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IN THE PRIVY COUNCIL

22 of 1953

Council Chamber, Whitehall, S.W.

Monday, 18th May, 1953

Present;

VISCOUNT SIMON
LORD OAKSEY,
LORD TUCKER,
LORD ASQUITH OF BISHOPSTONE,
LORD COHEN OF WALMER

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF WINNIPEG

Appellant

- and

THE CANADIAN PACIFIC RAILWAY COMPANY

Respondent

T H I R D D A Y

BLAKE & REDDEN,
17, VICTORIA STREET,
WESTMINSTER, S.W.1,
PRIVY COUNCIL AGENTS.

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

MR. W.P. FILLMORE, Q.C., MR. G.F.D. BOND, Q.C., (both of the
Canadian Bar) and MR. R.O. WILBERFORCE, instructed by Messrs.
Lawrence Jones & Co., appeared for the Appellant.

MR. C.F.H. CARSON, Q.C., (of the Canadian Bar) MR. FRANK GAHAN,
Q.C., and MR. ALLAN FINDLAY, (of the Canadian Bar) instructed
by Messrs. Blake & Redden, appeared for the Respondent.

T H I R D D A Y.

MR. FILLMORE: When your Lordships adjourned, I was at page 223 and I had finished the main part of the judgment of the late Mr. Justice Dysart. At line 29 he says: "The third important question is whether the City is estopped by its conduct or by res judicata from now contending that the covenant was ultra vires the company."

MR. CARSON: May I intervene to say, my Lords, that that is not a point that we took in the Supreme Court and it is not a point that we are taking here.

MR. FILLMORE: I do not think that I need read the rest of the judgment of Mr. Justice Dysart, as regards res judicata, because it was not pressed in the Supreme Court and it is not dealt with in the judgment of the Supreme Court. If counsel for the respondent should deal with it, I can say something in reply.

VISCOUNT SIMON: Do I understand the argument at one time to have been that, however bad their point may have been and whether this is to be regarded as a common law company or a statutory company, still the present appellants, in view of their past conduct, could not rely on those arguments? That was the point, was it?

MR. FILLMORE: Yes, my Lord.

MR. CARSON: Mr. Justice Dysart put it there, and he is saying something to the same effect.

VISCOUNT SIMON: You do not rely on that argument?

MR. CARSON: I do not rely on the argument put at page 223, line 29.

VISCOUNT SIMON: It was not pressed in the Supreme Court?

MR. CARSON: No, my Lord.

MR. FILLMORE: I think that I might then pass to the judgment of Mr. Justice Adamson, at page 229.

MR. CARSON: I should perhaps add this, my Lord: We have a res judicata point, which is a different point, which is not dealt with in that section of the judgment. It is referred to in Reason 5 of our Case. The reference to the case is 1900 Supreme Court Reports, and not 1930.

LORD COHEN: That Reason is directed to the question of the validity of the exemption?

MR. FILLMORE: Yes, my Lord.

VISCOUNT SIMON: That is not dealt with in the judgment of Mr. Justice Dysart?

MR. CARSON: No, my Lord.

VISCOUNT SIMON: Was the argument presented to him? The argument, I understand, is that the Canadian Pacific Railway Company say that there has already been a decision in the Supreme Court that they are exempt.

MR. FILLMORE: Yes, my Lord. In the case that is referred to in Reason 5 the position was taken by the City of Winnipeg that the statute of 1883 only validated the issue of the debentures, but it is apparent, we suggest, from the reasoning in the Supreme

Court that the validity of the exemption was raised. That is the question: as to whether the 1883 Statute went to the whole by-law. The Supreme Court held that the 1883 Statute applied to the entire by-law, which included the exemption.

VISCOUNT SIMON: We shall come to that in time.

MR. FILLMORE: Coming to the judgment of Mr. Justice Adamson, the first page is really a review of some of the facts and the statute. I do not think that I need read those again, because they have been read to your Lordships. At line 42 he says: "In the Bonanza Creek case, there were similar supposed restrictions and 'their Lordships construe as enabling - and not intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the Letters Patent'. Even if these words were held to be words of limitation, the doctrine of ultra vires does not apply because the only remedy is in the hands of the Crown; for the Great Seal of Canada is on the document. This appears to be conclusive.

"The argument advanced against such a conclusion is that it is in conflict with the intention of Parliament and that the affixing of the Great Seal was 'accidental, unnecessary and unauthorised'. There is nothing to support such a view. The facts are entirely the other way. Section 2 of 1881 44 Victoria, Chapter 1, says: 'for the purpose of incorporating. . . the Governor may grant to them. . . a charter conferring upon them the franchises, privileges. . . .' The only way in which the Governor could grant a charter was under the Great Seal. It cannot be held that the use of the Great Seal was either 'accidental, unnecessary or unauthorised,' or contrary to the intention of Parliament. The use of the Great Seal not being unauthorised, 'the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment': per Viscount Sankey in British Coal Corporation v. The King. There are no qualifications, either expressed or implied, and there is nothing to indicate that the company was not to have unrestricted powers.

"Apart from whether the company is a statutory company or a common law company, the expressly enumerated powers give the company authority to make the agreement and execute a binding bond. I refer again to Section 4, Chapter 1, Statutes of Canada 1881, already quoted, and emphasise the significance of the last sentence of that section."

LORD COHEN: That is a wrong reference. It is not a section of the Letters Patent at all?

MR. FILLMORE: No; it is Section 4 of the charter. "It is an historic fact that financing the building of the Canadian Pacific Railway and, in the early days, making it pay, were matters of great difficulty and public concern. The statutes of those years show that provincial and municipal agreements with railroads were not uncommon. See Mr. Justice Gordon in Reference re Taxation of the Canadian Pacific Railway. It is apparent that to locate the main line and shops where they were free from taxation was important in carrying out the enterprise. Power to make this agreement is given by Section 4" - he again refers to Section 4 of the statute - "as certainly and as clearly as is possible without specific reference to the agreement. Power to make the contract was one of the 'sufficient powers to enable them to carry out the foregoing contract': Section 21 (1881) 44 Victoria, Chapter 1. It could not be held that, because such a special transaction as this agreement is not specifically mentioned, power to enter into the agreement and give a binding bond

thereunder was not 'reasonably incidental' to such powers: Lord Macnaghten in Attorney-General v. Mersey Railway. 'This doctrine (ultra vires) ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires': Lord Selborne in Attorney-General v. Great Eastern Railway Company.

"This finding makes Whitby v. Grand Trunk Railway Company, on which the City greatly relied, inapplicable. That decision turned on the interpretation of the statutory powers of the company.

"It follows that the company did have the constitutional authority to make the agreement with the City set forth in by-law 148. The company did have powers enabling it to give a valid and binding bond as required under that agreement.

"It was submitted that the company, being a public utility, chartered and subsidised as a national enterprise, and for the public good, did not have powers enabling it to either deal with its property or to enter into an agreement which fettered or incapacitated it from carrying out its objects and discharging its public duty. The principle is well stated in Birkdale District Electric Supply Company Limited, v. Southport Corporation, by Lord Birkenhead at page 364: "...if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties."

"In Town of Eastview v. The Roman Catholic Episcopal Corporation of Ottawa, Chief Justice Mulock stated the proposition as follows: 'By this section, the legislature conferred on the plaintiff corporation the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and therefore the corporation is unable by any contract to divest itself of such powers or to abridge them. They were entrusted to it for the public good, and the municipality must always be in a position to exercise them when the public interest so requires'. Montreal Park & Island Railway Company v. Chateauguay & Northern Railway, York Corporation v. H. Leetham & Sons Limited, and other cases are to the same effect.

"I am unable to find that this principle has ever been applied to a corporation with a Royal Charter. It is a phase of the doctrine of ultra vires. In principle, it is difficult to see how it could apply to a company with a Royal Charter. Even if the principle of these cases does apply to the plaintiff company, the facts do not support the contention.

"The terms of the agreement which are said to denude the company of powers essential to forever efficiently operate the railway are (1) to forever run its main line through the City, and (2) to forever maintain its main workshops within the City limits." After I have finished reading the judgments, I will want to say a word or two about the "main line" there. I think that there may be a little misapprehension. "At that time (prior to the agreement) the terminals of the divisions of the railroad and the main line were provisionally located. According to those preliminary plans, the terminal point in

Manitoba was at Selkirk and the main line was located some miles north of Winnipeg. The citizens of Winnipeg offered the company substantial inducements to come to Winnipeg, as is shown by the agreement. By Section 13 of the agreement between the Syndicate and the Government - which is recited in the charter - the company had the 'right subject to the approval of the Governor in Council to lay out and locate the line of the railway.' The main line had to be located and the shops and cattle yards would naturally be located on the main line. The main line of a railroad, when once located, is not likely to be moved. Railroad shops are not usually moved from place to place. The main line, the shops and the yards, have been in Winnipeg for 67 years.

"It is significant that it is not suggested that the company has not efficiently and effectively operated the railroad these many years. So far as the evidence in this case shows, so far as the experience of the years indicates, the main line and the shops are most advantageously located. It is not submitted that either the main line or the shops could be better or more usefully located elsewhere. As the years go by these works seem permanently and solidly established in their present locations. We are asked to assume some imaginary and unforeseen catastrophe, some emergent circumstance or condition which would require that the main line and shops be moved away from Winnipeg. The argument is that because the main line and shops cannot, under the agreement, be moved in such a contingency, the company has denuded itself of powers necessary to efficiently and effectively run the railroad.

"There are two answers to this argument. In the first place, it cannot be assumed that there will be such changes that the railroad cannot be efficiently and effectively operated with its main line and shops in their present locations.

"The second answer is that the company agreed to do something which under its charter it was required to do, not something 'incompatible with the due exercise' of its powers. In the cases cited, the companies agreed not to do something which under their charters they possibly might, in the public interest, be required to do. The important thing is that the company did what it was required to do. This is the distinction between what was agreed to by the company, in the agreement under consideration, and the facts in the cases relied on by the City." That is an argument that I will have to meet.

"I am not overlooking the fact that in 1903 the company established its enlarged shops three or four city blocks west of the old city limits, in the added area. From that it cannot be concluded that in order to operate the railroad they were obliged to move the shops; nor does it mean that it was impossible for them to continue within the old city limits. It was clearly a matter of convenience and economy. Should circumstances arise which require the main line or the shops to be moved away from Winnipeg, the only recourse the City would have would be an action for damages on the bond and covenant. The legal consequence would be that the company would be liable for what damages the City could prove, but the company would not have denuded itself of essential powers to operate the railroad.

"The argument that the company has denuded itself of essential powers fails on the facts. The agreement set forth in by-law 148 is binding and the bond given by the company in pursuance of the agreement is valid".

I think that the balance of the judgment deals with other subjects and therefore I can now turn to the judgments handed

down in the Supreme Court of Canada, which commence at page 376.

LORD TUCKER: Before you go to the judgments of the Supreme Court, to what is the learned judge referring where at page 232, line 35 he says: "The second answer is that the company agreed to do something which under its charter it was required to do, not something 'incompatible with the due exercise' of its powers"

MR. FILLMORE: By "The important thing is that the company did what it was required to do" I think that he means that they completed the contract. That is the only thing that I can see. "The important thing is that the company did what it was required to do", namely, it erected workshops.

MR. CARSON: You were referring to the obligation to run the railway efficiently forever.

MR. FILLMORE: No. They had their workshops. He says: "In the cases cited, the companies agreed not to do something which under their charters they possibly might, in the public interest, be required to do"; that is, in the cases cited they agreed to do something and it was held that they in some way fettered their statutory powers. Mr. Justice Adamson says: That is not the case here; the company did what it was required to do, namely, it did build workshops and it still did complete the contract.

LORD COHEN: I thought that he was saying that the company, in order to carry out its contract, would have to build and maintain workshops. That is what it bound itself to do.

MR. FILLMORE: Yes.

LORD COHEN: I do not think it quite faces the point that was made against them; but there it is.

MR. FILLMORE: My submission is that they went further than they could. They went one step too far when they said -----

LORD COHEN: - We will maintain them in a particular spot.

MR. FILLMORE: We will maintain them forever within the limits of the City.

VISCOUNT SIMON: Your by-law No. 148, which begins at page 289 of the Record, on page 290 contains the provision that the railway company's property is to be exempt from taxation forever. That is what you challenge as not being proper?

MR. FILLMORE: Yes.

VISCOUNT SIMON: Supposing that at the date when you tried to put a tax on it the railway company was still properly performing its part of the contract, would not the exemption from taxation forever, even if it be in itself going too far, operate up to the time that you were seeking to impose the tax?

MR. FILLMORE: My answer to that is that, to start with, the agreement was either a contract or not a contract. It had to be binding on both parties. I again turn to paragraph 8 at page 293: "Upon the fulfilment by the said company of the conditions and stipulations herein mentioned", which relates back to sub-paragraph 3 of paragraph 4 on page 292, "by the said Canadian Pacific Railway Company all property now owned" and so forth.

VISCOUNT SIMON: The Canadian Pacific Railway Company did fulfil all the conditions and stipulations, did it not?

MR. FILLMORE: I submit not, for this reason: That they delivered a purported bond and covenant in the form, but our whole point is that, if it was ultra vires to make such a covenant, if it was not a binding document, if it imposed no obligation on the railway company, because they had no power to give it, the company did not fulfil the conditions and stipulations; in other words, paragraph 8 meant that we would get a valid bond and covenant; that we would get something binding on the company.

LORD TUCKER: That may be right, but it strikes me as very remarkable if it is right: that, if the legislature chooses in its wisdom to say that a certain thing shall become law in a certain event and the event that it prescribes is that someone shall hand up a document in a certain form and the people do hand up the document in the form prescribed, it can be said afterwards that the law has not become operative. It is not merely like a bargain between two people. It is a law-making body enacting that something shall be the law in a certain event and then afterwards saying: The event has never taken place, because, although everything that we prescribed as required to happen has been done, the document which was stipulated for turns out to be worthless; meanwhile, we have had the benefit of everything and now we shall say that the document that we asked for is worthless.

