs.

The decision of the Judicial Committee in Toronto and York Radial R.W. Co. v. City of Toronto (1913), 25 O.W.R. 315, is not inconsistent with the construction now adopted of the franchise conferred by clause 7(3) of the agreement of 1894.

The finding of their Lordships therefore was, that, for the purpose of operating the railway, the appellants had the franchise which they claimed in respect of the streets and adjoining lands proposed to be used, and they determined in the appellants' favour the question on which the majority of the Court below preferred not to give a final opinion.

Upon the second question, their Lordships referred to clauses 2, 3, 4, 5, 8, 9, 10, 17, 27, and 28 of the agreement of 1894; and said that the Board, before approving the plans of the appellants,