MR. FILLMORE: With respect, I suggest that that view does not fully take into account the significance of the Act of 1883 by the Province of Manitoba, which said that this by-law No. 148 is valid and binding on the Mayor and Council of the City of Winnipeg. That is as far as that statute went. It was a provincial Act. It could not affect the railway company. The legislature said: This by-law is binding on the City of Winnipeg. It is just as valid as if the City had its Charter powers to pass it when it was enacted. Therefore we look at this by-law to see what the agreement was between the City and the railway company. The railway company say: We made an agreement and the terms of the agreement are shown in the by-law. The City has power to pass the by-law and they had power to enter into the contract; but let us assume that the railway company did not have power to make such an agreement. Have you then got a contract? That is the situation, as I see it. The statement of Claim pleads that the contract was entered into between the railway company and the City and that the terms of the contract are shown in this by-law. We say that one party had power to enter into the agreement, but the other did not. If it was ultra vires, it was a nullity.

LORD COHEN: You say that the Manitoba Act conferred powers on the City, but could not enlarge the powers of the respondent?

MR. FILLMORE: No, my Lord; it could not.

LORD TUCKER: The Manitoba Act is a matter which has to be taken into account. It may be relied upon by each side possibly; but before we get to the Manitoba Act, just let us deal with the City of Winnipeg itself. It has legislative powers to pass a by-law and it says that in a certain event, if the company hand me a certain document, the by-law exempting them from taxation shall take effect. Can it afterwards say: The very document that we had insisted upon as a condition to the by-law taking effect has been handed to us, but it is a document which has no value?

One goes round in a circle, I dare say.

MR. FILLMORE: I would submit that we have to interpret an agreement by the words used.

LORD TUCKER: On top of that we get the Manitoba Statute, one of the purposes of which may have been to validate this particular point. Somebody may have realised that the City of Winnipeg had a completely worthless document, but, as they were going to get great benefits under it, the Manitoba Statute validates the by-law.

MR. FILLMORE: No. The statute in the preamble, recites: Whereas doubts have arisen as to the powers of the City to pass the by-law.

LORD COHEN: I should doubt whether a Manitoba Statute anyhow, would have power to vary the powers of the Canadian Pacific Railway.

LORD TUCKER: Yes; but might they not have power to say: Although the City of Winnipeg has stipulated for a worthless document, none the less the by-law exempting them is to be effective?

MR. FILLMORE: I would submit not. It says that by-law No.148 is valid and binding on the City of Winnipeg.

LORD COHEN: I should think that it is much more likely that no one doubted at that time the powers of the Canadian Pacific Railway, until at a later stage the City of Winnipeg chose to cast doubt upon it.

MR. FILLMORE: I think that that is no doubt the case: that somebody read this case of Whitby v. Grand Trunk Railway Company and got an idea.

LORD ASQUITH: If one looks at page 48 of the appendix, on which the Act of the Province of Manitoba is set out, it would appear that half-way through paragraph 6 it validates, I should have thought, the undertaking of the company as well as the actions of the City of Winnipeg. It says at line 22: "By-law No.148 to authorise the issue of debentures granting by way of bonus to the Canadian Pacific Railway Company the sum of 200,000 dollars in consideration of certain undertakings on the part of the said company." That is validated, I suggest, by the words: "be and the same are hereby declared legal". That surely validates, not only the action and undertaking of the City of Winnipeg, but the action and undertaking of the Canadian Pacific Railway Company.

MR. FILLMORE: It says "in consideration of several undertakings" -

LORD ASQUITH: If it validates by-law No.148 and that by-law deals with both subject matters, surely both subject matters are validated, even apart from the language of the validating section?

MR. FILLMORE: The "undertakings" refer to the physical works to be constructed.

LORD ASQUITH: And their maintenance forever.

MR. FILLMORE: Yes.

LORD OAKSEY: Could a provincial statute affect a Dominion railway company?

MR. FILLMORE: No, my Lord.

LORD OAKSEY: Could it give it power?

MR. FILLMORE: No; it had no jurisdiction whatsoever over railways.

LORD COHEN: I thought that Section 91 and Section 92 read together made it plain that railway undertakings were under the jurisdiction of the Dominion and not of the province.

MR. FILLMORE: Inter-provincial railways.

LORD ASQUITH: I was referring to what this statute purported to do.

MR. CARSON: We are not suggesting that the Manitoba legislature had any jurisdiction in relation to the Canadian Pacific Railway Company.

VISCOUNT SIMON: The question which is not quite clear to me is the question which I put to you. It is probably because I have not followed the documents; but at page 290 of the Record you see that by-law No.148 professes to exempt the railway company's property from taxation forever. What I do not carry in my mind is whether there is a subsequent by-law which professes to alter that.

MR. FILLMORE: No, my Lord.

VISCOUNT SIMON: Then the situation was that when the City of Winnipeg came and demanded tax from the Canadian Pacific Railway, the railway company had performed the consideration, in that it had given the bond and established its stations and yards in Winnipeg; so that for the time being, at any rate, they had done that which they were required to do?

MR. FILLMORE: Yes. Perhaps I did not fully appreciate your Lordship's question. In 1948 the City repealed or attempted to repeal by-law No.148.

VISCOUNT SIMON: That is what I wanted to see.

MR. FILLMORE: That is to be found at page 368. We repealed it or whatever the legal effect may be and then attempted to tax.

VISCOUNT SIMON: I am obliged. That is the position that I had in mind.

LORD TUCKER: The repeal has never been validated by provincial legislation?

MR. FILLMORE: No, my Lord. I think that probably this is the situation. The City could perhaps repeal a by-law, but, if there is a binding contract, we could not rescind the contract by repudiation. I do not go that far. We might repeal the by-law, but, if there were a binding obligation, if there were a contract - if there is anything in this point, the City cannot enter into a contract, but, if there is a contract, of course we could not rescind it the next day by repealing a by-law. I do not go that far; but I have to make the argument that at the date when the alleged agreement was entered into in 1881 the railway company had no power to give the covenants which it had agreed to give.

LORD OAKSEY: I do not know that it much matters, but could you repeal by-law No.148 in face of the Manitoba Statute? You were bound by the Manitoba legislation?

MR. FILLMORE: The Act says that the by-law is valid and binding on the Mayor and Council of the City of Winnipeg. I submit that, as stated in the case of Ontario Power Company of Niagara Falls v. Stamford Corporation, which is 1916 Appeal Cases, the effect of that was merely to confirm the fact that the City had statutory power to pass the by-law. It put the City in the same position as if the provincial statute giving power to the City had at the time given the City power to enter into such a contract. In Ontario Power Company of Niagara Falls v. Municipal Corporation of Stamford, reported in 1916, 1, Appeal Cases, page 529, Lord Buckmaster says at page 534 that in the following year, 1905, a statute was passed "entitled 'An Act to confirm by-law No.11 of the Corporation of the Township of Stamford'. This Act, after reciting the petition of the appellant company representing that by-law No.11 of the municipal council should be confirmed and made legal and binding, in accordance with the intention and meaning thereof, contains in Section 1 the following passage: 'By-law No.11 of the Municipal Corporation of the Township of Stamford, set forth as schedule 'A' to this Act, is legalised, confirmed and declared to be legal, valid and binding, notwithstanding anything in any Act contained to the contrary'. By-law No.11 is then scheduled to the Act.

"Now it is important to observe that the Act does not purport to confirm any agreement whatever between the parties; it purports only to legalise and make binding the by-law, which was not legal and could not be made binding without statute, for the reasons that have been already set out".

I submit that that was the effect of the Act of 1883, which declared that by-law No.148 was legal and binding on the Mayor and Council of the City of Winnipeg.

VISCOUNT SIMON: Do you contend that, if the City of Winnipeg had made an agreement with the railway company that they would not put a tax on the railway company's property for five years if for five years the railway ran its main line through Winnipeg, that would have been ultra vires?

MR. FILLMORE: It is difficult to say where you should draw the line. It may be a case of de minimis non curat lex, if you get down to too short a period; but it seems to me that it gets almost to a question of onus. Let me put it this way. Where you find a perpetual covenant that they will do something forever and maintain something, that is on the face of it something which is out of the ordinary course of business and it would put the onus on those who are upholding the power to show beyond doubt that the company had such power, when you get into that class of case; but, if you get down to two or three years, that might be called an ordinary business contract or an ordinary business transaction.

VISCOUNT SIMON: You rely on the duty of the Canadian Pacific Railway so to conduct its business as to serve the public advantage and their own advantage, and the argument is that it could not be to their own advantage to anchor themselves in the City of Winnipeg forever; but that argument would seem equally to apply if they undertook to anchor themselves there for five years or for five months.

MR. FILLMORE: I appreciate the point; but it seems to me that there must be a dividing line somewhere between what might be called an ordinary commercial transaction, the sort of contract that directors or the managers of a company would enter into from day to day and from time to time, and on the other side of the line

you get a contract which, if they say: We will maintain these works forever, if prima facie something that is outside the powers of the directors and beyond the powers of the company, unless there is something specifically in the charter giving them that power.

VISCOUNT SIMON: Supposing that the bargain had been that the City had said to the Canadian Pacific Railway Company: As long as you run your main line through Winnipeg and as long as it is good railway management to do so, you shall be exempt from taxation, would that have been objectionable?

MR. FILLMORE: I do not think so, my Lord, if that had been the by-law: As long as you keep your principal workshops here, we will not tax you; but I am looking at it from the other point of view. That, however, is not the agreement. We cannot make a new agreement. The agreement was that, upon fulfilment of the conditions and stipulations herein before mentioned, you will be exempt; and I am submitting that the agreement which they say that they entered into by the bond and covenant which they say that they got was never binding on the railway company, because they had no power to enter into them.

Might I also mention that, for example, under the Consolidated Railway Act, and even under the agreement, any railway company desiring at any time to change the location and so on of its line may do so. Once you agree to maintain important works for any considerable period in one locality it becomes a question of whether you have not agreed to give up something - agreed not to exercise some statutory powers.

I think that I might as well say here and now that there is a case of Birkdale District Electric Supply Company Limited v. Corporation of Southport, which is reported in 1926 Appeal Cases, page 355, in which it was held that the contract entered into by the Electricity Supply Company was an ordinary business transaction - one which the directors of the company had a right to enter into.

The question in this case, as I see it, is whether this was that type of contract or whether it falls within that line of cases where it has been held that it amounts to an attempt to fetter the statutory powers of the company.

The headnote to that case reads in part as follows: "By a supplemental deed of the same date, made without the approval of the Board of Trade, the company agreed with the Birkdale Council not to charge higher prices than those charged in the adjoining borough of Southport. In 1911 the Birkdale District and the contractual rights and obligations of the Birkdale Council were transferred to the Southport Corporation, but the company still remained electricity undertakers in Birkdale.

"The company having recently begun to charge higher prices than the Corporation, the Corporation brought an action to restrain the company's breach of agreement. The company contended that the supplemental agreement was ultra vires both under the Electric Lighting Act, 1882, Section 11, which prevented them divesting themselves of their statutory powers without the consent of the Board of Trade, and under the general law applicable to statutory undertakings: Held, that the agreement did not offend against the Electric Lighting Acts of 1882 and 1909, and that it was not void at common law as being incompatible with the due discharge of the company's duties".

The question is: Is the contract between the railway company and the City of Winnipeg that kind of contract, or does it fall within the class of contracts which the courts have held to be

beyond the powers of the company.

The Earl of Birkenhead reviews the facts and explains the nature of this contract, and at page 363 he says: "My Lords, as I have already pointed out, these provisions suggest rather an enforcement of the company's powers than a denudation of them. It is the company who proprio vigore are putting pressure on their consumers to accept the flat rate in order to escape the demand based on the maximum system. It is the company who are to reduce the flat rate to the borough of Southport. It is the company who are to deliver to everyone of their customers the notice that he will be charged the maximum demand unless he elects to be charged on the flat rate system. This arrangement may be terminated in four months. The price charged by the borough of Southport to its customers is, no doubt, the price which this company desires to force its customers to pay. That may have been arranged with the Corporation of Southport. There may have been a good commercial reason for the plan, for instance, it may have prevented competition between those two sets of undertakers. What, in fact, the company does is this: they say to their consumers - you must pay us the maximum prices which we are entitled to demand and be paid, but if you so elect you will only be charged a flat rate within our limit which we are also entitled to be paid. I am quite unable to see how the fact that the flat rate so offered for acceptance is the same as that demanded and taken in the borough of Southport amounts, on the part of the company, either to an abandonment of their powers, or, to the commission of an act incompatible with the just and proper exercise of those powers. No evidence has been given that the proposed flat rate is oppressive, or that its exaction interfered with or checked the industrial success of the company.

On the next page we find a reference to the other class of case. His Lordship says: "The appellants have strongly relied on a well established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties".

There is the situation, my Lords. The question is: Into which class of case does this so-called agreement between the railway company and the City fall; is it an ordinary commercial transaction or is it a case such as is mentioned by Lord Sumner at the bottom of page 371, where he says: "There is, however, another aspect of the Ayr Harbour case which ought to be loyally recognised. It is certainly some ground for saying that there may be cases where the question of competence to contract does not depend on a proved incompatibility between the statutory purposes and the user, which is granted or renounced, but is established by the very nature of the grants or the contract itself".

That is the question: Does it come within the class of business contract which directors can make or is it apparent from the agreement, from the statute and from the circumstances that there is actual incompatibility between the obligations of the railway company and the contract which they have entered into?

In the case that is reviewed in the Birkdale case, the case of York Corporation v. Henry Leatham and Sons, it was held that the agreement was on its face beyond the powers of the company.

LORD ASQUITH: That case has been commented on, has it not, and qualified?

MR. FILLMORE: Yes. It was criticised by Lord Sumner at page 374 of the Birkdale District case. He says: "In York Corporation v. Henry Leatham & Sons there were two navigations, both vested in the Corporation of York, which appear to have differed somewhat in their incidents, the Ouse Navigation and the Foss Navigation. The original Act of 1726, which authorised the former" and he reviews the facts.

LORD COHEN: Before you leave the Southport Corporation case, there is a passage very much in your favour at page 375, where Lord Sumner says: "It appears to me that no line can be drawn between the agreement now in question and any ordinary trading contract".

MR. FILLMORE: I was going to refer to that when it came to my argument. Lord Sumner says on page 374: "My Lords, with all respect to the learned judge, I am unable to adopt this reasoning. As I have said, it is no part of the intention of the legislature that the appellants should make a profit or avoid a loss. If, again, the agreement is to be ultra vires at all, it must be ultra vires all through. In cases like the Ayr Harbour case the land acquired under statutory powers was fettered in the undertakers' hands from the time the agreement was made. In the present case the company's activities have not yet been and may never be impaired by the agreement at all. So far it may have been and probably has been safe and beneficial. Now, then, can it have been ultra vires hitherto?" I would like to comment on that passage. I think that it is an obiter dictum and, after all, you cannot judge ultra vires by the result. Surely you cannot say: The agreement has been beneficial up to date; it has been profitable for the company and, therefore, it is intra vires; and then, if they make a bargain and it turns out to have been a poor bargain, you cannot say: It is ultra vires.

LORD OAKSEY: That seems to dispose of your observation, does it not, that de minimis non curat lex would apply? It would mean that it was ultra vires from the moment that it was made and therefore could be set aside immediately.

MR. FILLMORE: Yes.

Then towards the bottom of the page, in the paragraph to which my Lord Cohen called my attention, Lord Sumner says: "It appears to me that no line can be drawn between the agreement now in question and any ordinary trading contract, if the appellants are right in testing the validity of the contract by its ultimate and theoretic possibility of bringing upon them a crippling loss. I do not think that a speculation as to the possible effect of what they have done is a legitimate ground for relieving them from their bargain."

It seems to me that my position here is, first, that the respondent was incapable of complying with the conditions precedent which are laid down by paragraph 8 of the by-law, which says: "Upon the fulfilment by the said company of the conditions and stipulations" the company will be exempt from taxation.

LORD OAKSEY: What would be the position supposing that the City offered the exemption forever to the railway company? Could the railway company not accept it without an Act of Parliament, or could it go to the courts and get a dispensation?

MR. FILLMORE: I think that the City might say to the railway company: So long as you maintain your principal workshops in the City of Winnipeg, you will be exempt from taxation.

LORD OAKSEY: Supposing that the City were to say: We want your works here forever and we will then give you an exemption forever. What is to be done then?

MR. FILLMORE: I find it hard to visualise that, because here you have a covenant on each side. If there is to be a contract, each side must be bound. This by-law No.148 is, I submit, more than an offer by the City to the railway company.

LORD OAKSEY: You are suggesting that they made the offer and you are saying that the Canadian Pacific Railway could not accept it?

MR. FILLMORE: I say, if the offer was: We will exempt you from taxation forever, if you will agree to forever maintain your workshops in the City of Winnipeg, the railway company could not accept such an offer, because they had no power to give such an agreement.

VISCOUNT SIMON: You say that it does not come within the idea of an ordinary trading contract?

MR. FILLMORE: Yes.

VISCOUNT SIMON: I think that I follow the argument. Can we see what the other judgments are?

MR. FILLMORE: If your Lordship pleases. At page 376 we come to the judgment of Mr. Justice Locke in the Supreme Court of Canada.

LORD COHEN: It starts at page 379 really, does it not, where he says: "The first question to be determined is raised by the plea in the Statement of Defence of the City of Winnipeg"?

MR. FILLMORE: I was going to say that perhaps I need not read page 376, because Mr. Justice Locke merely reviews the facts and refers to certain parts of the agreement. I thought that I might start to read at line 29 on page 377. He says: "What was meant by the word 'charter' in this section was immediately made clear. On February 16, 1881, letters patent of incorporation under the Great Seal of Canada were issued incorporating the Canadian Pacific Railway Company. There is apparently no explanation as to why this procedure for the incorporation of the company was followed rather than that contemplated by the contract. While Section 4 of the Schedule referred to above indicated that the proposed company was to have the widest powers to enable it to carry out its undertaking and to take advantage of the various privileges and advantages which it was to receive from the Crown, it was perhaps considered advisable that it would be preferable to vest in the company the powers of a common law corporation restricted only in the matter defined by the contract and the Schedule rather than to enumerate those powers which it was to be authorised to exercise. But this is mere speculation. If, therefore, assuming that the powers of the company are only those which it would have enjoyed had the incorporation been by a special Act of Parliament, the contract entered into by it with the City of Winnipeg was beyond its powers, it would be necessary to determine a second question, i.e. as to whether the railway company has all the powers of the natural person.

"By its statement of claim, the railway company alleges" so

and so. I think that that is all a recital of facts which has been made for us before. He refers to condition (3) of the by-law and then clause 8 of the by-law, "Upon the fulfilment by the said company" and so forth, which has already been read.

I think that, if it is agreeable to your Lordships, I can pass to page 379, line 11, where he says: "The first question to be determined is raised by the plea in the Statement of Defence of the City of Winnipeg that the railway company: 'had no right, power or authority under its charter or otherwise, to make, or execute, or deliver such a bond and covenant', referring to the bond and covenant required to be given by the company under condition (3) above referred to, and by a further plea that the railway company was without power under its charter or otherwise, to agree to build within the City of Winnipeg, or at any other place, its principal workshops for the main line of its railway within the Province of Manitoba and to continue them forever.

"For the railway company, it is contended that the incorporation being by letters patent, under the Great Seal of Canada, it has all the powers of a natural person and that the doctrine of ultra vires does not apply to it and reliance is placed upon the judgment of the Judicial Committee in Bonanza Creek Gold Mining Company v. The King. For the City, it is said that the powers of the City are those only which it would possess if incorporated by an Act of Parliament and that the principle stated in Ashbury Railway Carriage and Iron Company v. Riche applies.

"The learned Chief Justice of the Court of King's Bench was of the opinion that the railway company had all of the powers of a common law corporation" and then he reviews it.

In the next paragraph he says: "In the view I take of this matter, it is unnecessary to decide whether or not the Canadian Pacific Railway Company is vested with the powers of a common law corporation. I think that, if it be assumed for the purpose of argument that the powers of the company are simply those it would possess if the incorporation had been by statute and the terms of the letters patent contained in that statute, to enter into the bond and covenant was within those powers.

"By the contract of October 21, 1880, which was approved and ratified by Chapter 1 of the Statutes of 1881, the contractors assumed the vast obligation of building the major portion of the proposed railway through a country largely unsettled and following a route only generally defined and thereafter together with those portions of the proposed road to be constructed by the Government to: 'thereafter and forever efficiently maintain work and run' the railway. While certain of the terminal points of the line then in part under construction were to be preserved, the company was to have the right, subject to the approval of the Governor-in-Council, to lay out and locate the proposed line and advantage was taken of this provision by abandoning the proposed route running generally westward from Selkirk and establishing the main line of the railway on a line which included the City of Winnipeg and changing the route through the mountains from the Yellow Head to the Kicking Horse Pass.

"By Section 21 of the contract, the company to be incorporated was to have 'sufficient powers to enable them to carry out the foregoing contract' and it was apparently realised that wide powers must be given to the proposed company to enable

it to advantageously carry out its terms.

"It was, in my opinion, for this reason that Section 4 of Schedule A to the contract was expressed in such wide language. It is clear that when the contract was signed, that the proposed incorporation was to be by an Act of Parliament which, I think, explains the very broad powers described in paragraph 4. It would have been quite unnecessary to particularise these powers in this manner had it been contemplated in 1880 that the incorporation should be by letters patent under the Great Seal, without any restriction upon the powers which such an incorporation would have vested in the company.

"Whatever the reasons which led to the grant of letters patent and whether or not it was intended by that Act to vest in the company the powers of a common law corporation, paragraph 4 of Schedule A was incorporated verbatim in the letters patent. Thus, there was conferred upon the company by Section 4 of the letters patent all the powers necessary or useful to enable it to discharge its obligations under the contract.

"It was, in my opinion, for the railway company to determine the location of its principal workshops for the main line of the Canadian Pacific Railway within Manitoba and the branches radiating from Winnipeg and that these workshops should be continued in such location as it should determine and to conclude as favourable a bargain as could be negotiated with the city of municipality where these were to be located.

"By the Fall of 1881 the directors of the company had evidently reached the conclusion that Winnipeg, by virtue of its location, was to be the principal city in the Province of Manitoba and, thus, the most suitable place from which branch lines such as the line running south to Morris and westerly through the Pembina Mountains areas, should have their Eastern terminus. The company was not asked by the City in exchange for the promised tax exemption and the grant of the debentures to maintain its only railway workshops for the main line in Manitoba in Winnipeg, but merely the principal workshops: others might be constructed elsewhere in the province. The further obligation was to erect large and commodious stock and cattle yards suitable and appropriate for the central business of the main line and the several branches as mentioned in Section 3 of the by-law, language which was incorporated in the covenant rather than that of paragraph 2 of the preamble to the by-law which referred to the 'principal workshops and stockyards'. The power of the company to agree to build a general passenger depot upon a designated site in the City is not, of course, questioned.

"The comment of Lord Selborne on the decision of the House of Lords in Ashbury Railway Company v. Riche in Attorney-General v. Great Eastern Railway Company is that the doctrine of ultra vires as explained in the earlier case is to be maintained but that it should be reasonably understood and applied and that whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised ought not, unless expressly prohibited, be held by judicial construction to be ultra vires. There is nothing in the letters patent or in the Act of 1881 which prohibited the railway company from entering into such a covenant as the one here in question. It was, in the language of Section 4, undoubtedly 'useful' to the company to enable it to carry out its contract to construct the railway and thereafter to operate it in perpetuity to give such a covenant, in order to obtain

such extensive financial assistance and exemption from municipal taxation. In my opinion, the contention, that it was beyond the powers of the Canadian Pacific Railway Company to enter into the bond and covenant, fails".

That is all of the judgment of Mr. Justice Locke on that subject.

I then turn to the judgment of Mr. Justice Rand, at page 386. He says: "Of the several points raised, I shall deal with only one: the authority of the company to bind itself forever to maintain the principal workshops for the province in the City and the legal situation resulting from its absence.

"On the first branch of the argument, that is, whether the company from its incorporation by letters patent under the Great Seal of Canada, possesses all the powers of a common law corporation, the controlling consideration, as decided by the Judicial Committee in the Bonanza Creek Company case, is the source from which the incorporating efficacy is drawn, whether from the statute or from the prerogative. On this, I should say that that source cannot be the prerogative alone for the reason that the authority to construct a railway, as given to the company, could not arise from it. The incorporation not only creates the capacities of the company but clothes it with essential powers and some of these latter impinge on common law rights and liberties for which legislation is essential. Nor can I infer from the statute an intention to authorise faculties proceeding from both sources: the incorporation was of an entirety of objects, capacities and powers; and although special powers can by legislation be conferred on a common law corporation, I know of no authority under the prerogative to add capacities to a statutory corporation.

"Then it is argued that the scope of the statutory endowment was sufficient for the covenant given. Viewing the question from the standpoint of the interest of the company as a private enterprise, it is difficult to see the creation of any obligation that violates the original compact of the shareholders inter se; but the principle of ultra vires, in addition to the general public interest in the authorisation of corporate action, has public aspects of special significance in enterprises of the nature of that before us. Here was an undertaking conceived primarily for a high national purpose; it was designed as a bond to complete the scheme and organisation of a Dominion extending from ocean to ocean by furnishing the essential means for the settlement and utilisation of the resources of its western half; and the company was made the beneficiary of substantial assistance from the public in money, lands and privileges. That object indeed exemplifies the importance of the initial construction; once permanent works were established, they would tend to draw to themselves an adjustment of other services and arrangements and the system of operations would become a settled accommodation which, in ordinary circumstances, would deepen its rigidity with the years. All this, in turn, would have its reflex in shaping the course and development of the social and business life of the community which it was to serve. But unusual circumstances, as at times eventuated in the early days of railway projects, might necessitate changes in transportation plans and arrangements and we might have such a situation as was presented to the courts of Ontario in Whitby v. Grand Trunk Railway Company.

"I do not find it necessary, however, to decide the question. I will assume that the company could not bind itself to continue

forever the workshops, and the question is, what follows from that. The entire transaction must be kept in view, and for that purpose it is desirable to summarise the details."

I do not think that I need go over those again and, with your Lordships' permission, I will pass to line 20 on page 388. The learned judge there says: "The company was clearly within its powers in building the branch line, depot, workshops and stockyards as it did; it would be absurd to say that the City could object to any part of that performance on the ground that the obligation to make it was invalid: and the remaining obligation to continue the workshops is clearly severable from that for their construction. But on the assumption I am now making the instrument cannot be said to furnish the entire consideration to which the city was entitled and there is, to that extent, a partial failure of a promissory character, although the performance has to this moment been completely and validly maintained.

"The question of law then is this: whether a partial and severable failure of promissory consideration, followed by an entirety of irrevocable execution of the remaining consideration to the benefit of the other party, can be the ground on which a continuing and substantial obligation on the part of the latter can be repudiated. Rescission is obviously impossible as it has been from the moment the first work was completed. As early as 1888 the City could have taken the ground it now takes: and it is only the accident of the present search for grounds of escaping taxation exemptions that discloses the flaw to-day.

"The significance of the contract to the City lay in the location of the railway and its centres of administration. The City was at the beginning of its life: it was seeking to establish itself as a focal point in the massive development of the West which was then in prospect. At that stage the action of the railway was of controlling importance. Transportation was the paramount agency in creating and promoting business and population groupings and probably no single factor has contributed so largely to the growth and wealth of what is now a great metropolis than the measures dealt with in the contract before us. The railway system is now too deeply integrated with the settled life of the province and the entire West to permit of any major readjustment: the City has attained a dominant position on the prairies, and the removal of the workshops could have no more than a minor effect on its economic life or interest. In other words, the City having absorbed irrevocably the substance of the benefit under the contract seizes upon this item which may never manifest itself in default, and which even in actual breach would create little more than a ripple on the surface of its economy, to justify repudiation notwithstanding that the courts, as I shall endeavour to show, could deal effectively with such a default should it ever arise.

"Both parties assumed the capacity of the company to make the covenant and acted under a common mistake of law; as executed it was in the precise form stipulated by the by-law; and it was accepted as a fulfilment of one of the conditions upon which the exemption from taxation became effective. On the strength of that acceptance, the construction of the workshops and stockyards was carried out. In these circumstances, the City is now estopped from taking the position that the exemption clause in the by-law never became effective; the coming into force of that provision is in the same category as to effectiveness as was the delivery of the bonds to the company: it is the same as if a new by-law had then been passed. The exemption provision became therefore and remains in effect, and in the

absence of its repeal, there is to-day no authority in the City to tax the company's property".

VISCOUNT SIMON: What does the learned judge mean when he uses the words: "It is the same as if a new by-law had then been passed"?

MR. FILLMORE: I do not know. I am just trying to follow that. I am afraid that I cannot answer that question, my Lord.

"The principle of enforcement in equity of contractual obligations with compensation is long established, and its employment here is dictated by the reasons on which it is based. Its general application has been confined to contracts for the sale of land. But the sale of land was part of the consideration here; the remainder was and is an indirect interest in and a beneficial consequence resulting from the operation of works on land. The controversy is broadly, then, within the scope of matters in which the principle has in the past been employed: there is not merely a close analogy, the actual items of land and interest constitute the basic subject-matter.

"The circumstance that differentiates the situation here from the generality of ultra vires contracts is the characteristic of time attached to the physical acts of performance. Those acts by both parties are intra vires: the exemption was confirmed by the legislature; the workshops may, in the discretion of the company, be continued within the city limits forever, indeed the existing circumstances may in fact compel that performance, and the city would then receive from the company the whole of what, by the contract, it sought. It is only the substitution of obligation for discretion in that continuance that raises the difficulty.

"The company could, at the outset, have validly accepted and can to-day accept the future tax exemption on the condition that if at any time the workshops should be removed, the amount of the taxes so saved would be recouped to the city to the extent of damages it might suffer from the removal: it would be the return of a benefit conditioned on a failure to maintain a work within the power of the company to create, maintain, or abandon. Such an arrangement would, I think, be clearly within the company's powers expressly or impliedly conferred by the incorporating statute as well as the Railway Act.

"That is closely analogous to one case of specific performance with compensation. When a vendor seeks to enforce an agreement, compensation is a voluntary condition of relief; the vendor enters court offering to give up a portion of the price of what he promised to and cannot fully convey. This may, roughly, be equivalent to damages, but it is not in law of that character.

"Such a mode of adjustment may here be said to substitute a conditional for a promissory term in the contract: instead of mutual promises to maintain an exempt, the obligations would be, to exempt so long as the workshops are maintained and to recoup should that cease. It is modifying the legal situation no doubt, but that would not be novel in equitable administration: all equitable relief modifies the legal situation; and since, at law, the parties would now be left as they are, that neither of the outstanding obligations would be enforced, it is just such a result that the principle of relief against unjust enrichment is in every case called in to redress.

"In this exceptional conjunction of circumstances, to carry a rule of ultra vires to an ultimate logic would, in the

presence of the institution of equity, be its reduction to absurdity. At such a point, logic must yield to common sense as well as to justice. The city, by reason of these matters, has drawn upon itself an equity of obligation; it would be inequitable and unjust while it is enjoying to the full the actual benefit for which it bargained to refuse to pay the price for them. There is no question of enforcing an ultra vires promise against the company nor of exacting performance by the city as the consideration of an ultra vires promise. The position of the City before any step was taken to withdraw the exemption, a position of full current but unenforceable performance on both sides, can in substance, from now on, be preserved by the application of established principles; and as equity looks at the substance and not the form of what is presented to it, to maintain that position would accord with the basic reason for equitable interposition at any time

"As the company asserts the covenant to be good, it is as if it were proffering an undertaking, in the event of the removal of the workshops from the City, to recoup to the City out of the benefit received through the future tax exemption, such amount of compensation as the Court might determine to be the loss the City might thereby sustain; on that basis, the declaration and injunction asked for should go"

VISCOUNT SIMON: I find that rather elaborate; but, supposing that Mr. Justice Rand had been the only judge, what order would he have made in this action? The Canadian Pacific Railway asked for an injunction to restrain the corporation from taxing them. If Mr. Justice Rand had drawn up the order, what would it have been?

MR. FILLMORE: I am afraid that I find that pretty difficult. I do not intend to try to discuss or support the observations which the learned judge makes on equitable principles.

LORD COHEN: Did any other judge, either in the Court of Appeal or in the Supreme Court, adopt this argument?

MR. FILLMORE: Mr. Justice Kellock touches on the same point, but not to any extent. I must confess that I am not going to try to ask for any relief based on the circumstance or reasons put forward by Mr. Justice Rand. I find it a little difficult to follow.

MR. CARSON: I think that there is an answer to the question put by my Lord Simon, when Mr. Fillmore stopped reading at page 390, line 40. He says: "On that basis, the declaration and injunction asked for should go".

VISCOUNT SIMON: Does that mean that the declaration and injunction would be granted, but certain conditions laid down.

MR. CARSON: He does not suggest so. He merely seems to approve the declaration and the injunction.

MR. FILLMORE: On the basis that, if they moved the shops away, they would give us compensation.

LORD COHEN: I think that it is on the basis that as things stood the company was entitled to the relief for which they asked. If at a later date they were to move, apparently you would have a separate cause of action against them. That is what he seems to be suggesting.

VISCOUNT SIMON: That is what he seems to have meant. What does

Mr. Justice Estey say?

MR. FILLMORE: On pages 390 and 391 he reviews the facts. On page 392 he continues his review and at line 45 he says: "The language of this Section 2 is consistent with the view that Parliament intended the letters patent should be issued by the Governor-General in the exercise of the prerogative right. At the outset it is provided that 'For the purpose of incorporating . . . and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof. . . .' This wide and comprehensive language is not limited or restricted by the provision 'a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract . . .' The position is similar to that in the Bonanza Creek case, where, though granted in accord with the statute, the letters patent were granted by the Lieutenant-Governor of Ontario in the exercise of the prerogative right. The company, therefore, was endowed with the powers and capacities of a natural person, subject to any limitations or restrictions imposed by the statute.

"Moreover, while this alternative method is provided in the same statute in which statutory effect is given to Section 21 of the contract, under which it was contemplated incorporation would be by statute, it was, as already pointed out, arranged for at a date subsequent to the contract. In these circumstances the intent and purpose of Parliament in making this alternative provision would be to provide something different in effect from that of incorporation by statute, and in the absence, as here, of any specific explanation, that intent and purpose would appear to be that if letters patent were issued the Governor-General would do so in the exercise of the prerogative right and thereby give to the company the powers and capacities of a natural person, possessed only by corporations created in that manner, subject to such limitations or restrictions as the statute imposed.

"The position is somewhat analogous to that in Elve v. Boyton, where it was contended that a company incorporated by letters patent pursuant to a statute was not incorporated by an Act of Parliament. Lord Justice Lindley, with whom Lord Justice Lopes agreed, stated at page 508: 'The answer is, it would have been impossible, without the Act of Parliament, to create such a corporation by that charter or any other charter. The real truth is that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the charter'.

"The language of Lord Justice Lindley is particularly apt as, apart from Section 2 above quoted, the company could not have been, in 1881, incorporated by letters patent. Parliament had, in 1877, expressly prohibited that possibility by providing that the incorporation of companies for the 'construction and operation of railways' could not be effected by 'Letters Patent under the Great Seal'. When, therefore, it was decided that the alternative method of incorporation by letters patent should be made available, it was necessary that such be provided for by an express statutory provision, as indeed it was in Section 2.

"This statute was assented to on February 15, 1881, and on the following day letters patent were issued under the Great Seal of Canada incorporating the company. These letters patent

recited the contract of the 21st of October, 1880, and the foregoing Section 2 and that 'the said persons have prayed for a charter for the purpose aforesaid' and then provided: 'Now know ye, that, by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf, We Do, by these our Letters Patent, grant, order, declare and provide . . . are hereby constituted a body corporate and politic, by the name of the "Canadian Pacific Railway Company"'.

"The reference to statutory authority in the foregoing paragraph immediately followed by the words 'and of any other power and authority whatsoever in Us vested in this behalf', with great respect to those who entertain a contrary view, leads rather to the conclusion that the Governor-General, in issuing the letters patent, acted not only pursuant to the statutory but to another authority separate and apart therefrom which, in the circumstances, could be only the prerogative right. (6 Halsbury, 2nd Edition, page 459, Section 547.) The words 'in this behalf', again with great respect, do not, in this context, refer to the contract but rather the power and authority to issue letters patent for the incorporation of companies.

"In the Bonanza Creek case, the letters patent, apart from the inclusion of the word 'Statute' instead of 'Act', included the following identical words that appear in the foregoing: 'under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf'.

"The phrase 'in part recited Statute' in the Bonanza Creek letters patent, refers to the Companies Act of Ontario (Revised Statutes of Ontario, 1897, Chapter 191), Section 9 of which reads, in part, as follows: 'The Lieutenant-Governor in Council may, by letters patent, grant a charter . . . creating and constituting . . . a body corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends, except the construction and working of railways'

"Viscount Haldane points out that Section 9 of the Ontario Act corresponds to Section 5 of the Dominion Companies Act (Revised Statutes of Canada, 1906, Chapter 79), the predecessor of which is Section 3 of the Companies Act of 1877 (40 Victoria, Statutes of Canada, 1877, Chapter 43). While letters patent were not granted to the company under any of the foregoing general statutory provisions, they would, no doubt, be present to the minds of the parties when determining the method of incorporation.

"The contract, statute and charter must all be construed in relation to the circumstances that obtained in 1880 and 1881. The construction, maintenance and operation of the railway was then an undertaking of the greatest magnitude. Parliament, particularly because of its obligation to British Columbia under the terms and conditions of the latter's admission into Confederation, desired not only that the railway should be constructed, but that its maintenance and operation should be efficient. It had provided that two parts of the railway should be constructed by the Government of Canada and, when completed, handed over to the company. It was in these circumstances that Parliament enacted the provisions in Section 2 that, as an alternative to the incorporation by the Act of Parliament, letters patent might be issued. The language then adopted, particularly when construed in relation to the letters

patent, as well as the circumstances of 1880 and 1881, discloses an intention that these were issued in the exercise of the prerogative right and thereby ensure to the company the benefits and advantages of that method of incorporation, subject only to the provisions of the statute.

"Even if, however, the letters patent incorporating the company were not issued by the Governor-General in the exercise of his prerogative right, but rather in the exercise of a power delegated to him by the statute and, therefore, the company must be treated as if it had been incorporated by statute, it would seem that the power to execute the contract here in question would be necessarily incidental to those powers expressed in the charter. That it was present to the minds of the parties that the company would be called upon to pay taxes is evident from the fact that they had provided for certain property of the company to be forever exempt in the contract with the Government (Clause 16). In the same contract (Clause 7) the company agreed to 'forever efficiently maintain, work and run the Canadian Pacific Railway'. Under these circumstances the power to make agreements binding forever with respect to payment of an exemption from taxes would be included, or at least necessarily incidental to the powers conferred upon the company by the words 'granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof,' (Section 2). This provision is in accord with clause 21 of the contract, where it was provided: 'The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, . . . ' and all this is implemented in the letters patent where it is provided that the company shall possess 'All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, . . . ' It is not suggested that at the time the contract with the City was made, or at any time thereafter, it has not proved useful to the company.

"The concluding words of Section 2 above quoted make it clear that, while the charter is not an Act of Parliament, it shall have the force and effect thereof and shall be held to be in compliance with the provisions of the contract relative to incorporation. This provision was necessary by virtue of the terms of clause 21 of the contract and it would appear that that was the only reason for its insertion.

"In either view, the company, in executing the contract, did not exceed its powers as provided in its charter. This distinguishes this case from that of the Corporation of Whitby v. The Grand Trunk Railway Company, where the contract to erect and maintain the chief workshops of the company at Whitby, was held to be beyond the powers given to the company incorporated in Ontario by 31 Victoria, Chapter 42.

"The company's covenant to 'forever continue' its principal workshops for the main line in Manitoba and the branch lines radiating out of the City and within the Province does not offend against the principle that a company incorporated and entrusted with powers and duties by the legislature 'cannot enter into any contract or take any action incompatible with the due exercise of its powers or the discharge of its duties.' 8 Halsbury, 2nd Edition, page 74, paragraph 126.

"The contention of the City is that this covenant is incompatible with the company's obligation to 'forever efficiently maintain, work and run the Canadian Pacific Railway'. The foregoing principle was applied in The Montreal Park and Island Railway Company v. The Chateauguay and Northern Railway Company, where Mr. Justice Davies (later Chief Justice of Canada), with whom Mr. Justice Girouard agreed, stated at page 47: '... the courts ought not to enforce and will not enforce an agreement by which a chartered company undertakes to bind itself not to use or carry out its chartered powers. I do not think such an agreement ought to be enforced, because it is against public policy'. The learned judge went on to explain that if the company can covenant not to exercise its powers in part it may do so in whole and that 'The courts have no right to speculate whether Parliament would or would not have granted these chartered powers to the defendant company over the limited area. Parliament alone can enact the limitation, and neither courts of justice nor companies can substitute themselves for Parliament'. See also Winch v. The Birkenhead, Lancashire and Cheshire Junction Railway Company, Ayr Harbour Trustees v. Oswald, Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa, re Heywood's Conveyance.

"The company's powers do not require the construction of its said principal workshops in any particular place in the Province of Manitoba. They might, therefore, have been placed by the company at any point that it might have selected. What is significant is that its placing of them in the City has never been regarded as inconsistent or incompatible with its duty to forever maintain and operate the railway efficiently. In other words, the complaint is not that the company has failed or contracted not to exercise its power, but only that it has contracted not to exercise that power elsewhere in the Province of Manitoba than the City of Winnipeg. That City may always remain the proper place for the maintenance of these principal workshops. Therefore, the language of the contract does not disclose any inconsistency or incompatibility with the company's duty. The City, however, suggests that future events, such as war, floods or other emergency, amalgamation or development in transportation equipment or methods may require the company, in the discharge of its duty, to move these principal workshops elsewhere, which would then be prevented by virtue of the existence of this covenant to forever maintain them in Winnipeg.

"This is not a case, therefore, such as the Montreal Park and Island Railway Company, where the company contracted not to construct its railway in an area where its powers authorised it to do so. It is equally distinguishable from Ayr Harbour Trustees v. Oswald, where the Trustees purported to bind themselves in respect to the use of land and thereby to impose restrictions upon their use thereof, contrary to the purpose as contemplated under the statute under which they had acquired same. In both of these cases the language of the covenant was incompatible with the due exercise of the company's power. On the same basis the other cases above mentioned are also distinguishable.

"Moreover, where, as already pointed out, the language of the covenant is not, upon its face, inconsistent or incompatible with the due exercise of the powers and the performance of the duties of the company, then, as pointed out by Lord Justice Lindley in The Grand Junction Canal Company v. Petty, the presence of incompatibility must be established by evidence. This view was referred to by Lord Sumner in Birkdale District Electric Supply Company, Limited v. Corporation of Southport, and where, as here, no evidence is adduced, the statements of

Lord ~~Sumner~~ would appear relevant where, at page 375, he states: 'In the present case the company's activities have not yet been and may never be impaired by the agreement at all. So far it may have been and probably has been safe and beneficial. How, then, can it have been ultra vires hitherto?'. These remarks are particularly applicable because the possible incompatibility here present is founded upon the future possibility that these workshops, as located, would prevent the efficient management of the Canadian Pacific Railway. In such circumstances a finding of incompatibility should be established by evidence and not founded upon speculations as to the future, particularly in respect of a company that has been carrying on for over seventy years in a manner that in no way constitutes a suggested inconsistency or incompatibility.

"No case was cited, not have we found one, which, in principle, would justify the decree here requested, where the incompatibility is neither apparent from the language used nor established by evidence, but is supported only upon the possibility of future events which, even if they should occur, might not require the removal of the workshops in order that the railway might be efficiently maintained and operated, and, therefore, would not establish the suggested incompatibility.

"Moreover, it should be noted that the covenant here in question is concerned only with the principal workshops and, therefore, what other workshops may be necessary may be constructed by the company at such points in Manitoba as it may deem necessary or desirable.

"Counsel on behalf of the City contends that it had no power to pass by-laws 148 and 195". I am not pressing that. At line 26 the learned judge says: "The City of Winnipeg possessed the authority to enact by-laws, but it was the terms of the substance of by-laws 148 and 195 that gave rise to the questions as to their validity and the legislature resolved those questions by the foregoing enactment. In Ontario Power Company of Niagara Falls v. Municipal Corporation of Stamford, where similar questions were raised, the Legislature of Ontario 'legalised, confirmed, and declared to be legal, valid and binding. . . .' the by-law. Then once the terms of the by-law were validated there remained only the question of the construction of the terms thereof.

"It was also submitted that the agreement was negotiated under the mistaken belief that it would assure the passage of the main line of the railway through the City of Winnipeg. By-laws 148 and 195 do not contain any undertaking on the part of the company to construct the main line through that City. On the contrary, throughout these by-laws it is rather assumed, as indeed the fact was, that the main line had already been altered to run through that City. In the recital Winnipeg is declared to be 'a central point on the main line' and in the operative part the company undertakes to 'establish and build within the limits of the City of Winnipeg, their principal workshops for the main line. . . .' It, therefore, appears that the parties were contracting upon the basis that the main line had already been altered to run through the City of Winnipeg and, therefore, there was no misunderstanding or mistake as to the facts in relation to which they were contracting, nor was there any failure of consideration."

VISCOUNT SIMON: Then he goes on to deal with the points which are not before us?

MR. FILLMORE: Yes.

VISCOUNT SIMON: I think that we had better ask you to leave Mr. Justice Kellock's judgment till after the adjournment.

(Adjourned for a short time)

VISCOUNT SIMON: You were about to come to the judgment of Mr. Justice Kellock, which is at page 403.

MR. FILLMORE: Yes, my Lord. I do not think that I need read the introductory parts. He reviews the decisions in the courts below and states what the questions are and what the by-law is. At page 405 he says: "The covenant does not of itself stipulate the continued maintenance of the stock yards within the City, but the recital states that the company had so agreed".

LORD TUCKER: Is that right?

MR. FILLMORE: That is correct, my Lord. The recital is to that effect; but when they get to paragraph 3 they say that the covenant that they have to give was only a covenant to maintain the workshops forever.

LORD TUCKER: The bond which they actually gave is at page 295.

MR. CARSON: At line 26 it appears that they were to procure and erect the stockyards. That is our obligation.

LORD TUCKER: The only thing that they have to maintain forever were their principal workshops.

MR. FILLMORE: Yes. The recital could be read that way, although it was not to be embodied in the covenant stipulated for in clause No. 3.

LORD COHEN: The operative part of the deed agrees with condition 4 of the by-law.

MR. FILLMORE: At page 294 it is described as the bond and covenant of the plaintiff.

VISCOUNT SIMON: It was recited at page 294, line 34, that there should be a bond under their corporate seal, "that the said company would, with all convenient and reasonable despatch, establish and build, within the limits of the City of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway Company within the Province of Manitoba and the branches thereof, radiating from Winnipeg within the limits of the said Province, and forever continue the same".

LORD COHEN: And the next paragraph binds them to erect stock and cattle yards, but it does not stipulate that they are forever to maintain the same. That is exactly the same as you find at page 295 in the bond.

LORD ASQUITH: I think that it is distinguishing between the stock yards and the workshops. He has just before referred to the provisions and to the workshops; that they are a perpetual obligation. Then he says something about stock or cattle yards, but he says that the covenant does not stipulate for continued maintenance of the stock yard, as distinguished from the workshops.

VISCOUNT SIMON: That does not run with page 295, line 18: "their

principal workshops for their main line of railways within the Province of Manitoba, and for the branches thereof, radiating from the said City of Winnipeg within the limits of the said Province, and that they will forever continue the same within the said City of Winnipeg". Your argument is just the same?

MR. FILLMORE: Yes. The next paragraph deals with the stock yards, but it does not say that they will forever continue the same.

LORD COHEN: Nor does the recital say so either.

MR. FILLMORE: No; but the recital in the by-law does. You could read the recital in the by-law that way.

VISCOUNT SIMON: However, if your argument is good, it would be a good argument if the stock yards were never mentioned at all?

MR. FILLMORE: Yes. I have not been stressing the stock yards. I would like to refer to the second recital in the by-law, at page 289. In the recital at line 10 on page 290 the words are:

"and have agreed to establish and continue their principal

workshops and stock yards for the Province of Manitoba in the

City of Winnipeg aforesaid"; so that the recital says that

they will continue their stock yards.

LORD ASQUITH: There is nothing about "forever" in that recital.

MR. FILLMORE: No.

VISCOUNT SIMON: Except that it might be understood to mean "except if you agree to continue".

MR. FILLMORE: To continue; but the word "forever" comes in clause 3.

LORD ASQUITH: The word "forever" only comes in a propos of the workshops, does it not?

MR. FILLMORE: Yes, my Lord, although the recital says that they agreed to continue. There is no time limit on "continue"; so that to that extent there is a certain amount of variation between the actual covenant and the by-law.

Returning to the judgment of Mr. Justice Kellock, the remainder of page 405 is a repetition of the clauses that have already been read.

Then at page 406 he quotes section 2 of the Act and says: "The appellant contends that in the change from the method of incorporation provided for by the contract, namely, by special Act in the form of the schedule appended to the contract, to the method provided for by section 2 of the statute, namely, by Letters Patent under the Great Seal, Parliament had in mind the decision in Ashbury v. Riche, decided some six years earlier, and intended that the ambit of the powers of the appellant company should not be restricted in accordance with the principle which had been applied in that case, but should be those of a common law corporation. Appellant stresses that the Letters Patent recite that they are granted not only under the authority of the special Act, but also under the authority of 'any other power and authority whatsoever in Us vested in this behalf', and counsel refers to the judgment of the Judicial Committee in the Bonanza Creek case.

"As stated by Viscount Haldane in the course of his judgment in that case, the question thus raised is simply one of interpretation of the language employed by Parliament. The words employed, to which the corporation owes its legal existence, must have their natural meaning, whatever that may be. Their Lordships, after tracing the prerogative power as to the incorporation of companies by the Governor-General and the Lieutenant-Governors respectively, considered the question whether there was, in the case before them, any legislation of such a character that the power to incorporate by charter from the Crown had been abrogated or interfered with to the extent that companies so created no longer possessed the capacity which would otherwise have been theirs. Reference is made to the Act of 1864, 27 and 28, Victoria, Chapter 23, which authorised the Governor to grant charters for incorporation of companies for certain purposes named in the statute. Section 4 provided that every company so incorporated should be a body corporate 'capable forthwith of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament.'

"Their Lordships construed this provision as enabling, and not as intended to restrict the existence of the company to what could be found in the words of the Act as distinguished from the Letters Patent granted in accordance with its provisions. They therefore held that the doctrine of Ashbury v. Riche does not apply where the company purports to derive its existence from the act of the Sovereign and not merely from the words of a regulating statute.

"It is to be observed that the Act of 1864 and the Dominion and provincial Companies Acts in question in the Bonanza case were each enacted at a time when the prerogative power to incorporate was unaffected by other legislation. In the case at bar, however, when the Act of 1881 was passed, any power to incorporate a company for the construction and working of railways by virtue of the prerogative, had previously been expressly abrogated by section 3 of the Joint Stock Companies Act of 1877, 40 Victoria, Chapter 43, and prior thereto by section 3 of the Act of 1869, 32 and 33 Victoria, Chapter 13. Accordingly, the language in paragraph 1 of the Letters Patent, so much relied upon by counsel for the appellant company, namely, 'and of any other power and authority whatsoever in Us vested in this behalf', is meaningless, there being in 1881 no power vested in the Governor-General in Council with respect to the incorporation of a railway company, apart from that bestowed by the statute of 1881 itself. One must therefore find in that Act, or not at all, an intention to revive the prerogative for the purpose of the incorporation of the appellant company: Attorney General v. De Keyser's Royal Hotel, particularly at pages 526 and 539 to 540.

"Before considering the language of the statute, it is not irrelevant to observe that had it been the intention of Parliament to create the appellant company with the powers of a common law corporation, one would have expected, at that date at least, that something in the nature of express language would have been used. That the decision in Ashbury v. Riche had nothing to do with the form of section 2 of the statute is, I think, indicated by the provisions of sections 14 and 15 of the Canadian Pacific Railway Act of 1872, 35 Victoria, Chapter 71". That is the old Act, under which the Government proposed to construct the railway, and they passed another Act in 1884, but I do not think that that throws much light on this. "In the case of these sections, it is not possible, in my opinion, to say that by the Letters Patent so authorised, a common law corporation would have emerged.

"Moreover, in my opinion, it is not possible to construe section 2 of the statute of 1881 as enabling in relation to a co-existent power to incorporate, existing apart from the statute. Such a power did not then exist. Further, the authority given by section 2 of the Act of 1881 for the purpose of incorporating the persons named in the contract, and of granting to them 'the powers necessary to enable them to carry out the said contract according to the terms thereof', was to grant to them 'in conformity with the said contract' a charter conferring upon them 'the franchises, privileges and powers embodied in the schedule to the said contract'.

"Pausing there, I find nothing in this language which operates to constitute such letters patent, letters issued by virtue of any royal prerogative or any authority apart from the statute itself, and, in my opinion, the following language, 'and such charter, being published ... shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract', extends in no way the effect of the preceding language.

"The contract itself contemplates nothing more than a statute of incorporation with the powers mentioned in the schedule to the contract. The contractors themselves contracted with the Government on that basis, and it surely cannot be supposed that it was in the minds of any of the contractors, or of the Government, that the capital of the corporation to be

created could be devoted to any purpose but the construction and continued operation of the railway therein described. It was an express term of the contract (paragraph 21) that the contractors were to be bound only in the event of an Act of incorporation being granted to the company 'in the form herein appended as Schedule A.' That schedule contemplates no powers being granted to the company apart from those contained within the four corners of the schedule itself. Accordingly, in my opinion, it was intended, by the words last quoted above, to satisfy the terms of paragraph 21 of the contract and to do no more. I think it is impossible to read into the legislation some bestowal of power upon the company outside of that which was contracted for.

"It would no doubt be speculation as to why incorporation by letters patent was adopted rather than by a special statute. It is to be observed, however, that the letters patent were issued the very day after assent was given to the statute, so that time seems to have been an important factor. It may have been thought that to have incorporated all the terms of the letters patent in 44 Victoria, Chapter 1, itself would have been awkward from a drafting standpoint and that an additional statute would have consumed more time, and getting on with the business of the transcontinental railway was an urgent matter. However that may be, it would seem, if the appellant's contention on this point be correct, that under a statute approving of a contract, a very large departure from the contract was at the same time effected in a very unobtrusive way. In my opinion, however, upon the true construction of the language of the statute, no such intention can fairly be gathered.

"The subsequent legislative history of the appellant company, for what it may be worth, is consistent with this interpretation. It may be said, and it was said on behalf of the appellant, that the subsequent legislation granting additional powers to the appellant company was merely obtained ex abundanti cautela. Such a theory, however, is rather negatived by the preamble to the Act of 1890, 53 Victoria, Chapter 47, to which no reference was made on the argument. That Act recites inter alia, 'and whereas several other railway companies are duly empowered to enter into agreements whereby the Canadian Pacific Railway Company may work, lease, or obtain running powers over their respective lines, and the Canadian Pacific Railway Company, not having the requisite legislative authority for taking part in such an agreement, has prayed that the necessity for special legislation, giving such authority in each case in which it may find it expedient to do so, be avoided, and that Parliament give it the general authority hereinafter mentioned ...'.

"It might be said that this recital refers not to the creation of further capacity on the part of the appellant company, but to the granting of further rights, and such an answer might account sufficiently for section 6 of the statute which authorised the appellants to enter into certain arrangements with Canadian companies. Such an explanation cannot account, however, for section 7, which authorises the appellant to make similar arrangements with companies outside Canada. Parliament can only create capacity to receive rights outside Canada. It cannot create the rights themselves. While the above recital may not be conclusive, and while it cannot control, if on a proper construction of the Act of 1881 the situation were otherwise, the position clearly appearing on the recital indicates that the conclusion to which I have come as to the proper construction of the incorporating Act is the one entertained by the appellant itself.

"Reduced to its essence, the contract, for the performance of which the appellant was incorporated, was for the construction by the company of certain parts of the railway, and, upon the completion and conveyance to the company of the parts constructed by the Government, for the permanent operation of the whole by the company. Apart from certain specific powers which are not relevant, the powers actually conferred upon the company by paragraph 4 of the letters patent were all the franchises and powers necessary or 'useful' to the company to enable it to carry out, perform, enforce, use, and avail itself of every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the contract.

"It is the contention of the respondent that the covenant of the appellant with respect to the maintenance of the shops at Winnipeg amounts to a covenant not to exercise its statutory powers. It is said for the respondent that the removal in fact of the appellant's shops from their original location to a point outside the 1881 boundaries of the city, and the establishment of additional stockyards outside those boundaries, shows that the covenant in question is incompatible with the efficient operation and management of the railway required by the contract with the Crown. It is said that other unforeseen events, such as excessive floods, might not only interfere with or prevent efficient operation, but might even yet render necessary the entire removal of the shops and yards from the city.

"The respondent also points to paragraph 13 of the contract, which reads: 'The company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of railway hereby contracted for, as they may see fit, preserving the following terminal points, namely, from Callander station to the point of junction with the western section at Kamloops by way of Yellow Head Pass', and contends that a later event of the character already mentioned might have resulted in the establishment of the centre of population at Selkirk instead of at Winnipeg, and that the obligation to build and forever maintain the shops for the main line at Winnipeg, involving as it did an obligation (I quote from respondent's factum) 'by necessary implication to establish Winnipeg as a terminus of the railway in lieu of preserving the same at Selkirk', or to establish Winnipeg as a 'central point' on the main line, was in conflict with paragraph 13.

"It may be pointed out, however, that the obligation of the appellant under the covenant was not to establish Winnipeg as a 'central point' on the main line. What the appellant covenanted to do was to establish and build within the city limits their 'principal workshops for their main line of railway within the Province of Manitoba, and for the branches thereof, radiating from the said City' and to continue them forever within the city, and it would seem obvious that shops for the branches radiating 'from' the city at least, could hardly, from a practical point of view, be located elsewhere than at Winnipeg.

"I do not think, either, that the covenant involved any implied obligation upon the appellant to substitute Winnipeg for Selkirk as a 'terminal point' of the main line. There appears to be involved in this contention of the respondent that the maintenance of the principal workshops at Winnipeg necessarily involved Winnipeg as a 'terminal' or 'divisional' point from the standpoint of the operation of the railway, and that as Selkirk and Winnipeg are only some twenty miles apart, the latter

would be elbowed out of its position as such a point, contrary to the statute. This argument is, in my opinion, founded on a misconception of the statute.

"Paragraph 1 of the contract defines four sections of the main line, with Selkirk as the western end of the Lake Superior section, which was to be built by the Government, and the eastern end of the Central section, which was to be completed by the appellant. The 'terminal points' mentioned by paragraph 13 have nothing to do, in my opinion, with the operation of the railway, but only with construction.

"It may perfectly well have been and probably was intended when the statute was passed that from Selkirk west the main line would run north of Winnipeg, but under the terms of paragraph 13, the appellant, with the concurrence of the Governor in Council, was free to construct the Central section of the main line from Selkirk to Winnipeg and then west if it saw fit.

"As appears from paragraph 15 of the letters patent, there was already in existence, at the time of the contract, a branch line of railway from Selkirk to Pembina. It appears also from the schedule to Chapter 13 of the Act of 1879 that this line was in course of building, and by paragraph 2 of the contract contained in the schedule to the Act the Government had undertaken to complete the line by August 3rd of that year. Winnipeg or Fort Garry was, of course, on this line. Chapter 14 of 42 Victoria establishes this, if it needs to be established

"P.C. 1458, dated November, 1881, shows that the main line had by that time been routed through Winnipeg. That this in no way interfered with the position of Selkirk is clear from the Act of 1882, 45 Victoria, Chapter 53. This statute amends the very paragraph of the contract under consideration, namely, paragraph 13, with respect to a change in the location of the railway through the Yellow Head Pass, but the statute, by section 1, shows clearly that Selkirk was still on the main line.

"If it were necessary to decide as to whether or not the covenant to build and forever maintain the workshops at Winnipeg was a covenant which the company could validly enter into, regard should be had to the principle laid down by Lord Selborne in Attorney General v. Great Eastern Railway Company, namely, that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not, unless expressly prohibited, to be held by judicial consideration to be ultra vires. However, I do not consider it necessary to decide the question, for the reason that, assuming the covenant to have been beyond the power of the company, the respondent, in the circumstances here present, is not now entitled to take the position that its obligation with respect to the exemption from taxation is no longer binding upon it.

"The position of the respondent, as set out in its factum, is that the 'purported agreement' between the parties is void for want of mutuality and that no consideration for the tax exemption was received by the respondent for the agreement or by-law or the granting of the exemption from taxation, and that the plaintiff did not as a result of or in reliance upon said agreement or any term or terms thereof exercise any forbearance or change its plans or incur any expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railways, or give any

consideration. It is said that the giving of the bond and covenant amounted to a covenant by the appellant not to exercise its statutory powers, which it had no right to do.

"In my opinion, it is plain that both parties contracted on the basis that the appellant had the power to give the covenant in question, and each was in as good a position as the other to ascertain whether or not that was so. The contract has been fully executed, except as to the future performance on the part of the City as to the maintenance of the tax exemption, and on the part of the appellant as to the maintenance of its shops at their present location.

"With respect to the point taken as to the lack of power on the part of the company, the view expressed by Lord Cairns (Lord Chancellor) in Ashbury's case at page 672 is, in my opinion, applicable. There is nothing involved in the covenant, in my view, which 'involves that which is malum prohibitum or malum in se or is a contract contrary to public policy and illegal in itself.' The question is not 'as to the legality of the contract; the question is as to the competency and power of the company to make the contract.' The covenant here in question, on the assumption it was beyond the powers of the company, which I make for present purposes, was simply void. Being ultra vires, the appellant, and therefore void, there can be no question of damages. Otherwise, the case would fall, in my opinion, within the principle of Boone v. Eyre. In that case the plaintiff had conveyed to the defendant by deed the equity in redemption of a plantation together with the stock" and so forth. I do not think that I need read that.

VISCOUNT SIMON: Will you turn back to page 411, line 41? The learned judge says: "It is plain that both parties contracted on the basis that the appellant had the power to give the covenant in question". Was that a mistake of law?

MR. FILLMORE: I think that the learned judge means that both parties contracted on the assumption; both parties thought; both parties believed that.

VISCOUNT SIMON: Supposing that they were wrong and the Act of Parliament or the Letters Patent or the two together did not confer on the Canadian Pacific Railway the power to agree to pass through Winnipeg forever, if both parties ~~contracted~~ thought that the documents did give that power, would that be, if they were both mistaken, a mistake of law?

MR. FILLMORE: Let us assume that, because I know that the next step will be that, if there is a mistake of law, it does not avoid a contract.

VISCOUNT SIMON: That is what was in my mind.

MR. FILLMORE: I think that the situation here is that we do not put it that way. Let us put it this way: I have no doubt but that both parties thought that the railway company had the power to give the bond and covenant in question.

VISCOUNT SIMON: It was because the corporation thought that that they gave the assurance to exempt from taxes.

MR. FILLMORE: I have no doubt about that; but the cause of action is that it is said that on or about a certain date the plaintiff and the defendant entered into an agreement. The terms of the agreement are set out in a by-law. I submit that, if one party to the agreement had no power to enter into it, if it was beyond

its powers, the purported execution was a nullity; that there was in fact no agreement. I do not think that the principle of mutual mistake of law applies where one of the parties had no power to enter into the agreement. I do not see that that line of cases applies. If money is paid under a mistake of law, of course you cannot get it back.

LORD ASQUITH: The learned judge in this passage is considering the position upon the assumption that the covenant by the company is void, is he not?

MR. FILLMORE: Yes.

LORD ASQUITH: He starts the passage by saying: "I do not consider it necessary to decide the question, for the reason that, assuming the covenant to have been beyond the power of the company", certain consequences follow. What he appears to be saying in this passage is that one of the consequences is that you may get a thing intra vires, so to speak, by estoppel. Supposing that both parties contract on an assumption of law which is mistaken and the City of Winnipeg acts on the basis that the Canadian Pacific Railway has powers which it has not got, that brings in something which was outside.

MR. FILLMORE: By way of estoppel. I intend to rely, naturally, on what was laid down by Mr. Justice Russell in York Corporation v. Leatham & Sons: that you cannot by estoppel make good something that was bad in the first instance.

The learned judge goes on at line 8: "The covenant here in question, on the assumption it was beyond the powers of the company, which I make for present purposes, was simply void. Being ultra vires the appellant, and therefore void, there can be no question of damages. Otherwise, the case would fall" within certain cases.

LORD COHEN: He is deciding it, is he not, on the same ground as Mr. Justice Rand?

MR. FILLMORE: Yes.

LORD COHEN: That appears from the top of page 413?

MR. FILLMORE: Yes.

VISCOUNT SIMON: I do not understand what he says at line 13 on page 413. He says: "I agree on this branch of the case with the order proposed by my brother Rand." I do not know what the order proposed by Mr. Justice Rand was.

MR. FILLMORE: Mr. Justice Rand seemed to suggest that the order for injunction should go, with the provision that, if they moved away the shops -----

LORD COHEN: Was not the position that the railway company won outright before the trial judge; certain limitations were imposed on its victory by the Court of Appeal in Manitoba, with the result that the railway company were the appellants before the Supreme Court; there the railway company won and the restrictions which had been imposed by the Court of Appeal in Manitoba on the trial judge's judgment were got rid of? I think that that is the position, is it not?

MR. FILLMORE: I do not know, my Lord. This is the way that it is put in the last paragraph of Mr. Justice Estey's judgment, on page 390: "As the company asserts the covenant to be good, it is

as if it were proffering an undertaking, in the event of the removal of the workshops from the city, to recoup to the city out of the benefit received through the future tax exemption, such amount of compensation as the court might determine to be the loss the city might thereby sustain".

LORD COHEN: The passage to which my Lord Simon refers is in the next words: "the declaration and injunction asked for should go." That is the order and declaration proposed by Mr. Justice Rand.

LORD ASQUITH: What does "go" mean? It means "shall issue"; not "shall be discharged"?

MR. FILLMORE: Yes.

Mr. Justice Kellock goes on at page 413, line 3, by way of conclusion: "It is past question, in my view, that the case is one for equitable relief rather than that the respondent, having obtained to date everything for which it originally stipulated with the exception of a binding agreement in which the existing status of the shops will be maintained, cannot in conscience be allowed to take the position that its agreement with respect to the tax exemption is no longer to be enforced against it. I think the facts are eminently such as to call for the application of the principle of compensation in so far as performance on the part of the appellant may fall short of that which it would have been obliged to provide if the covenant on its part, and which it asserts to be binding, were binding in law. I therefore agree on this branch of the case with the order proposed by my brother Rand." Whatever that may be is not perfectly clear.

VISCOUNT SIMON: Then he goes on to deal with the question of what is the meaning of "within the City of Winnipeg" and the hotel?

MR. FILLMORE: Yes.

VISCOUNT SIMON: He says in his last paragraph on page 416 that "the appellant succeeds substantially".

MR. FILLMORE: Yes. It seems to me that they succeed more than "substantially" - altogether, I would think.

MR. CARSON: That was because of the hotel. Mr. Justice Kellock dissented on the hotel question.

VISCOUNT SIMON: We now come to the judgment of Mr. Justice Kerwin?

MR. FILLMORE: The learned judge recites matters that we have gone over before. He refers to clause 8 and the conditions and stipulations in clause 3. At line 20 on page 417 he says: "This by-law and an amending by-law No. 195 passed September 20, 1882, were ratified and confirmed by an Act of the Manitoba legislature. It is admitted that the company fulfilled its obligations and with the exception of an abortive attempt by the City to impose school taxes, Canadian Pacific Railway Company v. City of Winnipeg, no question arose between the parties as to the company's liability to taxation until, in the year, 1948, the City attempted to assess and levy realty and business taxes, when this action was brought for a declaration that the company was not so liable."

He then reviews the findings in the court below and at line 48 says: "On this first point I find it unnecessary to determine whether the company was incorporated by Royal Charter

and hence had all the powers of a natural person, and therefore it is inadvisable to say anything upon the subject. The enumerated powers of the company, which appear in the reasons for judgment of several of the members of this court, and in the reasons for judgment in the courts below, are sufficient, in my view, to authorise the company to do as it agreed and as was subsequently carried out. Decisions like Corporation of Whitby v. Grand Trunk Railway Company, relied upon by the City, depend upon the terms of the enactments conferring the particular powers there in question. I might add that I have found it unnecessary in the consideration of this point, or any of the others, to deal with the company's argument that, because of the decision in Canadian Pacific Railway Company v. City of Winnipeg, several of the matters now raised by the City are res judicata."

The next part of the judgment is concerned with other matters, my Lords.

VISCOUNT SIMON: Will you tell me what the result is? The majority take the view that the respondent, the Canadian Pacific Railway, had the power to agree forever?

MR. FILLMORE: Yes.

VISCOUNT SIMON: That is the view of Mr. Justice Locke, Mr. Justice Estey, Mr. Justice Cartwright (who concurred with Mr. Justice Estey) and Mr. Justice Kerwin (with whom the Chief Justice, Mr. Justice Taschereau and Mr. Justice Fauteux concurred).

MR. FILLMORE: Yes.

VISCOUNT SIMON: The difference is that Mr. Justice Rand and Mr. Justice Kellock think that the respondent should succeed, but that there should be something added to protect -----

MR. CARSON: No, my Lord; nothing to be added.

LORD COHEN: They agreed that the respondent should succeed, but on a different ground, subsisting only in equity, on the equitable doctrine of specific performance for compensation.

MR. FILLMORE: Yes.

LORD COHEN: The actual order, at page 374, is that the "judgment of the Court of Appeal for Manitoba should be and the same was reversed and set aside" and that restored the trial judge's judgment, which appears at page 174?

MR. FILLMORE: That is right. I think that I might add that, as far as the Great Seal argument is concerned, I think all the judges, except Mr. Justice Estey and Mr. Justice Cartwright, reserved judgment; they did not give any opinion, except that Mr. Justice Rand and Mr. Justice Kellock were of the opinion that the company was not created a common law corporation; so that two of the judges in the Supreme Court of Canada expressed the opinion that the company was not created as a common law corporation, because the charter was granted under the Great Seal of Canada.

VISCOUNT SIMON: However they got at it, the majority took the view that the Canadian Pacific Railway Company had the power to agree in perpetuity?

MR. FILLMORE: Yes. It is quite clear that all, except Mr. Justice

Rand and Mr. Justice Kellock, agreed that the enumerated powers (that is, clause 4 of the charter) gave the power to enter into the agreement in question.

VISCOUNT SIMON: As "useful"?

MR. FILLMORE: I would like to discuss that briefly later; but first I would like to make a short submission on the question of whether or not the company is created as a common law corporation.

LORD TUCKER: None of the judges in the Supreme Court based their judgments on the fact that it was a common law corporation, did they?

MR. FILLMORE: No, my Lord. Mr. Justice Estey and Mr. Justice Cartwright said that it was a common law corporation and also that it had the express powers.

LORD TUCKER: Two of them said that it was a common law corporation, but in any event it had the power?

MR. FILLMORE: Yes. I wish to submit to your Lordships that it was not created a common law corporation by the fact that the charter issued under the Great Seal. I submit that the reasons given in the Court of Appeal in Manitoba by the late Mr. Justice Dysart and the reasons given by Mr. Justice Rand and Mr. Justice Kellock in the Supreme Court of Canada are more convincing than the reasons given in support of the contrary view. It seems to me, in the first place, that, where you have, first, the contract and then you have the statute and you have a company incorporated for a special purpose and section 2 of the incorporating Act says that it shall be held to be an Act of incorporation within the meaning of the said contract -----

LORD ASQUITH: That is an allusion to page 22, paragraph 21: "The company to be incorporated" and so on, in the event of an Act of incorporation being granted. It is saying that the Act of incorporation means what section 2 says.

MR. FILLMORE: Yes. Where it says "and shall be held to be an Act of incorporation", I think that means that it shall be held by the court or whenever the question comes to be considered.

The view to the contrary is based entirely on the decision in the Bonanza Creek case. The actual decision was that the company had the capacity to do business in the Yukon; it had the capacity to be registered there and to receive a miner's licence. The Act under which the company was incorporated was the Ontario Companies Act, Revised Statutes of Ontario, 1897, Chapter 191, section 9, which is referred to in the decision.: The Lieutenant-Governor in Council may by letters patent grant a charter to any number of persons not less than five, and so on. There are, therefore, no restrictions on the power of the Lieutenant-Governor there. The statute says that he may create a corporation. Here, however, we have a contract. The statute, at page 11, starts with the provision: "The said contract, a copy of which with schedule annexed, is appended hereto, is hereby approved and ratified, and the Government is hereby authorised to perform and carry out the conditions thereof, according to their purport."

LORD COHEN: Is this the point that you are making: that the respondent was incorporated for a special purpose pursuant to an Act which provided that the charter should have the effect of an Act of Parliament?

MR. FILLMORE: Yes.

LORD COHEN: And it was so incorporated at the time when the Lieutenant-Governor or the Governor-General had no power to incorporate a railway company by Royal Charter unless there was a statute expressly authorising it. That appears from Mr. Justice Kellock's judgment, page 407. Is that right?

MR. FILLMORE: Yes. I was only trying to make some point of distinction between the case at bar and the Bonanza Creek case, because in that case the statute said: The Lieutenant-Governor may issue a charter, if someone makes a petition, whereas the circumstances here are entirely different. In the Bonanza Creek case it is pointed out ~~that~~ by Lord Haldane that different considerations may arise where a company is incorporated by special statute; that the observations as to a company created entirely by grant do not apply when the company is created by a special Act. The difficulty that arises here, therefore, is that this Canadian Pacific Railway Act consists of two things. It is not entirely a special Act; it consists in part of a special Act and in part of a charter granted under the Great Seal.

LORD ASQUITH: What was the point of switching from the original plan set out in the contract of having an Act of incorporation and substituting for it a charter which is to be deemed to be an Act of incorporation? There must have been some purpose.

MR. FILLMORE: Different reasons have been surmised, but none of the judges in the court below were able to state definitely. One judge suggests that it was to save time. The charter issued the next day after the Act was passed. I submit that it amounted to the same thing, because the Act says "shall be held to be an Act of incorporation".

LORD ASQUITH: The contract was made and the Act was passed in February, 1881. At some time they discovered that for some reason or other an Act of Parliament would be a less eligible method of carrying out the thing than a charter. One cannot help speculating on the reason, but you cannot suggest any?

MR. FILLMORE: No-one has really solved the problem; so that I cannot answer that; but I submit that it does not make any really material difference whether you have a charter in the exact form stipulated for in the contract or whether a special Act was passed. It seems to me, as was laid down in the De Keyser's Hotel Company case, that you cannot have two sources; that the prerogative is excluded by the fact that all the power comes from the Act and the contract and the forms stipulated for in the contract; but the prerogative is simply the residue of the statutory powers remaining in the Crown and, according to the De Keyser's case, where the whole field is occupied -----

VISCOUNT SIMON: Not the residue of the statutory powers, but the residue of power.

MR. FILLMORE: Yes, my Lord. Where the whole field is taken up, there is no room left for the exercise of prerogative. It seems to me that that is the sum and substance of it.

Then these are the reasons why I submit that the Act should be considered to be a special Act and that the company is not to be regarded as a common law corporation created exclusively by the Great Seal under the royal prerogative.

VISCOUNT SIMON: It is a question, is it not, of construing the Act and the documents to which it refers and to which it gives validity?

MR. FILLMORE: Yes.

VISCOUNT SIMON: It is a pure question of construing the Act?

MR. FILLMORE: That is right, my Lord. In the first place, section 2 states that it shall be held to be an Act of Parliament and the learned judge recites the contract and says that it is issued under the authority of the Act of Parliament and it is in the exact words.

The next point made in the courts below is that at that time a joint stock company could not be incorporated for the purpose of creating a railway company. That was expressly excluded.

LORD COHEN: That is the Act referred to by Mr. Justice Kellock - section 3?

MR. FILLMORE: By the Canadian Joint Stock Companies Act of 1887, Chapter 43. The point is made by Mr. Justice Dysart and Mr. Justice Kellock.

LORD OAKSEY: You say that that is a Canadian statute?

MR. FILLMORE: Yes. It is at page 7 of the appendix: "An Act to amend the law respecting the Incorporation of Joint Stock Companies by Letters Patent."

LORD COHEN: I suppose that the way that it would be put against you on that is this, is it not? If it were not for the concluding words about the construction and working of railways, there would here be the widest possible powers for the Governor-General in Council to constitute a company by charter and the case would be exactly like the Bonanza Creek case. It is said against you, I think, in one of the judgments of the courts in Canada that, if you strike out ad hoc the words "except for the construction and working of railways", you leave the Governor in Council with the widest possible powers. I think that that is the way in which the trial judge put it against you.

MR. FILLMORE: As against that, let us consider other points made in the court below: that the grants of lands, moneys, rights of way, were beyond the prerogative rights of the Crown; that it required an Act of the legislature to give the company 25 million acres and 25 million dollars and the right to go wherever they liked, to confiscate property; the widest possible powers could not have been granted under the prerogative; so that that necessarily excluded any intention to create a common law corporation by the charter.

LORD TUCKER: Does the phrase "an Act of incorporation" necessarily contemplate an Act of Parliament?

MR. FILLMORE: I think so.

LORD TUCKER: Clause 21 of the agreement in the Schedule says: "The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of an Act of incorporation being granted to the company". Then the Act of 1881 says that the charter "shall be held to be an Act of incorporation within the meaning of the said contract." I do not know whether when you talk about an Act of incorporation being granted it necessarily presupposes an Act of Parliament or may not contemplate a charter.

MR. FILLMORE: I would submit that the words "Act of incorporation"

make one think at once that it means an Act of Parliament. You do not ordinarily say: in the event of an Act of incorporation being granted. That is a little unusual.

VISCOUNT SIMON: Lord Asquith was raising the question as to why the method was changed. Is it not possible that it was changed for this reason: that there was on the Statute Book the statute of 1877, which said that you could not create a company for the construction and working of railways by letters patent granting a charter. That was a general statute of Canada. In order to meet that difficulty, what you needed was a special statute incorporating this company. Is not that the reason why it was done in the Act of 1881?

MR. FILLMORE: That would be the reason for passing a special Act. You would have to have a special Act, as was at first suggested, or you would have to have the charter authorised by a special Act, which "shall be held to be an Act of incorporation". Do not they get around it by the words "shall be held to be" here?

LORD ASQUITH: It is a little difficult to see why they used the word "charter" at all.

MR. FILLMORE: In what clause, my Lord?

LORD ASQUITH: In clause 2 of the Act of 1881, which appears at page 12. I find it difficult to see why they made any allusion to a charter, if all that they wanted was an Act of Parliament. They do it in a devious way. The charter is to be part of the consideration and it is to be equivalent to something.

LORD TUCKER: It is to "have force and effect as if it were an Act of the Parliament of Canada".

LORD ASQUITH: Why not simply pass an Act of Parliament, instead of saying that there is to be a charter and saying that it should have the force of an Act of Parliament?

MR. FILLMORE: One suggestion which was made by one of the judges in the court below was that it was to save time; but I suppose that, if Parliament had been in session, they could have passed another Act.

LORD TUCKER: It would have saved time and, I suppose, money, too, would it not? I do not know much about parliamentary procedure; but this is a very short Act, which contains certain recitals, and then the operative part is to give legal effect to the agreement in the schedule, is it not?

MR. FILLMORE: It confirms the agreement. The agreement provides for the charter.

LORD TUCKER: If you had incorporated the charter in a special Act, it might have been that it could have been challenged clause by clause in Parliament; or would it have been introduced as a private Bill and had all the necessary expense attendant to that procedure? I do not know.

MR. FILLMORE: I suppose that this Bill, with the contract and schedule, must have been before Parliament.

LORD COHEN: In those days was it the practice to incorporate companies by Act of Parliament or was it the almost invariable practice to incorporate them, except railway companies, by charter, pursuant to the general power given by section 3 of the 1877 Act?

1 MR. FILLMORE: I think that practically all ordinary commercial companies were incorporated by letters patent. We can look at the statutes passed.

LORD COHEN: I was wondering whether, as Lord Simon says, it might not be the reason: that, it being the practice then to incorporate companies by letters patent, the most convenient method of doing it was to remove the embargo applying to railway companies, and that is all section 2 did.

VISCOUNT SIMON: And the Act of 1881 goes on to make it unchallengeable that there has been effectively a grant of money and of land to the company; it assures the company of its rights in all these things and removes any question and doubt as to whether it is entitled to the things that it is supposed to be given. It puts it plainly in the position: Everything that has happened to you is authorised.

MR. FILLMORE: In answer to an enquiry by Lord Tucker, the railway companies and companies of that character were ordinarily incorporated by special Acts in those days and since. One can look at the statutes of those years and find many companies incorporated by special Acts, the same as the Port Whitby Company.

LORD COHEN: Was there something in Canada called the Railways Clauses Act?

MR. FILLMORE: I was going to come to that as another reason. Why this company was not a common law company is that it was made subject both by the contract -----

LORD COHEN: There was a thing called the Railways Consolidation Act, 1879, or called by some such title?

MR. FILLMORE: Yes.

LORD COHEN: It is mentioned in clause 17.

MR. FILLMORE: It was made subject to the Consolidated Railway Act of 1879; so that both in the Act and in the contract it is subject to the Consolidated Railway Act of 1879.

LORD COHEN: Clause 17 is at page 27 of the appendix.

MR. FILLMORE: I think that that is a strong indication that Parliament did not intend this charter to create a common law corporation, because in section 7 of the Consolidated Railway Act, 1879, we find detailed the ordinary operating powers of a company. It provides that "The company shall have power and authority: To receive" grants of land; purchase land; occupy public lands, lands belonging to Her Majesty; power to carry a railway across lands of corporations; to construct and work the railway across any water, stream or watercourse; to complete the railway with one or more tracks; to erect and maintain all necessary and convenient buildings, stations, and from time to time alter and repair the same; to make branch railways, if required and provided by the special Act, and to manage the same; to construct and make all other matters and things necessary and convenient for the making, extending and using of the railway in pursuance of this Act and of the special Act; to take, transport, carry and convey persons and goods; to borrow; to enter upon lands; to remove trees; to cross other railways and construct branch railways on certain conditions.

VISCOUNT SIMON: All those powers would be included and, in as much as it is only included "in so far as they are not inconsistent

with or contrary to the provisions hereof", it would avoid any conflict.

MR. FILLMORE: Yes, my Lord; so that between the agreement and the charter and the Railway Act you have a complete guide for operating the railways, and it seems to me almost absurd to suggest that, after going to all this trouble, after outlining and crystallising the whole plan, working it out to the last detail, you could say: That was all unnecessary; that did not mean anything; this is a common law corporation; it can do anything that it likes. I submit that it is not actually a sensible view to take of the situation.

VISCOUNT SIMON: I do not understand that to be the view. The view is, is it not, that the Canadian Pacific Railway Company is a company which has been incorporated by a statute, namely, by the statute of 1881; you must therefore look at the statute and the documents to which the statute refers to find out what it can and what it cannot do and, looking at the relevant documents, you find that it is able to enter into agreements which are useful for the purpose of the railway. The argument is: That is what this is and so it has turned out.

LORD COHEN: That is the second point. You are at present arguing the first point: Has the company, apart altogether from section 4, got the powers simply because it is a chartered company? That is the point that you are arguing?

MR. FILLMORE: Yes. I am submitting that its rights and powers must be found in the relevant documents; that you cannot say: We do not need to look at the documents; we do not need to look at the charter; we do not need to look at the Act; they can do anything.

LORD COHEN: That will not help you, unless, as my Lord says, you are able to satisfy us that clause 4 is not in wide enough terms to cover this agreement.

MR. FILLMORE: Yes, my Lord. If the actual language of clause 4 is wide enough, this discussion is all wasted.

LORD COHEN: All academic. That is the line which the majority of the Supreme Court followed, is it not?

MR. FILLMORE: Yes, my Lord. That is what really decided the case against the appellant in the end: that the enumerated powers were sufficient. The judges were of that opinion in the court below and in the Supreme Court of Canada.

LORD TUCKER: You are really meeting an alternative argument which may be put against you?

MR. FILLMORE: Yes, my Lord.

LORD TUCKER: Mr. Carson may say: If I am wrong about the incorporation of these powers, I still say that I can do this, because I have the charter.

MR. FILLMORE: Yes. I do not propose to labour this point about the Great Seal.

The last point that I want to make is that, after all, this was a semi-public corporation and Parliament intended the money and the land to be used in a building contract; they did not intend to create a common law corporation which could do anything that it liked at any time. They intended these large grants of land and money to be used for the specified purposes.

I do not want to quote at length from the De Keyser's Hotel case. Whether this has been read or not, I do not know; but at page 539 of 1920 Appeal Cases Lord Atkinson says: "It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same - namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal prerogative may theretofore have been."

I will now leave that subject and turn to a discussion of clause 4 of the charter, clearing up on the way, if I may, a point about the construction of the railway. I do not think that I made it very clear in the opening session. I want to refer to the state of construction of the railway in 1881. I did not refer your Lordships to Chapter 14 of the Statutes of Canada 1879, 42 Victoria, assented to 15th May, 1879. It recites: "Whereas it is expedient to provide for the connection of the main line of the Canadian Pacific Railway with the City of Winnipeg and Pembina", therefore it is enacted as follows: "A branch of the Canadian Pacific Railway shall be constructed from some point west of the Red River on that part of the main line running south of Lake Manitoba to the City of Winnipeg, there to connect with the branch line from Fort Garry to Pembina. (2). A sum not exceeding one million dollars may be expended on that part of the main line west of the Red River and the branch hereby authorised without previous submission of contracts to Parliament."

In 1879, therefore, it was proposed that a branch line should be built to Winnipeg west of the Red River to connect with the main line.

I read to your Lordships in opening some Orders in Council in 1879, whereby the company were going to build a bridge and they were going to construct the branch line. Those seem to be in pursuance of this statute of 1879; but here is a rather peculiar thing which is not mentioned in any of the judgments and I did not mention in opening: At page 122 of the appendix you will find an Order in Council passed on the 18th August, 1915. It gives the history of the thing very prettyly: "The Committee of the Privy Council have had before them a report, dated 23rd January, 1915, from the Minister of Railways and Canals, representing that application has been made by the Canadian Pacific Railway Company for the conveyance to them by Letters Patent of the section of railway now known as the

'Stonewall Branch', a distance of about twenty miles.

"That the facts in the matter are as follows: Under the original scheme for the construction of the Canadian Pacific Railway, the main line was to cross the Red River opposite Selkirk, on the east side, with a branch from Victoria Junction -- a point about sixteen miles west of the River, and about two miles east of what is known now as Stonewall -- to Winnipeg." That is consistent with the 1879 statute.

"This scheme was abandoned in favour of a route south from Selkirk to St. Boniface and Winnipeg, thence northerly from Winnipeg, and thence westerly via Stonewall and Ossawa to Portage la Prairie, a distance of seventy miles, thus placing Winnipeg on the main line.

"For the construction of the first one hundred miles of the distance from Winnipeg, a contract was entered into by the Government on the 19th August, 1879, the whole to be completed by August 19th, 1880. By the end of June of that year, however, only eighteen miles of the track had been laid, and on October 1st the work was taken over by the Government" and so forth.

We can then turn to page 124 to continue the history. "On November 1st, 1881, the Engineer-in-Chief reported that the road was then being operated as far west as Brandon via Stonewall, a distance of 145 miles from Winnipeg.

"On the 2nd of June, 1881, the company made application for consent to a proposed relocation of the line from Winnipeg to Portage la Prairie, the proposed line to extend from a point about one mile west of Winnipeg on the line built by the Government, and taking a generally direct westerly course to Portage la Prairie, a distance of about 53½ miles.

"By Orders-in-Council of the 6th and 25th of August and 19th of November, 1881, the said relocation was approved.

"The company, under date the 27th of October, 1881, in renewing their application for approval of the entire relocation had stated that upon such approval being granted, the company would continue to operate the line to Stonewall as a branch of their railway, and the said Order of the 19th of November, 1881, contained provisions as follows: 'The Committee recommend, however, upon the report of the Minister of Justice, that it be made a condition of the approval that the company enter into an agreement with the Crown binding themselves to operate the line between Winnipeg and Stonewall as a branch, the draft of such agreement to be approved of by the Governor-in-Council before execution.

"The Committee further recommend upon the same report that as claims may be made against the Government by those persons who may have purchased land along the line of railway as at first located by reason of the change in the line, it be made a condition of the approval that all such claims be dealt with by the Company, and settled upon equitable principles, and be referred to the Government for decision in case the company and the parties fail to agree with respect to the settlement, and that the draft of the agreement embodying this condition be also approved of by the Governor-in-Council before execution.'"

VISCOUNT SIMON: I do not myself understand the relevance of these references.

MR. FILLMORE: I am coming to this point: that at the time the covenant was given on the 5th September Winnipeg was not officially on the main line. It became the de facto main line, but actually did not get formal approval even as late as 1915.

VISCOUNT SIMON: What conclusion follows from that?

MR. FILLMORE: I thought that it might have some bearing on the obligation of the railway company to maintain Selkirk as a terminal point.

LORD TUCKER: In your opening statement you told us, did you not, that it had already been decided that the line should go through Winnipeg before this contract was entered into; therefore, the City of Winnipeg did not get anything particularly much out of this contract. Is that so or are you now saying something which indicates something different?

MR. FILLMORE: I am saying something different, and to this extent: that it was on the 2nd June that the Canadian Pacific Railway made the application. They then wanted to relocate. What I had overlooked in opening was the Act of 1879, which provided that the branch line would be built to Winnipeg from a point west of the Red River. It now appears from this Order in Council that the company, having a copy of it furnished to them, as appears from the last paragraph of the document from which I was reading, wrote on the 5th December, 1881, "saying that they declined to undertake the obligation in respect of claims. The company, however, built their main line from Winnipeg on the new location and were duly paid subsidy for it. They also continued to operate the line to Stonewall, and the matter so rested until 1897, when the company applied for the issue of a patent to them of certain lands. More recently, the company have applied, as above stated, for Letters Patent vesting in them the said 'Stonewall Branch'."

Therefore, actually pursuant to the application made in June Winnipeg became the de facto main line, but not the official main line. That is the reason why I wanted to make that correction.

LORD COHEN: Is that a ground on which you are saying that it was remarkably improvident of the railway company to enter into this bargain; or what otherwise is the relevance of it?

MR. FILLMORE: It is only relevant in this way, for example. In 1882 the statute was passed which is referred to by Mr. Justice Kellock. That is 45 Victoria, Chapter 53. It recites: "Whereas by clause thirteenth of the contract with Her Majesty the Queen now held by the Canadian Pacific Railway Company, (which contract is contained in the Schedule to the Act passed in the forty-fourth year of Her Majesty's reign, Chapter one, intituled 'An Act respecting the Canadian Pacific Railway') it is provided that the said company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of the railway thereby contracted for as they may see fit, preserving the following terminal points, namely, from Callander Station to the point of junction with the western section at Kamloops by way of the Yellow Head Pass; and whereas it may be found to be in the public interest that the junction with the western section at Kamloops should be made by way of some pass other than the Yellow Head Pass: Therefore Her Majesty ... enacts as follows: (1) The Canadian Pacific Railway Company may, subject to the approval of the Governor in Council, lay out and locate their main line of railway from Selkirk to the junction with the western section at Kamloops by way of some pass other than the Yellow Head Pass".

VISCOUNT SIMON: I am sorry, but I do not follow the relevance of this. You have fifteen reasons at the end of your Case. Which of the fifteen reasons are these references intended to support?

MR. FILLMORE: It seems to me that they have a bearing on the situation as it existed in 1881 and on the right of the railway company, in view of the relevant statutes and Orders in Council, to give a covenant that they would forever maintain their workshops within the City.

VISCOUNT SIMON: That is a separate ground for saying that they had no power to make the contract.

MR. FILLMORE: Yes, my Lord.

VISCOUNT SIMON: It is another ground.

LORD TUCKER: How do you put it exactly? They had no power to make the contract - because of what, on this point?

MR. FILLMORE: Mr. Justice Kellock disposes of the contention that they were bound to maintain Selkirk as a terminal point and my submission was and is that the agreement to erect and maintain their principal workshops for Manitoba in Winnipeg had the practical effect of wiping out Selkirk as a terminal point.

LORD COHEN: That would seem to be more a matter of grievance coming from Selkirk rather than from somebody appearing for Winnipeg.

VISCOUNT SIMON: Your third reason is: "Because the purported bond and covenant dated 10th October, 1881, is incompatible with the obligation of the respondent to forever efficiently operate the railway". I understand that now you are saying that it is also incompatible with the obligation of the company to maintain Selkirk as a terminal point?

MR. FILLMORE: Yes, my Lord.

LORD COHEN: Are you putting it perhaps slightly differently, which would involve less of an alteration? It was improvident of the company and not a proper bargain to make to undertake to erect and maintain the workshops at Winnipeg at a time when it was doubtful whether Winnipeg would be on the main line at all?

MR. FILLMORE: Yes. I was trying to develop that point: that at that time Winnipeg was actually on a branch line; that the main line to Selkirk -- this is what is recited in this Order in Council that I read, stated in 1915 -- was never formally abandoned; so that the Government might have said at any time to the Canadian Pacific Railway: Cross the Red River at Selkirk and go on west. There was that element of danger in the situation. They were taking quite a risk in entering into that covenant on the 5th day of September, 1881.

LORD COHEN: Were they not in a better position to judge the risk on that date in 1881 than we are now? You are really asking us to say that it was an improvident exercise of their powers. It is quite separate from the point that you were going to make as to the improvidence of binding themselves forever. That is a different matter. Now you are asking us to say: Here is something which they did in 1881 which in fact has worked perfectly well from 1881 to 1948 and yet it was so improvident that we ought to hold that it was ultra vires.

MR. FILLMORE: I would not put it that way.

VISCOUNT SIMON: That is one of the reasons in your Case.

MR. FILLMORE: I would not make an argument that it was improvident. I would not be on sound ground. I can only argue that on the face of it this agreement is in conflict with their obligation to exercise their statutory powers.

VISCOUNT SIMON: And on that ground was, you say, ultra vires?

MR. FILLMORE: Yes.

VISCOUNT SIMON: That is alleging a wholly separate ground, is it not, from anything that you have alleged in your Case?

MR. FILLMORE: No, my Lord. Our case from the start has been that the bond and covenant was ultra vires.

VISCOUNT SIMON: There are two distinct reasons which might be given for that. One is because you have promised to stay in Winnipeg forever.

MR. FILLMORE: Yes.

VISCOUNT SIMON: Another and wholly distinct reason is: Because you were already bound to use Selkirk as your terminal point. The two things have nothing to do with one another.

MR. FILLMORE: It seems to me that it has a bearing on their power to enter into such a covenant, if that covenant is in conflict with some other obligation created by the agreement. If there is a conflict between the covenant which they actually gave and their obligations under the contract, that would fortify my argument that the agreement to maintain the shops forever was bad on its face. That is the way I was trying to work that in.

LORD COHEN: I find difficulty in fitting in this argument with the last sentence of paragraph 3 of your Case, in which I find these words: "By the summer of 1881 the directors of the company had evidently reached the conclusion that Winnipeg by virtue of its location was likely to be a great centre of trade and was to be the principal city in the Province of Manitoba, and thus the most suitable place from which branch lines should radiate." Therefore you are asking us to say that with that in their minds (and, I think it is implicit, rightly in their minds) it was improvident for them to bind themselves to erect their principal workshops there. I am not talking about maintaining them there, but erecting them. I should have thought that that was impossible to maintain, in view of your own pleadings.

MR. FILLMORE: I could not ask the court to find that it was improvident for the railway company to erect their shops there in 1881. I can only say that it may have appeared provident at that time and that it may have been good business at that time.

LORD COHEN: But it cannot have been ultra vires the railway to erect at that time, can it, their principal works for Manitoba at Winnipeg?

MR. FILLMORE: No; there was nothing wrong in that. I have to say that the directors had a right to do that and probably exercised good business judgment in doing that. I cannot complain of that and I do not complain. All that I can say is that they had no right to say that no future Board of Directors could at any time ever move those shops. I say that that is where you get from what is good into what is prohibited, when they attempt to say: No matter what happens, never can the railway company move their principal workshops out of the City of Winnipeg. If that is bad on the face of it, having in mind the statutes, Orders in Council

and documents, the covenant and agreement is of no force or effect. That is all my argument boils down to: that such a covenant is on the face of it beyond the powers of the company.

VISCOUNT SIMON: You were saying just now that there was a reference to this in Mr. Justice Kellock's judgment. Is it on page 410, line 287?

MR. FILLMORE: Yes. He is there discussing our argument that there was some obligation to maintain Selkirk as a terminal point and he says: "This argument is, in my opinion, founded on a misconception of the statute."

VISCOUNT SIMON: He goes on to say at line 40: "The 'terminal points' mentioned by paragraph 13 have nothing to do, in my opinion, with the operation of the railway but only with construction."

MR. FILLMORE: Yes. That is his position. My argument was that a terminal point is equivalent to something like a divisional point; it is the terminus of a section of the railway.

LORD ASQUITH: Must you have your principal workshops at your terminus?

MR. FILLMORE: No.

LORD ASQUITH: May they not be anywhere else?

MR. FILLMORE: They could be; yes.

LORD ASQUITH: I do not see why the bond or covenant should be invalidated because it conflicts with clause 13.

MR. FILLMORE: I was only trying to make the suggestion that from the practical point of view a workshop is generally found at a terminal point.

I have, I think, corrected a statement made by Mr. Justice Kellock at line 9 on page 411: "P.C. 1458, dated November 19, 1881, shows that the main line had by that time been routed through Winnipeg." It was a de facto line, but it did not have official approval.

However, I will not pursue that branch any further; but I would like in opening in the morning simply to confine my discussion to the meaning and scope of clause 4 of the charter and the meaning of the word "useful".

(Adjourned till tomorrow morning at 10.30).
